P.E.R.C. NO. 90-92

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH CALDWELL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-238

NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the North Caldwell Education Association against the North Caldwell Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it failed to include temporary disability insurance in a successor agreement. The Commision finds that there was no meeting of the minds and therefore no binding agreement on this issue.

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NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Metzler Associates
(James L. Rigassio, Labor Consultant)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On February 21, 1989, the North Caldwell Education Association filed an unfair practice charge against the North Caldwell Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (5) and (6),[1/] when it failed to include temporary disability insurance ("TDI") in a successor agreement.

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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

On May 5, 1989, a Complaint and Notice of Hearing issued. On August 16, the Board filed its Answer claiming that no agreement on the issue of temporary disability insurance exists, and that the Board had invoked mediation and fact-finding to help reach a final agreement.

On September 25 and 26, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On December 29, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-31, 16 NJPER 78 (¶21032 1989). He found that the Board had not refused to negotiate in good faith. Instead, he found that the Board took a firm position on TDI, ultimately offering $1200 per year toward TDI premiums, and that the Association had not proved that the Board's chief negotiator, James Sterrett, agreed to include TDI in the successor agreement. He concluded that there was no "meeting of the minds" between the parties on this issue.

On January 31, 1990, after an extension of time, the Association filed exceptions. It claims that the Hearing Examiner erred by: (1) crediting the remainder of Sterrett's testimony after discrediting his testimony about when the Association first proposed TDI in negotiations; (2) not crediting four Association witnesses who claimed that the Board had agreed to the Association's TDI proposal; (3) finding that the Association did not include TDI in its list of contract changes submitted to Association members for

ratification; (4) treating the charge as one alleging bad faith bargaining by taking a firm position rather than one alleging a failure to sign an agreement incorporating TDI after having agreed to do so, and (5) assuming TDI would be an overriding financial obligation of the Board even though that fact is not in the record. The Association argues that Sterrett agreed to TDI, but belatedly realized that TDI was too expensive and had to cover other employees as well as teachers. It maintains that the Board's continuing attempts to negotiate an alternative to TDI show its attempt to "wiggle out from the deal."

On February 8, 1990, the Board filed a reply urging adoption of the recommended decision. It claims that there was no meeting of the minds.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-14) are generally accurate. We incorporate them with the modifications noted below.

The Association presented its TDI proposal in November 1987.[2/] Sterrett indicated that he would look into it.[3/] On January 12, 1988, Sterrett responded. This case turns on that response.

2/ We add to finding no. 4 that TDI was not included in the Association's original proposals because the Association did not yet have all the information it needed.

3/ Sterrett's recollection of the date was wrong. Recognizing that he erred does not require discrediting his recollection of whether he agreed to TDI.

Sterrett testified that he stated he had "no problem considering it. That was the context of the words, I had no problem with it."[4/] Board member Mary Blythin testified that Sterrett said he would look into it. She denied that he agreed that TDI would be included as part of the contract package.[5/]

Four Association team members testified that Sterrett stated he had no problem with it and that he was not opposed to it as part of the whole package. But one member, Phyllis Schaefer, also testified that Sterrett indicated that he wanted to look into it further and wanted more information. She later testified that there was no question in her mind that the Board had agreed to TDI on that date.[6/]

The inconsistency in the six recollections is unfortunate, but understandable. Sterrett's imprecise response generated differing, but sincerely held, impressions of what he meant.[7/]

Later events did not clarify matters or expose these differing impressions. The parties signed a document entitled

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4/ We modify finding no. 6 to state that at one point Sterrett testified that when the Association made its TDI proposal, he stated "we had no problem with it, we would consider it" (2T42).

5/ Blythin's notes of that session do not refer to the TDI discussion.

6/ We add to finding no. 6 that Association team member Fitzpatrick testified that, "I just assumed from the way Dr. Sterrett spoke that that was agreed upon at the time (1T80).

7/ We reject finding no. 9.

