H.E. NO. 87-62

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

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, MIDDLETOWN TOWNSHIP ADMINISTRATORS & SUPERVISORS ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 11,

Respondents,

-and- Docket No. CO-87-67-55

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a motion by the three Respondents to dismiss at the conclusion of the Charging Party's case for the reason that the Charging Party adduced at least a "scintilla" of evidence, as to which all "reasonable inferences" were afforded, that the Respondents have been parties to an illegal parity agreement, arrangement or understanding since 1982 whereby benefits negotiated by the Charging Party have in a "me-too" fashion been thereafter granted by the Respondent Board to the Respondent Administrators and Respondent IBT without the benefit of collective negotiations. Much of the evidence elicited by the Charging Party was considered as out-of-time "background" but, at this stage of the proceedings, there was no way in which the motions to dismiss could be granted.

The Hearing Examiner also dismissed motions for sanctions by the Charging Party and by the Respondent Board based upon the failure of the Respondents to answer interrogatories in a timely fashion. Here the Hearing Examiner relied upon pertinent decisions of the New Jersey courts, New Jersey Civil Practice Rule 4:23-5 and the OAL rules.

The denial of a motion to dismiss being interlocutory, the matter now proceeds to a plenary hearing on any defense or defenses that the Respondents may have to the unfair practice charge, as amended. Dismissal of the motions for sanctions may or may not be interlocutory but will not be further considered by the Hearing Examiner.

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Respondents,

-and-

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MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent Board
Kalac, Newman & Lavender, Esqs.
(Peter P. Kalac, Esq.)

For the Respondent Administrators
Wayne J. Oppito, Esq.

For the Respondent Teamsters
Schwartz, Pisano, Simon & Edelstein, Esqs.
(Nathanya G. Simon, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENTS' MOTIONS TO DISMISS AND MOTION AND CROSS-MOTION FOR SANCTIONS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 8, 1986, and amended on October 27, 1986, by the Middletown Township Education Association (hereinafter the "Charging

Party" or the "MTEA"") alleging that the Middletown Township Board of Education (hereinafter the "Board"), the Middletown Township Administrators & Supervisors Association (hereinafter the "Administrators") and the International Brotherhood of Teamsters, Local 11 (hereinafter the "IBT")") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, as alleged in the amended Unfair Practice Charge of October 27, 1986,[1/] the Respondents, all of whom are parties to several collective negotiations agreements, were also "parties" to an unwritten "mutual benefits" or "parity clause," which automatically guaranteed to the members of the Administrators and IBT units the same benefits as those that had been negotiated by the MTEA; evidence of such a "parity clause" was manifested by a memo sent by the Board to the Administrators and IBT, advising them that, pursuant to "mutual benefits" clauses, increased dental benefits became available to "all staff members" as of January 1, 1985; prior to January 1, 1985, the Board had concluded contracts with both the Administrators and the IBT through 1986 and neither agreement provided for increased dental benefits; nevertheless, effective January 1, 1985, the Board automatically granted to the Administrators and IBT members the increased dental benefits that

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1/ All of the relevant allegations are contained in the amended Unfair Practice Charge.

the MTEA had negotiated with the Board and, further, the Board automatically granted to the Administrators and IBT units a payment for accumulated sick leave on retirement after the conclusion of their respective negotiations; and during the six months period prior to the filing of the initial Unfair Practice Charge, the Board automatically granted the Administrators and IBT members increased dental benefits, which had been negotiated by the MTEA and thereafter implemented a new prescription drug benefit as of July 1, 1986 for the Administrators and IBT when negotiations with the Administrators for a new contract had not yet been concluded; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) of the Act[2/] and, further, all of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) of the Act.[3/]

2/ 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; (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; and (7) Violating any of the rules and regulations established by the commission."

