P.E.R.C. NO. 81-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-79-79-24

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission dismisses a complaint in an unfair practice case filed by the Association against the Board. The Commission concluded, in agreement with the Hearing Examiner, that the Board had not violated the New Jersey Employer-Employee Relations Act when it refused to permit two teachers to be represented by an Association representative at a closed session of the Board held to consider requests made by the employees for extended child care leave. The Commission in dismissing the exceptions filed by the Association to the Hearing Examiner's Report concluded that the relevant meeting with the Board appeared to have been conducted solely for the purpose of providing the Board with additional information concerning the requested leaves -- which were in fact granted by the Board -- and was not the type of situation that would entitle employees to representation under the U.S. Supreme Court's Weingarten decision.

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Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, Esqs.
(Mr. Gordon J. Golum, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, ESqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("the Commission") on October 10, 1978 by the South River Education Association ("the Association"). The charge alleged that the South River Board of Education ("the Board") had engaged in unfair practices in violation of N.J.S.A. 34:13A(a)(1) and (5) [1/] by refusing to allow unit employees (teachers) to be accompanied by their chosen representatives at a closed session of the Board at which the employees intended to discuss

1/ These subsections of the New Jersey Employer-Employee Relations Act prohibit employers from : "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act" and "(5) Refusing to negotiate in good faith with a majority representaive 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."

their individual requests for extended sick leave and extended maternity leave.

It appearing that the allegations, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 22, 1979. On January 30, 1980, pursuant to N.J.A.C. 19:14-6.7, the parties submitted a stipulation of facts with exhibits to the Hearing Examiner for a decision without a hearing. The parties filed written legal arguments with the Hearing Examiner by February 29, 1980. On April 29, 1980 the Hearing Examiner issued his Recommended Report and Decision 2/ which included findings of fact, conclusions of law and a recommended order, copies of which were served on the parties and the original was filed with the Commission. A copy of this Report is attached hereto and made a part hereof. A letter appeal in lieu of formal brief excepting to the Hearing Examiner's findings was filed by the Association on May 15, 1980 and the Board filed a resonse on May 19, 1980.

The Hearing Examiner found that the Board did not violate the Act by refusing to allow the teachers to have an Association representative at their discussions concerning extended child care leaves at a closed session of the Board. The teachers elected to have their applications for extended leave discussed at a closed Board session, rather than an open session where their representative could address the Board.

The Hearing Examiner concluded that the meeting was not an investigatory interview which the teachers reasonably feared

2/ H.E. No. 80-43, 6 NJPER (¶ 1980).

might result in sanctions or discipline,[3/] and at which the employees were entitled to have a representative present.

The Association takes exception to the Hearing Examiner's finding that the teachers were not entitled to representation because the Association contends that since a term and condition of employment was being discussed, the teachers were entitled to representation under the Act.

We agree with the Hearing Examiner and the Appellate Division in East Brunswick Board of Education and East Brunswick Education Association, P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), affmd in part, revd in part App. Div. Docket No. A-280-79 (6/18/80) that the standard to be used to determine when employees are entitled to representation is that enunciated by the United States Supreme Court in the Weingarten case (see fn 3, supra).

The Association also excepts to the Hearing Examiner's conclusion that the teachers were not entitled to representation at the closed session of the Board because, according to the Hearing

3/ The Hearing Examiner relied on NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975), noting the Commission had adopted the Weingarten standard in East Brunswick, supra. While the Commission's decision in East Brunswick was reversed in part, the Appellate Division noted that while Weingarten involved interpretation of the National Labor Relations Act, the experience and adjudication under the NLRA were appropriate guides for interpreting the unfair practice provisions of the New Jersey public employment statutory scheme. Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409, 429 (1970). Under Weingarten, the Court points out, an employee should be allowed union representation when an employer requests an employee to appear at an investigatory interview which the employee can reasonably believe might result in disciplinary action.

Examiner's Report, the Board believed that the consideration of the employees' requests could result in their rights being adversely affected. The Respondent correctly notes that the Hearing Examiner was in error when he found that the Board believed the employees' rights could be adversely affected. The employees were discussing their entitlement to a contractual benefit that had already been negotiated by their majority representative. (See p. 6, Hearing Examiner's Report, attached). That portion of the Hearing Examiner's recommendation is rejected.

The parties have stipulated that the appearance of Ms. Carney and Ms. Linke before the Board of Education on July 25, 1978 was not pursuant to the contractual grievance procedure. Inasmuch as the meeting with the Board of Education appears to have been conducted solely for the purpose of providing the Board with additional information and not for the purpose of grieving the Board's prior determination, -- in fact, the Board did grant the requested leaves following receipt of the additional information -- we agree with the Hearing Examiner's recommendation that this is not the kind of situation that entitles employees to representation. 4/

Based on an independent review of the entire record, including the exceptions filed, we adopt the Hearing Examiner's finding of fact, as modified above, and his conclusions of law.