"Areas of Agreement" (R-2) that does not mention TDI -- but it also does not state that it includes all areas of agreement.[8/] The parties entered into a memorandum of agreement which incorporates "all items previously agreed," -- but it does not list those items. The Association included TDI in its highlights of changes presented to the membership for ratification[9/] -- but the record does not indicate that the Board reviewed any comparable document before it ratified the memorandum of agreement.

Even an August 1988 encounter over TDI failed to reveal the misunderstanding. The Association's chief negotiator, Joan Marks, gave Sterrett a TDI pamphlet. She testified that she asked him if he remembered "that we have this included," and he responded that he remembered. Sterrett testified that he told Marks that he remembered it, he would keep his word, and the Board would consider it. It appears that Sterrett believed he was agreeing to live up to his commitment to consider the issue while Marks believed that Sterrett was agreeing that the Board had accepted the proposal.[10/]

8/ We modify finding no. 11, particularly footnote 9, to indicate that the record is not clear that R-2 incorporates all items agreed to by the parties up to that point. The Association maintains that R-2 reflects only Board proposals. Blythin kept notes during negotiations (R-4). Those notes do not prove that the Association's proposals are included in R-2.

9/ We modify finding no. 16 accordingly.

10/ We modify finding no. 15 to state that Schaefer did not testify that Marks reported that TDI would be part of the package. She testified only that Marks asked Sterrett if he remembered that "we had said that disability insurance would be part of the package. Schaefer added "and--I really am not certain. I just can't remember." (1T51).

When the Association received the Board's proposed final agreement which did not include TDI, the parties' differences finally surfaced. They continued to negotiate over TDI, but those negotiations shed little light on what happened at the table a year earlier.[11/] Both parties presented compromise proposals,[12/] and the Board invoked mediation and fact-finding. The Association argues that the Board's willingness to continue negotiating over TDI, despite both parties' ratification of the memorandum of agreement, proves it is trying to "wiggle out" of an agreement. But that willingness can also be viewed as the fulfillment of its earlier commitment to consider the issue and a desire to reach final agreement on the contract. On this record, we are not prepared to judge the motives behind post-ratification negotiations.[13/]

After weighing all the evidence, we are convinced that the parties' differing, yet equally sincere, interpretations evidence

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11/ We add to finding no. 18 that Marks testified that the purpose of the January 24, 1989 meeting was "Dr. Sterrett found out that everybody in the school system, all employees, would have to be covered by disability and he did not want to do this" (1T93).

12/ We add to finding no. 21 that when asked if on January 31, 1989 the Board denied that it had agreed to TDI, Blythin answered "the Board considered it to be an open item and one that was under consideration. The Board never agreed that it was something that had been agreed to" (1T135).

13/ We also note the policy considerations against penalizing a party for trying to settle a dispute. See, e.g., N.J.A.C. 19:14-6.13(b).

the underlying failure to reach agreement on TDI. The Board and the Association walked away from the table in January 1988 with two different views of what had transpired and no written agreement to support either parties' view. There was no meeting of the minds and therefore no binding agreement. Accordingly, the Board did not violate the Act when it refused to include TDI in the successor agreement. Trenton Bd. of Ed., P.E.R.C. No. 88-49, 13 NJPER 848 (¶18327 1987); Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986). Consistent with Trenton and Long Branch, we note that this ruling does not foreclose negotiations over TDI. In fact, the Board has agreed that there was no meeting of the minds and has sought to invoke fact-finding. Further negotiations are appropriate so that this issue can be resolved.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Reid and Bertolino abstained from consideration.

DATED: Trenton, New Jersey
April 25, 1990
ISSUED: April 26, 1990

H.E. NO. 90-31

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

In the Matter of

NORTH CALDWELL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-238

NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1), (5) or (6) of the New Jersey Employer-Employee Relations Act when the Board refused to include in the provisions of a successor agreement temporary disability insurance under the New Jersey Temporary Disability Insurance Program. The Hearing Examiner found that there was no "meeting of the minds" between the parties on this issue, notwithstanding extensive negotiations and the execution of a Memorandum of Agreement on August 12, 1988, citing, inter alia, Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15120 1983). Accordingly, dismissal is recommended.