3/ These subsections prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are

Footnote Continued on Next Page

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 13, 1986. Prior to the commencement of the hearing on March 23, 1987, two significant events occurred: First, on January 9, 1987, when the Hearing Examiner was apprised that the Charging Party was having problems in obtaining answers to the interrogatories propounded to each of the three Respondents, the Hearing Examiner convened a meeting of all counsel for the parties and, after limitations on the scope of the interrogatories were agreed to, a schedule was set by the Hearing Examiner wherein the Respondents would apprise the Hearing Examiner by January 16, 1987, as to what interrogatories they would answer and the Respondents would thereafter answer the interrogatories by January 30, 1987; and if there were any problems with the answers provided, the Charging Party would so advise the Hearing Examiner by February 6th. The events subsequent to the January 9th meeting between the Hearing Examiner and counsel for all parties will be the subject of discussion hereinafter. The second event was the filing of a Motion for Partial Summary Judgment by the Board on January 14, 1987, with

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3/ Footnote Continued From Previous Page

the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the commission."

a supporting affidavit and brief, and on January 23, 1987, the Chairman of the Commission referred this Motion to the undersigned for disposition, which will also be set forth hereinafter.

The Interrogatories Issue

As noted above, interrogatories were to be answered by the Respondents by January 30, 1987, following the response of counsel for the Respondents by January 16th, supra, indicating the scope of their response. The initial response of the Board was made on January 19, 1987, the responses of the Administrators and the IBT was made on January 28, 1987 and February 3, 1987, respectively. No objection was made by the MTEA to the scope of the responses of the Respondents, notwithstanding that counsel for the Charging Party asked for an extension in which to do so.

Thereafter, although not within the prescribed time limit of January 30, 1987, the Board answered the Charging Party's interrogatories on February 4th, the Administrators answered the interrogatories on March 10th and the IBT answered the interrogatories on March 11 and March 14, 1987.

The initial answers of the Board were objected to by the MTEA as unsatisfactory regarding Interrogatories Nos. 11 and 12 but this was cured by the Board on March 12, 1987. Thus, by March 14, 1987, eight days prior to the commencement of the Hearing on March 23rd, all Respondents had answered the interrogatories of the MTEA to its satisfaction.

On March 4, 1987, the MTEA filed a motion for sanctions against all Respondents for failure to have complied with the schedule for answering interrogatories as set by the Hearing Examiner and agreed upon by the parties on January 9, 1987, supra. On March 5, 1987, the Hearing Examiner sent a letter to all parties, scheduling a hearing on the motion for sanctions by the MTEA for Thursday, March 19, 1987. In his letter, the Hearing Examiner requested responses by all Respondents to the MTEA's motion for sanctions on or before March 16, 1987.

On March 9, 1987, the Board filed a cross-motion for sanctions against the MTEA, based on alleged misrepresentations made by counsel for the MTEA in his certification in support of the MTEA's motion for sanctions. Counsel for the MTEA responded to this cross-motion on March 11, 1987.

The responses of the several Respondents to the MTEA's motion for sanctions having been received before the date of hearing on March 19th, the hearing proceeded as scheduled and arguments were heard by the undersigned on March 19th.[4/] Counsel for the MTEA agreed on March 19th that, having received the answers to interrogatories from all Respondents prior to that date, he was able to prepare for the hearing on the merits, commencing March 23rd.

4/ The arguments will not be summarized and repeated here as they appear in the transcript of the hearing on March 19, 1987 (pp. 22-43).

The argument of counsel for the Board and the MTEA on the Board's cross-motion for sanctions was heard prior to the commencement of the hearing on the merits of this case on March 23, 1987.[5/]

The Hearing Examiner will hereinafter discuss and decide the motion for sanctions by the MTEA against all three Respondents. Likewise, the Hearing Examiner will discuss and decide the Board's cross-motion for sanctions hereinafter.

Board's Motion For Partial Summary Judgment.

As noted previously, the Board filed a Motion for Partial Summary Judgment on January 14, 1987, which was referred to the Hearing Examiner for disposition. In its Motion, the Board sought dismissal of the allegations in ¶'s 7-11, inclusive, of the MTEA's amended Unfair Practice Charge on the ground that the allegations were time-barred under §5.4(c) of the Act. According to the Board, these allegations pertained to events which occurred in 1985 and, thus, occurred more than six months prior to the filing of the initial Unfair Practice Charge on September 8, 1986.

Since a memorandum from the Board to all staff, dated January 8, 1985, formed the basis for ¶'s 7-11 of the amended Unfair Practice Charge, and since counsel for the MTEA advised the Hearing

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5/ Likewise, the arguments of counsel made on the Board's cross-motion for sanctions will not be summarized and repeated here since they appear in the transcript of the first part of the hearing day of March 23, 1987 (pp. 7-20).

