P.E.R.C. NO. 78-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY VOCATIONAL-TECHNICAL
BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-77-58-71

SOMERSET COUNTY VOCATIONAL-TECHNICAL
EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

In the absence of exceptions filed by either party, the Commission adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision in an unfair practice proceeding. The Hearing Examiner found, and the Commission affirms, that the Board, in accordance with the existing collective negotiations agreement, had the right to dock its teachers two-sevenths of one day's pay when, under an established practice, they failed to attend a scheduled "Open House" on May 13, 1976.

Accordingly, the Commission concludes that in docking its teachers the Board did not interfere with, restrain or coerce the teachers in the exercise of the rights guaranteed to them by the Act; did not discriminate in regard to a term or condition of employment to discourage these employees from exercising the rights guaranteed to them by the Act; and did not refuse to negotiate in good faith with the Association concerning a term and condition of the teacher's employment.

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Charging Party.

Appearances:
For the Respondent, Jacob Green Law Offices
(Mr. Allan P. Dzwilewski, of Counsel)

For the Charging Party, New Jersey Education Association
(Mr. John A. Thornton, Jr., Field Representative)

DECISION AND ORDER

On September 10, 1976, the Somerset County Vocational-Technical Education Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Somerset County Vocational-Technical Board of Education (the "Board") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association contends that the Board violated N.J.S.A. 34:13A-5.4 (a)(1), (3) and (5)[1/] when, on June 23, 1976, it withheld two-sevenths

1/ These subsections prohibit employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

of one day's salary from its teachers. It is alleged that the Board took this action without prior notification and negotiations, thereby unilaterally imposing a new term and condition of employment. The Board having taken this action while negotiations for a successor agreement were in progress, it is further alleged that the docking constituted an illegal sanction or penalty in an effort to coerce and restrain these employees from exercising their rights under the Act.

It appearing that the allegations, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 29, 1976.

Pursuant thereto, a hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, on June 1, 1977, at which time the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by August 22, 1977. On February 3, 1978, the Hearing Examiner issued his Recommended Report and Decision, which Report included findings of fact and conclusions of law and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.[2/]

None of the parties has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3.

Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law

2/ H. E. No. 78-24, ___ NJPER ___ (1978).

rendered by the Hearing Examiner substantially for the reasons cited by him. Specifically, the Commission notes that, under its decision in Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976), a contractual obligation can be created through a past practice. Under the past practice the teachers were required to attend "Open House" for two hours in the evening after being dismissed at midday.

In view of the documentary evidence presented and the Hearing Examiner's opportunity to observe the demeanor of the contradictory witnesses, the Commission accepts the Hearing Examiner's conclusion that the Association was less than candid when it took the position that it was unable to ascertain whether the Board would abide by the past practice and dismiss the teachers early in consideration for their presence at the "Open House" that evening. The Board having complied with the past practice, it was fully justified, under the existing collective negotiations agreement, [3/] in docking two-sevenths of one day's pay of those teachers who failed to attend the two hour "Open House". Accordingly, the Complaint is dismissed in its entirety.

ORDER

For the reasons set forth, the Commission hereby adopts

3/ The Commission agrees with the Hearing Examiner's analysis that, under Article XIV, Section D of the then existing agreement, the Board, by implication, clearly had the right to dock teachers when they were absent without excuse.

the aforementioned Hearing Examiner's Recommended Order and IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett, Hurwitz and Parcells voted for this decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
March 16, 1978
ISSUED: March 20, 1978

H.E. No. 78-24

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY VOCATIONAL-TECHNICAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-58-71

SOMERSET COUNTY VOCATIONAL-TECHNICAL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission (the "Commission") that charges of unfair practices filed by the Somerset County Vocational-Technical Education Association (the "Association") against the Somerset County Vocational-Technical Board of Education (the "Board") be dismissed. Specifically, the Hearing Examiner concluded that the Board had the right to dock its teachers two-sevenths of one day's pay when they failed to attend a scheduled Open House on May 13, 1976. It was found that the teachers were docked in accordance with the existing collective negotiations contract.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and conclusions of law.