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.

H.E. NO. 90-31

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Appearances:

For the Respondent, Metzler Associates
(James L. Rigassio, Labor Consultant)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, Esqs. (Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 21, 1989, by the North Caldwell Education Association ("Charging Party" or "Association") alleging that the North Caldwell Board of Education ("Respondent" or "Board") has 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. ("Act"), in that the Board and the Association are parties to a collective negotiations agreement effective during the term July 1, 1986 through June 30, 1988; and that during negotiations for a successor agreement the Board agreed to provide disability insurance, the last discussion on this matter

having occurred on or about January 12, 1988; the parties, with the aid of a mediator, ultimately agreed upon a successor agreement, which was memorialized in a Memorandum of Agreement in August 1988, which Memorandum of Agreement incorporated all terms previously agreed to by the parties; the Board presented the Association with a draft of this successor agreement on January 16, 1989, but, however, this draft did not include a provision for disability insurance; the Board advised the Association that it did not agree to provide disability insurance and on February 13, 1989, the Association's President wrote to the Board and advised it that the Association would not sign a successor agreement until it incorporated all of the terms and conditions which the parties had agreed upon, including disability insurance; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 5, 1989. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 25 and September 26, 1989, in Newark, New

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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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by November 13, 1989..

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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

2. The North Caldwell Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The most recent collective negotiations agreement between the parties was effective during the term July 1, 1986 through June 30, 1988 (J-5). The instant dispute concerns the negotiations for a successor agreement to J-5.

4. The first collective negotiations session for a successor agreement to J-5 was scheduled for November 24, 1987, and about one and one-half weeks prior to that session the Association

mailed its contract proposals (1 Tr 85; J-6). The Association's contract proposals touched upon, inter alia, the grievance procedure, teacher employment, salaries, sick leave, temporary leave of absence, the dental and prescription drug insurance plan and professional development and educational improvement (J-6, pp. 2, 3). These contract proposals were dated November 9, 1987 (J-6, p. 4).

5. The Association's Negotiations Committee[2/] first met with the Board's Negotiating Committee[3/] on November 24, 1987 as scheduled and Sterrett presented the Association with a "Bergenfield letter" (2 Tr 5). Although the Association's contract proposals above did not include a demand for the New Jersey Temporary Disability Insurance Program (TDI), the Association submitted TDI on November 24th as an additional contract proposal[4/] in the form of a brochure, outlining the benefits to be provided (J-1. All four of the Association's negotiators testified that J-1 was submitted to the Board at the November 24th session (1 Tr 18, 31, 46, 76, 86). Blythin, who was the Board's designated record keeper at the

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2/ The Association's Negotiating Committee consisted of four members, namely, Joan Marks, as Chief Negotiator, Walter Fitzpatrick, Phyllis Schaefer and Kenneth M. Joseph (1 Tr 13, 45, 46, 75, 76, 84, 85).

3/ The Board's Negotiating Committee consisted of Dr. James R. Sterrett, as Chief Negotiator, Mary J. Blythin, a Board member and Superintendent Sharon Clover from time to time (1 Tr 117, 118; 2 Tr 3, 4).

4/ The Board did not object to this additional proposal (2 Tr 6).

negotiations, acknowledged that at the November 24th session the Association presented to the Board the TDI brochure and Sterrett said "...he would look into it..." (J-1; 1 Tr 127, 128). Sterrett, on the other hand, insisted that he was not given the TDI brochure (J-1) at the November 24th session, but, instead, he testified that he did not receive the brochure until the next negotiations session on January 12, 1988 (2 Tr 7, 36-38). Given the testimony of the four witnesses for the Association, and the corroborating testimony of Blythin, the Hearing Examiner must necessarily conclude that the TDI brochure was presented by the Association to the Board at the November 24, 1987 session and not, as testified to by Sterrett, that the Association submitted J-1 at the January 12, 1988 session.[5/]

6. Sterrett testified that at the January 12th negotiations session, in considering the contract proposal of the Association for TDI, he stated that: (1) as he looked at J-1 he "...had no problem with considering it. That was the context of the words, I had no problem with it..." (2 Tr 8); (2) TDI was one of the Association's proposals "...that we accept and agree to consider..." (2 Tr 39); (3) "...we had no problem with considering it..." (2 Tr 41); and (4) "...we would consider it..." (2 Tr 42). [TDI was not brought back to the Board as having been agreed to by the "negotiating team" (2 Tr 8)].

