P.E.R.C. NO. 78-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL
BOARD OF EDUCATION,
Respondent,

-and-

Docket Nos. CO-77-22-42
and CO-76-337-43

MANALAPAN-ENGLISHTOWN REGIONAL
EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

In an unfair practice proceeding initiated by the Association, the Commission concluded, in agreement with the Hearing Examiner, that the Association had failed to prove by a preponderance of the evidence that it represented disputed summer employees employed by the Board of Education. Therefore, both the Commission and the Hearing Examiner determined that the Board had not violated the Act by refusing to negotiate terms and conditions of employment with the Association regarding these employees. Thus, the Complaint was dismissed in its entirety.

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Appearances:
For the Respondent, Metzler Associates
(Mr. Stanley C. Gerrard, Consultant)

For the Charging Party, Chamlin, Schottland, Rosen and Cavanaugh, P.A. (Mr. Michael D. Schottland, Of Counsel)

DECISION AND ORDER

The Public Employment Relations Commission issued a decision on October 21, 1977, P.E.R.C. No. 78-17, 3 NJPER ___ (1977), in which it severed the above-captioned case from another case with which it had previously been consolidated. As stated in that decision, the instant matter was not decided in P.E.R.C. No. 78-17 because the Commission had received a letter from the Manalapan-Englishtown Regional Education Association (the "Association"), the charging party in this case, that the parties had voluntarily resolved this matter. In a subsequent letter from the Manalapan-Englishtown Regional Board of Education (the "Board"), however, we were informed that the Board disputed the Association's understanding of the parties' agreement and the Board urged us to decide the instant matter. We did not receive the Board's letter enough in advance of our last meeting to reach a decision with respect to the instant

matter at that time. Therefore, we issued a decision regarding one of the two charges and we severed the two cases.

The instant unfair practice charge was filed on August 2, 1976 by the Association alleging that the Board had committed an unfair practice by refusing to negotiate regarding terms and conditions of employment for regular, full-time teachers employed by the Board in the migrant labor education program for the summer of 1976 in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/]

The charge was processed, a complaint was issued, and a hearing was held on January 6, 1977 before Commission Hearing Examiner Edmund G. Gerber at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. On August 1, 1977, subsequent to the filing of memoranda of law by the parties, the Hearing Examiner issued his Recommended Report and Decision,[2/] which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served on the parties. A copy is attached to this Decision and Order and made a part hereof.

Pursuant to the Commission's Rules, the Association filed exceptions to the Hearing Examiner's Recommended Report and

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 the 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/ H.E. No. 78-2, 3 NJPER 254 (1977).

Decision on August 9, 1977.

With respect to the instant charge, the Hearing Examiner concluded, after his review of the record and after considering the language of the collective negotiations agreement as well as the parties' negotiating history, that although the teachers who worked in the migrant labor education program were regular, full-time faculty employed by the Board during the school year and represented by the Association during the school year, the position of summer school teacher was not part of the collective negotiations unit which the Association represents. Therefore, he found that the Board was under no obligation to negotiate with the Association concerning the terms and conditions of employment of summer school teachers and he recommended that the charge against the Board be dismissed.

The Association excepts to the Hearing Examiner's finding of fact that,

> "Significantly, in the prior summer a Title One summer instructional program as distinct from the migrant labor program, was instituted by the Board, yet there is no evidence that the Association made a demand upon the Board for negotiations, even though the contract had just come into effect on July 1, 1975."

The Association also argues that the fact that the Board did not contest the status of the Association as the representative of a majority of employees employed in the migrant labor program, particularly after the Board had allegedly negotiated with the same Association with respect to Title One for the previous summer,

leads to the conclusion that the Board simply refused to negotiate with the Association as required by the New Jersey Employer-Employee Relations Act.

Further, the Association contends that, given the fact that summer programs often cannot be anticipated far in advance, the fact that the contract does not include summer employees should not be taken to mean that the Association which represents school year employees does not also represent summer employees. This, according to the Association, is especially true where, as here, the employees are the same although the Association acknowledges that a different case would be presented if the Board hired personnel from without the district for the summer project.

Based upon these exceptions and its supporting brief, the Association would have us decline to adopt the Hearing Examiner's recommendation that the complaint be dismissed.

We do agree, as set forth in the Association's exceptions, that the Hearing Examiner's finding of fact regarding the absence of evidence that the Association demanded negotiations for employees in the Title One summer instructional program the previous summer is not supported by the record and we do not adopt it.

The uncontroverted testimony of the Association President establishes that the Association did negotiate and reach an agreement with the Superintendent regarding the 1975 summer instructional program.[3/]

3/ Tr. pp. 12 and 13.

However, we do not agree that this finding is dispositive. In an analogous case cited by the Hearing Examiner, we stated that a review of both the contract[4/] and the negotiations history was necessary in order to determine whether a disputed category of employees was included in the negotiations unit represented by the employee organization.[5/]

There is, in our judgment, very strong evidence that the parties did not intend to include summer school employees in the unit represented by the Association. The recognition clause refers to all certified classroom teachers employed by the Board, a phrase that arguably is broad enough to include summer program teachers. However, the contract limits the teachers' work year to 182 days not including the months of July and August.

The salary guide provides for payment for the regular school year and not for summer work. The agreement calls for receipt of the final check on the last working day in June when the teacher has completed final check out.

The agreement makes no mention whatsoever of summer employment. Summer employment is not required by the terms of the agreement nor does the agreement in any way restrict the Board in hiring people for any summer programs.

In addition to the above findings of fact, all of which were made by the Hearing Examiner and which we specifically adopt, we note, as did the Hearing Examiner, that the agreement contains a

4/ Exhibit A-2, in evidence.
5/ In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977). See also In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976).

provision which bars a reopening of the agreement during its two-year term of July 1, 1975 to June 30, 1977 absent mutual agreement.

The fact that the Association President had negotiated with the Superintendent concerning the pay schedule for Title One summer instructional employees the previous summer does not mean that the Board had recognized the Association as the exclusive representative of summer instructional employees. There is no evidence that the parties modified their agreement subsequent to these negotiations to provide for the representation of summer instructional personnel by the Association.

In light of the above, we do not believe that the Association has sustained its burden of proving by a preponderance of the evidence that the Association represented employees who worked in the migrant labor program and who also happened to be included in the unit represented by the Association for the regular school year.

While it may be true that the Association represented all employees who were employed in the migrant labor program during the regular school year, that does not mean that the Association thereby had the right to represent these individuals during the summer months as well. As stated above, the agreement does not refer to summer employees and it does not require the Board to employ teachers employed during the regular school year for the summer program. The Association in its exceptions acknowledges that this would be a different case if the Board in fact employed personnel from without the district for this program. Again,

however, the fact that the Board chose to employ its regular employees for this program does not mean that the Board has agreed to accept the Association as the exclusive representative of these employees for the summer program. A public employer is only required to negotiate with a majority representative of employees in an appropriate unit[6/] and, as stated by the Hearing Examiner, if there is a dispute regarding the appropriateness of a unit, there are procedures available to a party seeking to add employees to an existing unit or seeking to clarify a unit, depending upon the circumstances.[7/]

Therefore, in agreement with the Hearing Examiner, we conclude that the complaint in the instant matter, CO-77-22-42, should be dismissed.

ORDER

For the above-stated reasons, the Commission hereby dismisses the instant complaint in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

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

DATED: Trenton, New Jersey
November 15, 1977
ISSUED: November 17, 1977

6/ See footnote 1 above.
7/ See In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).