H.E. No. 78-24

STATE OF NEW JERSEY
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Appearances:

For the Somerset County Vocational-Technical Board of Education
Jacob Green Law Offices
(Allan P. Dzwilewski, of Counsel)

For the Somerset County Vocational-Technical Education Association
(John A. Thornton, Jr.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Somerset County Vocational-Technical Education Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on September 10, 1976, alleging that the Somerset County Vocational-Technical Board of Education (the "Board") committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") by improperly withholding two-sevenths of one day's salary of its employees on June 23, 1976. It is claimed the Board acted without prior negotiations and did not give a notice of its intent to act, that the Board imposed a new term and condition of employment without prior negotiations, that their actions constituted a sanction or penalty which is illegal in an effort to coerce and restrain its employees and that these actions were taken while negotiations for a successor agreement

were in progress. It is specifically alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5). [1/]

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 29, 1976, and a hearing was held before the undersigned in New Brunswick, New Jersey, on June 1, 1977. [2/]

In the months of April and May 1976 the parties were engaged in negotiations for a successor agreement for the coming year, although no active negotiations were taking place. The parties had been through mediation and were awaiting a hearing by a factfinder.

The school calendar provided for an "Open House" on May 13, 1976. While there is no specific provision within the then existing contract for such an Open House, it is undisputed that a past practice had arisen over the years whereby on the day of Open House teachers would work half a day and then return for two hours in the evening. This particular year the majority of teachers did not attend Open House. Those teachers who did not attend were docked approximately two-sevenths of one day's pay.

The Association maintains that it was an unfair practice for the Board to dock the two hours' pay since a conflict arose as to whether or not the teachers would be entitled to leave school early as in years past. It is claimed that they were never told they had the right to leave early, that the Board in effect pro-

1/ These subsections provide that an employer, his representatives or agents are prohibited from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Each party filed a post-hearing brief by August 22, 1977. Upon the entire record in this proceeding the undersigned finds that the Board is a public employer within the meaning of the Act and is subject to its provisions. The Association is an employee representative within the meaning of the Act and is subject to its provisions. An unfair practice charge having been filed with the Commission alleging that the Board has engaged or is engaging in an unfair practice within the meaning of the Act, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

moted confusion over the issue and, accordingly, they worked a full teaching day and should not have been docked. The undersigned finds the Association's claims in this matter entirely without merit.

Mr. Jeffrey Frey was President of the Association and testified on behalf of the Association. He stated that on May 7, 1976, he wrote a letter to Mr. Russell Shellhammer, Acting Principal, asking if the teachers will be dismissed at 1 o'clock as they had been in the past for Open House day. Frey claimed that he never received an answer directly to this letter except that on May 10, 1976, a letter was sent to all teachers simply stating that they were to announce in their classes that on Open House day there will be an early dismissal at 1:15 p.m. Frey maintained that the May 10 letter did not answer his questions concerning the matter, but admitted that he did not ask anyone for a clarification. Shellhammer, however, testified that he spoke to Frey privately and told him there would be an early dismissal.

On May 12, 1976, Frey sent a letter (addressed, "To Whom It May Concern") to the Superintendent of Schools, Mr. LaPenna. The letter stated that the members of the Association "respectively decline the invitation to attend Open House on May 13 from 7 to 9 p.m. We do so in order to emphasize our views concerning problems that seriously affect the educational process at Somerset County Vocational-Technical Schools, that we regret having to take this action, we feel it is necessary because other methods to eliminate problems have proven ineffective." The letter goes on to list three areas of concern, specifically (1) reduction of actual teaching time by assignment of bus duty; (2) failure of the city administration to implement an effective policy concerning attendance, student behavior; and (3) claimed abuse of managerial prerogatives through contractual interpretations by the Board of Education. On that same date, May 12th, Frey sent a letter to Shellhammer stating that the members of the Association will "remain in their respective areas until 3:45 on May 13, 1976. We are doing so to fulfill our contractual obligation as specified in Article XVII of the 1975-1976 collective agreement between the Association and the Board of Education." The letter went on to say that, "we will remain at our respective areas unless ordered otherwise. Please contact me if you have any questions about this action." In response to this letter Shellhammer contacted LaPenna, the Superintendent, and