5/ In so finding, the Hearing Examiner is not discrediting Sterrett's overall testimony as a witness for the Board but just his apparent failure of recollection as to the issue at hand.

7. However, the Association's witnesses contradicted the testimony of Sterrett thusly: (1) JOSEPH stated that at the November 24th session Sterrett said that he "...would look at it and get back to us..." (1 Tr 18); that at the January 12th session Sterrett testified that he "...had no problem with it as an overall, with the whole package..." (1 Tr 20) and that Sterrett said "...that there was no problem with it and that it could be included as part of the whole package..." and "it seemed like a good idea to the Board..." (1 Tr 30-34, 41); (2) SCHAEFER testified that at the November session Sterrett said that "...they would look into it..." (1 Tr 46, 47); and that at the January 12, 1988 session Sterrett said that he "...was not opposed to the disability plan and it would be part of our package..." (1 Tr 48)(emphasis supplied), but she also testified on direct examination that she "believed" that the Board told the Association that it wanted to look further into disability insurance (1 Tr 55), however, she subsequently testified flatly on cross-examination that "...the Board had agreed to the disability plan..." (1 Tr 56); (3) FITZPATRICK testified that at the November session Sterrett said that he "...would look into it and he would let us know at a later date..." and that at the January 12th session Sterrett said that "...he looked into it and he was not opposed to it being included in the package deal..." (1 Tr 77)(emphasis supplied); and, finally, (4) MARKS testified that at the November 24th session Sterrett said that "...he would look into it and get back to us at our next negotiation meeting..." and that

at the January 12th session Sterrett stated that "...he looked into it and he had no problem with it and that it would be part of our proposal -- or, our package when we were finished negotiating..." (1 Tr 86, 87)(emphasis supplied).

8. On the other hand, Blythin testified in corroboration of Sterrett while at the November 24th session Sterrett "...told the Association that he would look into it..." she was adamant that at the January 12th session Sterrett did not state that he was not opposed to TDI and, further, that Sterrett did not state that TDI would be included as part of the contract package (1 Tr 128, 129).[6/] Sterrett was equally adamant that although he said that he "...had no problem with considering it (TDI)..." he denied that it was agreed to by the Board's team (2 Tr 8). He also said that there was no discussion of specifics as to who would be covered or costs (2 Tr 9).

9. Given this conflict in the testimony of the witnesses for the Association and the witnesses for the Board on the key issue in this case, namely, whether or not Sterrett committed the Board at the January 12, 1988 negotiations session to accept TDI and include it in the successor agreement to J-5, the Hearing Examiner finds that the Association's proofs as to what Sterrett said on

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6/ However, Blythin acknowledged that although she took notes concerning the discussion at the January 12th session, there was nothing in her notes about TDI (1 Tr 129, 130).

January 12th are not conclusive on the TDI issue when finally analyzed, infra.[7/]

10. Following the second negotiations session on January 12, 1988, there were seven additional sessions on February 9, March 8, March 22, April 4,[8/] April 27, May 9 and June 9, 1988 (1 Tr 27, 28). Joseph, Schaefer and Marks testified without contradiction that TDI was not discussed at these sessions following January 12th (1 Tr 21, 27, 29, 48, 49, 88). Marks testified that this was because TDI was a "...settled issue that...would be part of the package..." (1 Tr 88; 48).