Examiner on February 3, 1987, that it would stipulate that this memorandum, being time-barred under §5.4(c) of the Act, could not constitute an unfair practice, the Hearing Examiner on March 3, 1987, granted the Board's Motion for Partial Summary Judgment as to only ¶'s 8-11, inclusive, of the MTEA's amended Unfair Practice Charge, refusing to dismiss the allegations contained in ¶7 thereof for the reason that those allegations were not necessarily keyed to a date or event in 1985 as was the case in ¶'s 8-11 of the amended Unfair Practice Charge. This decision was served upon the parties but has not been, and will not be, published as a Hearing Examiner's Recommended Decision and Order, it being interlocutory.

In ordering the grant of the Board's Motion for Partial Summary Judgment as set forth above, the Hearing Examiner also ordered that the MTEA might use the allegations in ¶'s 8-11 of its amended Unfair Practice Charge as "background" at the hearing commencing March 23rd: Local Lodge No. 1424, IAM (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411, 45 LRRM 3212 (1960).

* * * *

Pursuant to the Complaint and Notice of Hearing, supra, hearings were held on March 23 and March 24, 1987, in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, all Respondents made motions to dismiss on the record and the Hearing Examiner, after hearing oral argument, reserved decision until the following day, March 25th. On

that date the Hearing Examiner advised all parties that further hearing dates were cancelled, pending the issuance of the instant Decision and Order. A briefing schedule was established for further argument and the parties filed their briefs by April 15, 1987.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and upon the record made by the Charging Party only, and after consideration of the parties' oral argument and the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for disposition of the Respondents' Motions to Dismiss.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Middletown Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Middletown Township Education Association, the Middletown Township Administrators and Supervisors Association, and International Brotherhood of Teamsters, Local 11 are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

NEGOTIATIONS/CONTRACTS BETWEEN THE BOARD AND THE ADMINISTRATORS

3. The 1982-84 Administrators contract (CP-2) in Art. IV, "Insurance Protection," contained a provision for dental coverage[6/] but it contained NO provision for prescription coverage. Further, Art. XII, Sick Leave, made NO provision for payment of accumulated sick leave upon retirement. Thus, this is where the Administrators stood as of June 30, 1984.

4. On June 27, 1984, the Board and the Administrators executed a Memorandum of Agreement for a new two-year contract (CP-9). The first paragraph of this memorandum stated that with the exception of the changes below all language in the 1983-84 agreement shall remain in effect for the 1984-86 contract. The eight paragraphs of this memorandum of June 27, 1984 made no reference to any of the three benefits in issue[7/] and, therefore, CP-2, supra, remained in effect. Further, the Board minutes of September 10, 1984, which recommended a settlement with the Administrators, made no reference to any of the three benefits in issue (CP-13).[8/]

6/ Art. IV, §4.2, providing for dental coverage, also states that effective July 1, 1983, "these benefits" will be extended to include dependents.

7/ Throughout this decision the "three benefits in issue" are dental, payment for accumulated sick leave upon retirement and a prescription plan.

8/ Diane Swaim, the President of the MTEA, acknowledged that she did not know the status of negotiations between the Board and the Administrators or the IBT in November 1984, when the MTEA negotiations were concluded.

5. Also, Art. IV of CP-3 (p. 2), "Insurance Protection," in the 1984-86 Administrators contract, contained NO provision regarding a prescription plan. The MTEA contract (CP-1) contains in Art. IV, "Insurance Protection," a provision for dental coverage with increased benefits, effective January 1, 1985 (§4.2), and provision for a prescription plan in the 1986-87 school year (§4.3).

6. On January 8, 1985, William F. Hybbeneth, Jr., the Board's Director of Labor Relations, issued a memo to all staff members in the three negotiations units where the subject was "Increased Dental Benefits." In the opening paragraph of this memo he stated:

> As a result of the conclusion of negotiations with the MTEA and pursuant to the "mutual benefits" clauses negotiated by the MTASA and Teamsters Local 11, the Board of Education is pleased to announce that as of January 1, 1985, increased dental benefits became available to all staff members.9/

7. In a January 18, 1985, letter from Hybbeneth to the President of the Administrators unit (CP-17), Hybbeneth confirmed his meeting with him on January 15th where an agreement was made regarding the printing of the Administrators contract, which was to include, inter alia, an Art. XII (§12.12--"new"), and provided that effective July 1, 1985, administrators retiring after a minimum of 15 years would receive $20 per day for all unused sick leave to a

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9/ In response to a question from the Hearing Examiner, as to whether or not there were "mutual benefits" clauses in the Administrators and IBT contracts, counsel for the MTEA stated that there were none.

maximum of $3,000. This identical language appeared in CP-3, the 1984-86 contract of the Administrators, supra, on p. 16 thereof. Note is made of the fact that this letter from Hybbeneth is dated January 18, 1985; the 1984-84 Administrators contract was presumably concluded as of July 1, 1984.