4/ Cf. Red Bank Regional Ed. Ass'n v. Red Bank Board of Ed., 78 N.J. 122 (1978).

ORDER

Accordingly, for the reasons set forth above, the Complaint in this matter, CO-79-79-24, is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
July 10, 1980
ISSUED: July 14, 1980

H. E. No. 80-43

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

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-79-79-24

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Public Employment Relations Commission Hearing Examiner recommends dismissal of an unfair practice charge filed by the South River Education Association alleging that the Board of Education interfered with employee rights under the New Jersey Employer-Employee Relations Act and refused to negotiate in good faith with it when the Board refused to permit two teachers to be represented by an Association representative at a closed session of the Board held to consider requests made by the employees for extended child care leave.

As the requests were made under an existing contract provision relating to Board granting of such leaves, the Examiner concluded that they were neither grievances nor negotiating demands which under existing Commission precedent would have required the employer to accord a right of representation to the employees. Since the employees had requested their appearance at the closed session, a statutory provision mandating representation whenever teachers are required to appear on any matter adversely affecting them was deemed not applicable. A doctrine of Federal law adopted by the Commission requiring representation whenever an employee reasonably fears discipline resulting from an interview by his employer was also found inapplicable on the facts presented. Thus, the Examiner recommended dismissal of the case.

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/or conclusions of law.

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For the Respondent, Wilentz, Goldman & Spitzer, Esqs.
(Mr. Gordon J. Golum, Of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, Of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On October 10, 1978, the South River Education Association ("Charging Party" or "Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that on May 23, 1978 and again on July 25, 1978 the South River Board of Education ("Respondent" or "Board") refused to allow unit employees (teachers), their chosen representatives at Board meetings at which the employees intended to discuss their individual requests for extended sick leave and extended maternity leave, respectively, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 22, 1979. By Answer filed November 2, 1979, the Respondent

1/ These subsections prohibit public 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; and "(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."

denied the material allegations of the Complaint except admitted that on the dates specified it refused to allow representatives of the Charging Party to accompany certain teachers in closed sessions of the Board, closed in accordance with the wishes of the teachers pursuant to the Open Public Meetings Law, at which the Board had informed them it would discuss their individual requests for extended sick leave or for child care leave. The Respondent's Answer also contains 12 separate affirmative defenses to the Complaint. A number of them raised procedural defenses which have been resolved as a consequence of a later executed stipulation of facts. A number of the others shall be dealt with in the analysis portion of this Report insofar as they have been pressed in Respondent's brief.

On January 30, 1980, the respective attorneys for the parties filed with the undersigned Examiner a stipulation of facts with exhibits annexed and by covering letter noted on behalf of their clients their agreement to waiver of hearing. Accordingly, by letter of the same date, the undersigned acknowledged the agreement to waive hearing pursuant to N.J.A.C. 19:14-6.7 and advised the parties that the full stipulation shall constitute the record for purposes of all further proceedings.

On February 15, 1980, Charging Party filed a letter memorandum in lieu of formal brief, and on February 29, 1980, Respondent filed a brief. These submissions have been duly considered. Upon the entire record in this case, consisting of the stipulation of facts and annexed exhibits, I make the following:

FINDINGS OF FACT

At all material times, the Association has been the exclusive representative of classroom teachers and other professional employees employed by the Board for purposes of collective negotiations concerning their terms and conditions of employment. 2/ An agreement between the parties covering school years 1976 through 1978 contains a Grievance Procedure, Article III, defining a grievance as "a claim by a teacher or group of teachers based upon an alleged violation, misinterpretation, or inequitable application, of any of the provisions of this Agreement as required by Paragraph 7, Chapter 303 laws." 3/ A grievance to be considered under this procedure

2/ I conclude that the Association is a majority representative of public employees, and the Board is a public employer, respectively, within the meaning of the Act.

3/ The grievance definition contained in a successor agreement effective July 1, 1978 to June 30, 1981 is very similar. It uses the term "appeal" instead of "claim" and refers to N.J.S.A. 34:13A-1 instead of Paragraph 7, Chapter 303. It requires grievance initiation within 20 school days rather than 30 calendar days of its occurrence.

must be initiated by the employee within 30 calendar days of its occurrence.