11. The procedures that the parties had followed during negotiations to narrow the issues and record areas of agreement was testified to by Blythin and Sterrett. According to Blythin, as matters were agreed upon they were eliminated from the documents that she maintained in order to produce a much shorter list, and that as of March 8, 1988, she produced an eight-page document entitled "Areas of Agreement" which indicated the proposals tentatively accepted by the parties (R-2, R-4; 1 Tr 102-107, 119-122; 2 Tr 2, 3). Sterrett testified that the parties attempted at each session where there was an agreement to "...keep those items in such a manner that we could eventually come to a document that represented or embodied the items

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7/ See Joseph (1 Tr 20, 30-34, 41); Schaefer (1 Tr 55); Fitzpatrick (1 Tr 77); and Marks (1 Tr 87); SUPRA.

8/ Impasse was declared by the Association after this session (1 Tr 27).

that we had agreed to..." (2 Tr 12). More specifically, he added that the parties "went through" the Association's and the Board's proposals and that when agreement was obtained "...we transferred" the agreed upon items to a "sheet of paper" so that there was a running list of things agreed to (2 Tr 14). The end result was a "bipartisan list" which included things agreed to and also specifically excluded items that "...we agreed not to include..." (2 Tr 14, 15). As a result, R-2 was produced on March 8, 1988 (2 Tr 16). Marks acknowledged on cross-examination that R-2 was prepared by the Board on March 8th and reflected the items that the Association had agreed to include in a successor agreement as of that time (1 Tr 102-108).[9/] Schaefer acknowledged that the Association had "signed off" on "sheets" submitted by the Board to the Association on matters agreed upon (1 Tr 57).

12. The 10th negotiations session was held on August 12, 1988, with the assistance of a Commission mediator. As a result, a

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9/ The first two brief paragraphs on page 1 of R-2 refer to all terms and conditions in J-5 remaining the same except as otherwise agreed to by the parties. Significantly, in the second one-sentence paragraph it is stated that: "The following proposals have been tentatively accepted by the parties to amend the 1986-1988 Negotiated Agreement" there following the changes agreed to up to that point and the signature of "J. Marks" appears on each of the eight pages with the date "3-22-88." This clearly indicates that Marks, as the Association's chief negotiator, assented on its behalf to all of the changes agreed to as of that time, March 8, 1988. Note that R-2 does contain three slight language changes in Article XIV, Sections A and B, regarding "Health Care Insurance" but no reference to TDI.

Memorandum of Agreement was executed by the parties on that date, which contained five paragraphs, summarized as follows: (1) a three-year contract through June 30, 1991; (2) "All items previously agreed will remain as agreed; all proposals not previously agreed nor specifically referenced herein will be considered withdrawn by the proposing party. Unless changed herein or by previous agreement, all current contract provisions will remain as is"; (3) summer work -- 1st year $25.00/hour etc.; (4) payment for accumulated sick leave -- delete the present reference to substitute rate and replace with $49.00 per day; and (5) salaries as per the attached (J-2).

13. Joseph, Schaefer and Marks testified that since TDI was not an issue, it was not included in J-2 because everything previously agreed to was "...encompassed in paragraph 2..." (1 Tr 88; 22, 23, 49, 50) just like other items such as sick time, personal days put over to sick time and accumulated sick time (1 Tr 89, 108, 109).

14. Schaefer testified as to the intent of paragraph 2 of the Memorandum of Agreement, supra, but in terms of the parties not having "signed off" on certain issues even though they had been agreed to (1 Tr 65, 66, 71, 72). Schaefer gave as an example teachers salaries, sick leave, paid sick days and TDI (1 Tr 66). Sterrett agreed in essence with the Association's testimony that the Memorandum of Agreement did not refer to each item that had been

agreed to[10/] but he insisted that the phrase in paragraph 2 of J-2 "...All items previously agreed..." incorporated the items "signed off" between March 8 and March 22, 1988 (R-2; 2 Tr 44, 45). However, Sterrett then conceded that an agreed upon change in the grievance procedure was not included in R-2 on March 8, 1988 (2 Tr 45-47). He further conceded that the agreed upon item of the accumulation of unused personal days as sick days did not appear in R-2 and that the only documents in which agreements as to language appear are R-2 and J-2 (2 tr 47, 48). Blythin also acknowledged that changes in the grievance procedure and in personal days as accumulated sick days, which were agreed to on March 22, 1988, were not specifically mentioned in the Memorandum of Agreement (J-2) [1 Tr 132, 132].