8. Also, at p. 2 of CP-17, supra, in the first paragraph under "§E," Hybbeneth noted that "we agreed" that increased dental benefits "are in place" and that language need not be written into the Administrators contract. In the next paragraph Hybbeneth referred to the prescription plan coverage negotiated by the MTEA for 1986-87 and then stated that since the Administrators did not have a negotiated agreement for 1986-87 as to this benefit they were not entitled to a prescription plan. However, he stated that if they were to place this proposal on the table in negotiations for 1986-87 the "Board will look most favorably on including" the Administrators under the prescription plan.10/

9. In the Summer of 1985, Swaim heard that the Administrators were receiving payment for accumulated sick leave upon retirement. Swaim requested that the Board provide copies of the 1984-86 contracts between the Board and the Administrators and the IBT. On August 20, 1985, Hybbeneth sent a memo to Swaim, advising that the Administrators contract should be printed within

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10/ The MTEA in CP-1, Art. IV (§4.3) had obtained prescription coverage for its members as of July 1, 1986.

the next day or two and he attached a copy of the IBT contract (CP-6). However, Swaim did not receive the Administrators contract (CP-3) until October 1985. Upon receipt of the Administrators contract for 1984-86, the

MTEA noted that at p. 16 (§12.12) the contract provided that administrators who retire after 15 years shall receive $20 per day for all unused sick leave up to maximum $3,000 even though this was not provided in CP-2, the 1982-84 Administrators contract, supra. The MTEA had negotiated this benefit, which appears in CP-1 (the MTEA 1984-87 contract) at p. 19 (§13.2) in identical language.

10. The 1986-87 Administrators contract (CP-4), executed on October 6, 1986, provides, inter alia, for a prescription plan for administrators, effective July 1, 1986, plus the unused sick leave upon retirement benefit, which was increased to $30 per day to a maximum of $4,500. The execution date of October 6, 1986, is consistent with the Board

minutes, which recommended ratification of the agreement on the same date (CP-18). These Board minutes make no reference in the four lines thereof to the fact that a prescription plan had been granted to the administrators.

NEGOTIATIONS/CONTRACTS BETWEEN THE BOARD AND THE IBT

11. In the IBT contract, effective July 1, 1982 through June 30, 1984, reference to Art. XII, "Sick Leave," discloses that the only provision pertinent hereto is §10, which provided only that the Board agreed to apply accumulated sick leave to retirement

benefits "...if and when statutes permitting such application is (sic) enacted..." (CP-5, p. 21). Also, CP-5, Art. XX, "Insurance," provided dental coverage in terms analogous to the dental coverage provided in the MTEA 1984-87 agreement (CP-1, pp. 3, 4).

12. In CP-10, an "overview" memorandum of the IBT 1984-86 settlement, the Office of the Assistant Superintendent for Business on July 5, 1984, set forth the articles that were modified in negotiations. A new Art. XII, "Retirement Sick Day Payment," stated that "Me-too" informal agreement, granted only if awarded to other units." This same "Overview" memorandum also stated that there would be a new Art. XX (3)(a) "Optical/Prescription," again stating that this was an informal "Me-Too" agreement.

13. CP-12 is the Memorandum of Agreement, dated August 7, 1984, between the Board and the IBT for those terms and conditions to be changed from those in CP-5 for the 1984-86 agreement (CP-6). Significantly, there is no reference in this Memorandum of Agreement, regarding the CP-10 July 5, 1984 memo, supra, where reference was made to a new Art. XII, involving "Retirement Sick Pay Payment" and a new Art. XX(3)(a), involving optical/prescription coverage. Further, in the Board minutes of August 6, 1984 (CP-11), which was one day before CP-12, supra, the settlement with the IBT was approved and there was no reference made to prescription coverage or to sick leave pay on retirement.