they, in turn, met with Frey and other Association members, including Fred Vogt. There was a dispute in the testimony as to what transpired at the meeting. Frey in his testimony characterized the conversations to the effect that the Board would not clarify their position as to whether or not there would be an early dismissal. He did not testify as to what specific words were said and was very evasive in terms of the total context and thrust of this meeting. Similarly, Vogt testified that the issue of early dismissal was raised but he never testified to exactly what was said at the meeting. He claimed he wanted to know if they would be dismissed at 1 o'clock but it was never made clear to the Hearing Examiner by Vogt what the Association's position was in terms of their willingness to attend the Open House. Both Shellhammer and LaPenna testified that the issue of the early dismissal was never raised at the meeting by the Association but rather the meeting dealt with the willingness of the Association members to attend the Open House.

Mr. LaPenna, on the same day of May 12th, wrote a letter to Frey concerning the events of the day. He acknowledged receipt of Frey's letter of May 12 and reviewed the 4 o'clock meeting. LaPenna wrote that Frey personally confirmed the stated intention of the teachers not to attend the Open House. LaPenna went on to say in the letter that the Open House will be conducted as scheduled and teachers are expected to be in their respective shop/classrooms at the scheduled time. Additionally, LaPenna wrote a letter to Frey on the day of the scheduled Open House, May 13th. In that letter LaPenna confirmed the past practice of the district and stated there would be an early dismissal; the teachers would not be expected to remain beyond 1:15 p.m., but they would be expected to return to school at 7 p.m. and be there until 9 p.m. Frey testified that he did not receive this letter until sometime after his lunch hour -- sometime between 12:15 and 1 p.m. His testimony was not disputed. Shortly after the students were dismissed, the Association held a meeting of its members in the school. Frey testified that the teachers decided that they would remain for the regular school hours and not participate in the Open House. Frey admitted that he did not reveal to other Association members the contents of LaPenna's letter of May 13th.

It is undisputed that the teachers for the most part did not attend the Open House and those teachers who did not attend were docked the equivalent of two hours' salary from their following paycheck. On the basis of all the evidence adduced and on the credibility of witnesses as discussed above, I find that the

Association's position that they could not determine what the status of the early dismissal on the 13th would be is less than honest. The Association officers knew full well that there would be an early dismissal and if there was a legitimate concern on the part of Frey as to the meaning of Shellhammer's notice of May 10th (assuming Shellhammer was mistaken and they did not meet), Frey could very easily have simply asked Shellhammer, but by his own testimony Frey admitted that he did not do so. It is clear that the Association took advantage of the confusion over the issue of Open House in order to stage a job action [3/] to publicize their problems in negotiations.

The parties acknowledged the existence of the Open House as a past practice and the Commission has held that the contractual obligation can be created through a past practice. Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976); H.E. No. 76-12, 2 NJPER 284 (1976). The requirement of the Board for attendance could in no way be considered a change or alteration of terms and conditions of employment. The fact that the Association members stayed in school until 3:45 p.m. is irrelevant. They knew they had no obligation to do so.

The Association argues that, in any event, it was improper to dock pay from the salaries of Association members and that it is maintained an employer has no right to impose a penalty upon employees absent some contractual provision and none exists in the parties' contract. It is noted the contract between the parties for 1975-76 incorporated by reference the preceding year's contract. Within that contract Article XIV provides that, under Section D, "each employee may request to be excused without loss of pay for not more than a total of three days per school year" for the certain enumerated reasons (emphasis supplied). It is clear by inference that the Association through the negotiations process accepted the right of the Board to dock employees on days when they are absent without excuse. Here the teachers were absent from the Open House without excuse. It is important to note that the scheduled attendance requirement for teachers at the Open House was two hours, and those who did not attend were docked for only two hours. Accordingly, this action was not a fine or punishment, but was imposed in accordance with the contract.

3/ Or boycott or whatever term one may choose to define such an action.

Accordingly, it is hereby recommended that the Commission dismiss the Complaint in its entirety.

Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
February 3, 1978