Both the 1976-78 and 1978-81 agreement contain the identical Leave of Absence clause, Article XIII. Within that clause is a provision providing for extension of a child care leave upon the birth of a child. 4/ The provision reads as follows:

> "15. Child Care Leave
>
> * * *
>
> b. If the child is born on March 1 or thereafter, the Board shall, upon written application made not later than sixty (60) days after the birth of the child or June 30, whichever comes first, grant an extension of the Child Care Leave through the following school year. This provision shall apply to non-tenured teachers only if the Board grants said teacher a renewal of contract for the following year."

By letter dated June 20, 1978, directed to Board Secretary Edward S. Perdik, unit employee Linda Linke requested reconsideration of a recent Board decision rejecting her request for a one-year extension of her child care leave. The latter notes her difficulty in arranging satisfactory care for her two small children. By letter dated June 27, 1978 directed to the Board, unit employee Patricia C. Carney requested an extension of her child care leave for the following school year. She noted in the letter certain difficulties in obtaining competent child care for her two children. Both employees noted their understanding that if their requests were denied they would resume teaching in the fall. 5/

By almost identical letters dated July 21, 1978, directed to Linke and Carney, Superintendent of Schools Anthony F. Agnone advised each of them that their request would be discussed by the Board at a closed session to be held in the Board's office on the evening of July 25. The letters noted that the employees may be pre-

4/ Article XIII, para. 11, subpara b in the 1976-78 contract and Article XIII, para. B., subpara. 15b. in the 1978-81 agreement.

5/ The record fails to show when Linke's or Carney's child was born or whether Linke's original request for extension or Carney's only request had complied with the time requirements contained in the extension of child care leave subparagraph of either contract.

sent at this session or they may request that the Board discuss it at the regular open meeting of the Board to be held later that evening. The letters closed with a request that the writer be advised of their preference and whether they planned to attend. Both teachers replied in writing, Linke by letter dated July 22, and Carney by letter dated July 23, in which each advised she would attend the Board's closed session and had asked an Association representative to accompany her.

The Board's position is that its letters to the teachers with respect to its July 25 consideration of their requests and their right to request a discussion of their applications at a public session were sent purusant to the Open Public Meeting Law, N.J.S.A. 10:4-6 et seq. 6/

Linke and Carney attended the July 25, 1978 regular meeting of the Board with Doris Wenger, Treasurer of the Association, as their representative. The President of the Board, Regis Wyluda, advised Wenger, Linke and Carney that the Association representative would not be permitted to attend the closed portion of the Board meeting which Linke and Carney requested be closed, but could address the Board in its open session that evening and that after the closed session he would inform Linke and Carney that if they desired representation, the Board would hear their request in open session. The Board did not require a closed session, indicating to Linke and Carney that they could request the discussion be at an open session instead of a closed session of the Board. Doris Wenger was not allowed to attend the closed session which the two teachers elected to attend. The Board solicited information from Linke and Carney during the closed session relating to their applications but did not require them to remain at the closed session. The Board advised both teachers that no decision would be effective and final until the Board voted on the leave requests in its public session.

An open session then ensued at which time the Board voted to grant the requested leaves.

6/ N.J.S.A. 10:4-12b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

* * * * * * *

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

The parties agree that the appearance of Linke and Carney before the Board on July 25, 1978 was not pursuant to the grievance procedure, Article III of the 1976-78 agreement.

The Board argues that its action would not have been affected if the teachers had not attended the closed session where it considered their application. The Association asserts that an informal straw vote had been taken at the closed session.

ANALYSIS

The Charging Party argues that the form of leave sought by the two employees is clearly a term and condition of employment. 7/ From this undisputed premise and without any further rationale, Charging Party concludes that the two teachers were entitled to have an Association representative at the Board's closed session. Charging Party also contends that the Supreme Court's determination in Red Bank Regional Ed. Assn. v. Red Bank Board of Education, 78 N.J. 122, 393 A.2d 267, 272 (1978) further supports its position. Yet the quotation from the Court's opinion which appears at page 4 of its letter memorandum refers specifically to the constitutional right of public employees to make known "...their grievances and proposals by the representatives of their choosing." Id at 272. The matters pending before the Board at the time the employees requested an Association representative was neither a grievance under the parties' agreement nor a proposal for negotiation. 8/ A further quote from Red Bank appearing at page 5 of the Charging Party's memorandum is inapposite. The parties' stipulation of facts hardly presents a situation in which the public employer is requiring "...individual action at the critical moment when a vindication of employee rights is at stake..." Id at 275. The instant employee requests cannot reasonably be interpreted as "short-circuiting" the system of collectivity which the legislature sought to promote under the Act and with which the Court in Red Bank was justifiably concerned.

As to the Charging Party's contention that East Brunswick Board of Education, P.E.R.C. No. 80-31, 5 NJPER par. 10206 (1979) supports a finding of violation here, I disagree. The Commission's footnote quoted at p. 7 of its memorandum

7/ Respondent does not dispute that the extended child care leave is a term and condition of employment. None of its affirmative defenses nor its brief make a claim that the subject matter is unlawful or a non term or condition of employment.