14. In CP-14, a letter dated November 29, 1984, from Hybbeneth to one Carl Hallengren, a Local IBT representative,

Hybbeneth confirmed his conversation of November 26, 1984, regarding negotiations for the 1984-86 "period" and the "me too handshakes" that were exchanged. Hybbeneth then outlined the benefits that would accrue to the IBT "as a result of the conclusion of negotiations with the MTEA." First, Hybbeneth said that for the 1984-85 school year IBT members would become eligible for increased dental insurance coverage "...should the Board of Education decide to upgrade the Master Policy...."[11/] Hybbeneth next stated that for the 1985-86 school year IBT members would become eligible for reimbursement for accumulated unused sick leave at retirement and that the language "would most likely read" that IBT members who retire after completing a minimum of 15 years would receive $10 per day for all unused sick leave to a maximum of $1500.[12/]

15. Also, in CP-14, Hybbeneth next advised Hallengren that for 1986-87, the MTEA had negotiated a prescription plan, adding that since the IBT did not have this benefit for that year and is not "strictly entitled," Hybbeneth's suggestion was that the IBT place this proposal on the bargaining table for 1986-87 and that it was his "personal belief" that the Board would look "most favorably" on including the IBT members under this coverage.

11/ This was, of course, done and was implemented by Hybbeneth's memo of January 8, 1985 (see Finding of Fact No. 6, supra).

12/ The MTEA 1984-87 agreement (CP-1) provides on p. 19 under §13.2 for payment of $20 per day for teachers up to a maximum of $3,000, thus, there is a significant difference in the benefit accorded the IBT members.

16. Further, in CP-14, supra, Hybbeneth stated, in reference to Hallengren's "last 'me too' concern as it applies to the salary package," it was Hybbeneth's recollection that "salaries were not to be covered under any 'me too' arrangement...".

17. The IBT contract, effective July 1, 1984 through June 20, 1986 (CP-6), provided in Art. XII, Sick Leave, §10 (p. 21) that members who retired after completing a minimum of 15 years shall receive $10 per day for all unused sick leave to a maximum of $1500. This follows from the 1982-84 contract (CP-5, p. 21, supra) where it was provided that the Board agreed to apply accumulated sick leave to retirement benefits if and when statutes permit it (see Finding of Fact No. 11, supra). The dental benefit provision in Art. XX, "Insurance," in CP-6 (1984-86) remained the same as the like provision in Art. XX of CP-5 (1982-84). Finally, the 1984-86 IBT contract contained NO prescription plan.

18. The 1986-89 IBT contract provides in Art. XX, §2 "Insurance," the same dental benefits as in the previous contracts, supra, but also contains in a new §3 thereof that, effective July 1, 1986, "prescription coverage" will be provided (CP-7, p. 33).

DISCUSSION AND ANALYSIS

The Standard Applicable To A Motion To Dismiss At The Conclusion Of The Charging Party's Case.

Quoting from a most recent decision of the Commission in UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987), the Hearing Examiner notes that the Commission said:

> When a respondent moves for dismissal at the end of charging party's case, the Hearing Examiner must accept as true all the evidence supporting the charging party's position and must give the charging party the benefit of all reasonable inferences. Bexiga v. Havir Mfg. Co., 60 N.J. 402, 409 (1972); Dolson v. Anastasia, 55 N.J. 2, 5, 6 (1969); N.J. Turnpike Auth., P.E.R.C. 79-81, 5 NJPER 197 (¶10112 1978). The Hearing Examiner must then deny the motion if there is a scintilla of evidence to prove a violation. (13 NJPER at 116)(emphasis supplied).

Thus, it is clear to the Hearing Examiner herein that he must grant the MTEA the benefit of all reasonable inferences in assessing whether or not the conduct of the Respondents, one to the other since 1982, violated the Act under the principles of the Commission's decision in City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978), aff'g. H.E. No. 78-32, 4 NJPER 225 (¶4114 1978).

The Respondents' Motions To Dismiss At The Conclusion Of The Charging Party's Case Are Denied.