15. Marks testified that on August 12th, after the Memorandum of Agreement was signed, she took "the pamphlet" (J-1) to Sterrett and stated to him, "Remember that we have this included..." and that Sterrett took it and said that "...he remembered..." or "...yes, I do..." (1 Tr 89, 90, 109, 110). Schaefer recalled that Marks left the teachers' room on August 12th, stating that she wanted to mention "disability again" to Sterrett, and that when Marks returned she said that she had "spoke to him," adding that she thought that Marks had said that TDI "...would be part of the

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10/ See J-2, ¶2, supra.

package..." (1 Tr 50, 51).[11/] Sterrett acknowledged that Marks approached him in the principal's office regarding TDI and asked him if he "...remembered that and I said I did remember it...And I said that I would keep my word, that we would consider it..." (2 Tr 23) (emphasis supplied).

16. According to Joseph, a ratification meeting was held by the Association on September 2, 1988. TDI was "brought up" and Marks said that it would be included in the package even though it was not in the (initial) written proposal to the Board. [1 Tr 35, 36]. However, TDI was not included in the contract changes submitted to the Association members at the September 2nd ratification meeting (see CP-1). Nevertheless, the members present ratified the "package" (1 Tr 36, 37, 39, 40). After the Association's ratification meeting, Sterrett presented J-2 to the Board for ratification and ratification occurred several days later (2 Tr 16, 17). However, when the Board ratified J-2, TDI was not part of the package (2 Tr 23).

17. Marks had called the Board Secretary about three times prior to the receipt of a draft agreement, dated January 23, 1989 (J-3) [1 Tr 91].[12/] Marks testified that among her concerns at that time was getting the forms for TDI (1 Tr 91, 92).

11/ However, Schaefer also testified that Marks said that Sterrett "...was looking into it..." (1 Tr 51).

12/ The draft agreement of January 23rd (J-3) was prepared by the Board's Negotiating Team and was based upon Blythin's notes, the computer on the "prior" contract and the Memorandum of Agreement (1 Tr 124-126). It contained no reference to TDI.

18. The parties then met on January 24, 1989, where TDI was the major subject of discussion (1 Tr 92, 93). Sterrett informed Marks that under TDI everyone in the District would have to be covered but that he "...was just dealing with teachers..." (1 Tr 93, 94; 53). Sterrett then raised self-insurance and said that the Board would come up with an alternative plan since TDI was too expensive (1 Tr 54, 94-96). Sterrett acknowledged that the Association was anxious to have an agreement on a "disability program because of a time line..." (2 Tr 26; 1 Tr 54).

19. The next meeting of the parties was on January 31, 1989, where they discussed a Board proposal, dated February 1, 1989 (R-1), in which the Board proposed that it would pay $1200.00 per year toward premiums paid by teachers for temporary disability insurance and that this would appear as a ¶G of Article XIV of the contract (2 Tr 27). The matter was discussed and Sterrett again said that the Board would absolutely not enroll everyone since this was a "...teachers' contract..." (1 Tr 60). This proposal of the Board did not resolve the issue (2 Tr 27). Blythin added that Marks said on January 31st that she had told the Association members at the time of the ratification in September that they had their temporary disability insurance and that, therefore, the "...contract would be null and void if we (the Board) didn't come up with it..." (1 Tr 134, 135). When Marks made this statement it was Blythin's recollection that Sterrett said, "...We said we would consider the proposal..." (1 Tr 136).