8/ See East Brunswick Board of Education, P.E.R.C. No. 80-31, 5 NJPER par. 10206 (1979).

(5 NJPER at 400,n.2) notes that a finding of violation of subsection (a)(5) could be predicated upon a refusal to negotiate with respect to a mandatory subject. Admittedly the extended leave request is a mandatory subject. However, the record contains no evidence that the Association was seeking to negotiate with respect to extended child care leave. Indeed, the subject had already been negotiated and the fruits of those negotiations are embodied in the last two contracts executed by the parties. 9/

As the stipulation notes, Respondent provided the employees with an opportunity to appear in executive (closed) session because of a belief that its consideration of their requests presented a matter which could result in employee rights being adversely affected. 10/ Thus, Linke and Carney were informed that they could elect to have their requests discussed at the Board's closed session. They chose to present their requests at the closed session and did not request in writing a public meeting. 11/

Whether or not the Board is correct in its general position that representatives may be precluded from a closed session pursuant to the Open Public Meeting Law, it is clear on the stipulated record before me that the teachers' requests for favorable consideration of their claims for extended sick leave does not raise a serious issue of entitlement to representation by their collective negotiations representative.

The sole purpose for providing the exception to an open public meeting for consideration of personnel matters under the Open Public Meeting Law is to protect individual privacy. 12/ That purpose would be seriously undermined were

9/ The contractual provision quoted at page 3, supra, appears to mandate granting of the extended leave provided certain conditions are met. Assuming the conditions were met it would appear that the Board's processing of the teachers' requests would be purely ministerial in nature and would not normally have caused the teachers apprehension. As noted, the record is silent as to the facts which would have resolved this particular matter.

10/ See f.n. 6, supra.

11/ As Charging Party correctly notes, this election as well as the fact that Board consideration originated with the teachers requests, precluded application of N.J.S.A. 18A:25-7 which provides a right to representation whenever any teaching staff member is required to appear before the board of education concerning any matter which could adversely affect that staff member's continued employment, salary or increment. This principle is incorporated as Article IV, para. c. of the parties' 1976-78 agreement.

12/ Rice and Union Cty. Reg. High School Teachers Assn. v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 382 A.2d 386 (App. Div. 1977)(In the absence of evidence of waiver of individual right of personal privacy there is

(continued next page)

non-employees permitted to attend and in a representative capacity. As the closed session is held at the employee's election, it is the employee who determines whether or not representation in presenting an employee benefit request may be afforded 13/ and whether or not the matter shall be submitted privately in the first instance.

As Respondent correctly notes in its brief, the teachers' requests did not involve an interview which they reasonably feared may result in sanctions or discipline. 14/ The Respondent had not initiated an investigation of the employees. Rather, the employees were seeking to invoke rights under a collective agreement, either a right to which they were automatically entitled or a right which required the employer to exercise its discretion in determining entitlement. Only if the requests were denied would the matter be ripe for presentation as a grievance under the parties' agreement. See page 2 and f.n. 3, supra. Indeed, the applications never reached that stage as the Board granted both requests without the necessity for any further presentation or proceeding.

The Commission has now adopted the Weingarten standard in determining whether employees are to be denied or granted the presence of the majority representative where that presence is disputed by the employer. 15/ The extension of that principle to the instant facts is not warranted for the reason stated. Accordingly, and upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

12/ (continued)

no authority in the bargaining representative to request a public hearing on the private personnel matters of 'adversely affected' employees); see also, Oliver v. Carlstadt-East Rutherford Regional Board of Education, 160 N.J. Super. 131, 388 A.2d 1324 (App. Div. 1978).

13/ Nothing in the stipulation indicates Board rejection of a request for teacher representation by the Association at the public meeting.

14/ See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2684 (1975); NLRB v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (1975). Because of this conclusion I deem it unnecessary to discuss any of the cases Respondent cites in its brief interpreting the Weingarten principle under Federal law.

15/ See In re East Brunswick, supra, at 5 NJPER 399. See also In re Point Pleasant Borough Board of Education, P.E.R.C. No. 79-83, 5 NJPER (para 10114 1979).

CONCLUSIONS OF LAW

The Respondent South River Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by failing and refusing to permit the affected teachers to retain Association representation at their discussions held with the Board at closed sessions pursuant to their requests for extended child care leaves.

RECOMMENDED ORDER

The Respondent South River Board of Education having not violated the Act, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

Robert T. Snyder

Robert T. Snyder
Hearing Examiner

Dated: April 29, 1980
Newark, New Jersey