The legal premise from which the Hearing Examiner commences is that portion of the Commission's decision in City of Plainfield, supra, wherein, after concluding that the inclusion of a parity clause in a collective negotiations agreement[13/] constitutes an unfair practice within the meaning of §§5.4(a)(1) and (5) of the Act, the Commission stated:

13/ The Hearing Examiner in this case makes no distinction between a written parity clause in a collective negotiations agreement as in City of Plainfield or where, as contended here, there exists an unwritten parity agreement, arrangement or understanding.

> This result (that parity clauses are illegal) does not foreclose a public employer from considering the historical background of collective negotiations and traditional patterns of wage and benefits relationships including "comparability" with the different employee organizations it has previously negotiated with. A public employer may voluntarily choose to maintain certain relationships between two or more employee organizations. Additionally, a reopener clause does not offend the Act because there is no predetermined result that an employee organization only agree to reopen negotiations in good faith if another employee organization is successful in achieving a greater economic settlement. This is no guarantee of equality of the economic packages. (4 NJPER at 256)(emphasis supplied).

It appears to the Hearing Examiner from a detached consideration of the various documents introduced in evidence by the MTEA, coupled with the relevant testimony of Swaim, that the Respondents' motions to dismiss must be denied since the evidence adduced to date indicates the existence of more than a mere "comparability" relationship between and among the Respondents. It must be recalled that the Respondents' citation of the recent Commission decision in Rutgers, supra, dictates that a charging party at this stage of the proceeding must be given the benefit of "all reasonable inferences" in the course of determining whether or not there is a scintilla of evidence, establishing a violation.

Given the present state of the record, there is no way in which the Hearing Examiner can conclude other than that the Charging Party has established by at least a "scintilla" of evidence, when given the benefit of all reasonable inferences, that there existed at least between 1982 and 1986 an illegal parity agreement, arrangement or understanding among the Respondents inter se. In so

concluding, the parties should be mindful that this interim conclusion does not suggest in any way what the ultimate outcome of this case will be after the Respondents have been provided an opportunity to present their respective defenses on the merits.

The analytical basis for the Hearing Examiner's conclusion that the MTEA has established the existence of at least a "scintilla" of evidence that the Respondents were parties to an illegal parity agreement, arrangement or understanding is as follows: First, as to the Board and the Administrators; (1) Hybbeneth's memo of January 8, 1985, applying to all staff members, uses the unfortunate term "mutual benefits" clauses in referring to the negotiations with the Administrators and the IBT;[14/] (2) on January 18, 1985, Hybenneth wrote to the President of the Administrators unit, confirming his meeting with him on January 15th where an agreement was made regarding the new contract, which was to include a new Art. XII, §12.12, providing that effective July 1, 1985, the administrators would for the first time receive payment for accumulated sick leave upon retirement in language essentially identical to that in the MTEA 1984-86 contract (CP-3);[15/] (3) also on January 18, 1985, Hybenneth stated that although the administrators were not then entitled to prescription coverage, the

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14/ Note is taken of the fact that counsel for the MTEA acknowledged that the contracts of the Administrators and the IBT never contained "mutual benefits" clauses.

15/ See Finding of Fact No. 7, supra.

Board would look most favorably upon such a benefit if it was placed upon the table in the negotiations for 1986-87;[16/]; (4) when Swaim in October 1985, received the 1984-86 Administrators contract she noted that Art. XII, §12.12, provided for the payment of accumulated sick leave upon retirement, referred to previously, as set forth in Hybenneth's letter of January 18, 1985.[17/]

The Hearing Examiner, in having concluded from the foregoing that there is at least a "scintilla" of evidence of an illegal parity agreement, arrangement or understanding between the Board and the Administrators, acknowledges that the inferences he has drawn from the Charging Party's evidence to date regarding the Administrators are not as strong as those which follow, regarding the relationship between the Board and the IBT. However, when the situation is considered overall, as must be done, the "scintilla" standard is deemed satisfied as to the Administrators and the motions of the Board and the Administrators to dismiss must be denied.

Now, as to the IBT: (1) as in the case of the Administrators, supra, Hybenneth on January 8, 1985, issued his memo to all employees regarding dental benefits where he referred to "mutual benefits" clauses between the Board and the IBT as well as the Administrators; (2) in the "overview" memorandum of July 5, 1984, the Board stated that a "me-too" informal agreement regarding

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16/ See Finding of Fact No. 8, supra.

17/ See Findings of Fact Nos. 7 & 9, supra.

retirement sick day payment could be granted only if it was awarded to other units and, also, the memo referred to an informal "me-too" agreement as to optical/prescription coverage;[18/] (3) on November 29, 1984, Hybenneth wrote to a Local IBT representative, confirming a November 26th negotiations meeting for 1984-86 and the "me too" handshakes that were exchanged and then stated that for the 1985-86 school year IBT members would become eligible for reimbursement for accumulated unused sick leave at retirement, adding that the language "would most likely read," etc.;[19/] (4) Hybenneth stated further on November 29, 1984, supra, that regarding the last "me too" concern as it applied to the salary package, salaries were not "to be covered under any 'me too' arrangement..."[20/]

Notwithstanding the urging of the Respondents that the Hearing Examiner view the proofs to date as protected under the umbrella of "comparability" negotiations between a public employer and several public employee representatives, City of Plainfield, supra, the Hearing Examiner is persuaded at this point that there is at least a "scintilla" of evidence that an illegal parity agreement,

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18/ See Finding of Fact No. 12, supra.

19/ See Finding of Fact No. 14, supra.

20/ See Finding of Fact No. 16, supra. The Hearing Examiner finds it most significant that Hybenneth would state to the IBT representative in November 1984 that the "salary package" did not fall within the "me too" arrangement since it raises a clear inference that other terms and conditions of employment were within the "me too" arrangement.

arrangement or understanding has existed since 1982 between the Board, the Administrators and the IBT.[21/] Accordingly, a plenary hearing to afford the Respondents an opportunity to present their defense on the merit will be scheduled.

* * * *

The Charging Party's Motion For Sanctions Against The Respondents Is Dismissed.

It will be recalled that at the March 19, 1987, hearing on the Charging Party's motion for sanctions against the Respondents for failure to answer interrogatories in a timely fashion, the Hearing Examiner elicited from counsel for the Charging Party that as of that date all of the Respondents had satisfactorily answered their respective interrogatories and, further, that counsel for the MTEA could adequately prepare for the plenary hearing, which was to commence on March 23rd. Given this factual setting, the Hearing Examiner now disposes of the MTEA's motion for sanctions against all three Respondents.

On March 19th, the Hearing Examiner set forth on the record his understanding of the status of the law, both administratively

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21/ In concluding that the Charging Party has adduced at least a "scintilla" of evidence that an illegal parity agreement, arrangement or understanding has existed since 1982, the Hearing Examiner is acutely aware that the evidence adduced occurred in a time frame prior to he six-month limitation period under §5.4(c) of the Act. At this point, the Hearing Examiner has only utilized this evidence as "background" under Bryan Mfg. Co, supra, for the purpose of giving the Charging Party the benefit of all "reasonable inferences" at this stage of the proceeding.

and by court decision, for dealing with a motion for sanctions for the failure to answer interrogatories, in this case, in a timely fashion. The first reference was to New Jersey Civil Practice Rule 4:23-5, entitled, "Failure to Serve Answers to Interrogatories," which provides, inter alia, that if timely answers to interrogatories are not served then the complaint, etc. "shall be dismissed or stricken." It is noted that there was no reference to the imposition of counsel fees.

Further, the "OAL" rules in N.J.A.C. 1:1-3.5(b) provides that for unreasonable failure to comply with any order of a judge, he may, inter alia, suppress a defense or claim, or exclude evidence, or take other appropriate action. Additionally, N.J.A.C. 1:1-11.5, entitled, "Time for Discovery," provides in §(c) that the parties shall complete all discovery no later than the first day of the evidentiary hearing unless application is made in §(d) for a shortening or lengthening of the period for discovery. Finally, in N.J.A.C. 1:1-11.6, entitled, "Sanctions for Discovery Abuses," it is provided in §(a) that if a motion compelling discovery is granted, as the Hearing Examiner deems took place here on January 9, 1987, then a judge may consider sanctions against the person whose conduct necessitated the motion, here the three Respondents. Section (b) of N.J.A.C. 1:1-11.6 provides that refusal, without just cause, to obey

an order compelling discovery shall be considered obstructive behavior under N.J.A.C. 1:1-3.5(c).[22/]

Again, on March 19th, the Hearing Examiner, in laying out the basis for an ultimate decision on the MTEA's motion for sanctions for failure to answer interrogatories, referred to several court decisions in New Jersey on the question of sanctions and their imposition for failure to answer interrogatories. In the case of Schlosser v. Kragen, 111 N.J. Super. 337 (Law Div. 1970), the court, relying on an earlier New Jersey Supreme Court decision, held that "Dilatory and obstructive tactics are not to be tolerated in preparation for trial," but stated that, "...sanctions should rarely be imposed..." (111 N.J. Super. at 341). Also, the Appellate Division in Comeford v. Flagship Furniture Clearance Center, 198 N.J Super. 514 (App. Div. 1983) sustained the dismissal of a complaint for failure to answer interrogatories in a timely fashion but this was done because there was "...no satisfactory explanation for all of the protracted delays..." (198 N.J. Super. at 518), spanning many months. Compare Zaccardi v. Becker, 88 N.J. 246 (1981) and Rivera v. Prudential Property & Casualty Insurance Co., 197 N.J. Super. 34 (App. Div. 1984).[23/]

22/ The foregoing provisions of the New Jersey Civil Practice Rules and the OAL Rules were read to the parties and are found in the record of the transcript of March 19, 1987, pp. 6-10.

23/ The foregoing decisions were cited and briefly discussed by the Hearing Examiner on March 19th and appear in the transcript of that date at pp. 11 & 12.

As noted on page 5 of this decision, supra, the Board answered its interrogatories on February 4th and the objection of the Charging Party to these answers was remedied by March 12, 1987. The Administrators answered the interrogatories on March 10th and the IBT answered the interrogatories on March 11 and March 14, 1987. Although, concededly, the Respondents collectively did not answer the interrogatories as scheduled by January 30, 1987, the simple fact of the matter is that they were answered in a time frame, agreed to on January 9th, that allowed counsel for the MTEA to prepare adequately for the plenary hearing, which commenced on March 23, 1987.

Given the language in the several court decisions cited above to the effect that "...sanctions should rarely be imposed..." and the manifestation of a disdain for the imposition of sanctions in the absence of the most egregious circumstances, the Hearing Examiner can do nothing other than conclude that the MTEA's motion for sanctions against all three Respondents should be denied. Thus, the Hearing Examiner will order the dismissal of the MTEA's motion for sanctions.

The Respondent Board's Cross-Motion For Sanctions Against The MTEA Is Denied.

In a sense, the cross-motion of the Respondent Board for sanctions against the MTEA, filed on March 9, 1987, is derivative and flows from the MTEA's motion for sanctions against the Respondent Board. What transpired between the counsel for the MTEA and the Board, in the opinion of the Hearing Examiner, is

unfortunate in that they will, in all likelihood, have an ongoing relationship in the representation of their respective clients in the future. The Hearing Examiner sincerely regrets that he was to some extent involved in any misunderstanding that might have arisen between counsel for the MTEA and the Board by virtue of his having acted as an intermediary in a telephone call, originating from counsel for the Board to the office of the Hearing Examiner in Newark, where counsel for the MTEA was present. The Hearing Examiner takes some responsibility for having failed to have initiated a conference call on that occasion where all three parties would have been "plugged in," rather than the Hearing Examiner being on the telephone with counsel for the Board and the counsel for the MTEA merely overhearing the conversation in the Newark office of the Commission.

Under all the circumstances, and really not reaching the merits of the Board's cross-motion for sanctions, the Hearing Examiner is of the opinion that the best resolution for all concerned is to deny the motion under the circumstances recited above.

Accordingly, the Hearing Examiner will recommend dismissal of the Respondent Board's cross-motion for sanctions against the Charging Party.

* * * *

Based upon the record to date, and upon the foregoing, the Hearing Examiner enters the following:

ORDER

1. The motions by the three Respondents to dismiss at the conclusion of the Charging Party's case in chief is DENIED.

2. The Charging Party's motion for the imposition of sanctions upon the three Respondents for failure to answer timely the interrogatories propounded by the MTEA is DISMISSED.

3. The Respondent Board's cross-motion for sanctions against the MTEA is DISMISSED.

4. A plenary hearing is peremptorily scheduled for May 15, 18 & 21, 1987, in Newark, or on such other dates as may be agreed upon, in order that the Respondents may present such defense or defenses as they have to the Unfair Practice Charge, as amended.

Alan R. Howe
Hearing Examiner

Dated: May 1, 1987
Trenton, New Jersey