20. Several days after the January 31st meeting, Marks presented R-1 to the membership and it was rejected (1 Tr 61, 62). Blythin testified that at the last session of the negotiating teams on March 20, 1989, Carol Rosenfeld of the NJEA produced a document entitled "NJEA Umbrella Temporary Disability Benefits Plan -- 1989" (R-3) and that this was one of several alternative proposals considered by the parties (1 Tr 136-139).[13/]

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate The Act When It Refused To Include TDI In Its Draft Agreement Of January 23, 1989, Since There Had Been No "Meeting Of The Minds" On The Issue.

The Hearing Examiner is confronted with yet another case where the public employee representative contends that the public employer agreed in collective negotiations to provide a requested term and condition of employment as to which there was no "meeting of the minds" on the issue, i.e., in this case the Association's contract demand for the inclusion of TDI in the successor agreement to J-5. This Hearing Examiner has had three such cases: Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 78-25, 3 NJPER 382 (1977); Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); and Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15120 1983). The latter two of these cases were last cited by the Commission in Ocean Cty. Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341,

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13/ The record does not reflect that any further negotiations sessions were held by the parties.

347 (¶17130 1986). In each case it was found that there had been no "meeting of the minds" and, therefore, the employer was not directed to execute either a memorandum of understanding or a collective negotiations agreement.

As the Commission noted in Jersey City, "...The charging party has the burden of proving the allegations of the Complaint by a preponderance of the evidence. N.J.S.A. (sic) 19:14-6.8..." (10 NJPER at 20). The standard for determining a refusal to negotiate in good faith was first set forth in State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). That case states:

> It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred...A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a predetermined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [Id. at 40][Footnotes omitted][Emphasis supplied].

A review of the instant record in light of this standard convinces the Hearing Examiner that the Board's actions during negotiations did not constitute an illegal refusal to negotiate. The Board demonstrated a sincere desire to reach agreement. This is manifested by R-2 (March 8, 1988), the August 12, 1988 Memorandum of Agreement and the subsequent efforts in 1989 to resolve the remaining differences between the parties. The stumbling block which prevented the parties from reaching a final agreement was the

question of the cost of TDI and the Board's objection to the scope of required coverage under TDI, i.e., all employees of the District. While the Board took a firm position on TDI, it did ultimately offer $1200 per year toward temporary disability insurance premiums (R-1). Such a position does not constitute an unfair practice.

What was said in State of New Jersey, supra, is applicable here and is worthy of repetition:

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement...(and)...is not necessarily a failure to negotiate in good faith. [Id. at 40]

The deficiencies in the Association's proofs as to whether or not the Board ever agreed to include TDI within the successor agreement to J-5 become apparent when a series of questions are propounded: (1) Why, on such an important issue, was TDI not included in the initial Association "proposed changes" for the successor agreement (J-6)? (2) Even if the testimony of the Association witnesses is fully credited as to what happened at the negotiations session on January 12, 1988, why would there not have been some testimonial evidence as to discussions between the parties as to the cost and the scope of coverage of TDI and some memorializing of this discussion?[14/] (3) Why when Joan Marks

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14/ Blythin's notes contain no reference to even the discussion of TDI on January 12th.

placed her signature and the date of March 22, 1988, upon Exhibit R-2 was there no reference to TDI having been agreed to, this document having been purported to delineate all of the proposals which, as of that date, had been tentatively accepted by the parties "...to amend the 1986-1988 Negotiated Agreement"? (4) Why did not the Memorandum of Understanding of August 12, 1988, contain some specific reference to TDI, it being such an overriding financial obligation of the Board? (5) Why did Marks see the need on August 12, 1988, to seek out Sterrett to obtain assurance from him that TDI had been agreed upon if, in fact, it had already been clearly agreed upon? (6) Why was TDI not included in the document "Highlights of Changes in the Contract 1988-1991" (CP-1), which was presented to the Association's members at the ratification meeting of September 2, 1988? The only testimonial evidence was that of Joseph, who testified as to what happened at that meeting. Even Marks did not testify as to what occurred at the ratification meeting on September 2nd with respect to TDI or any other matter on CP-1.

These questions suggest clearly to the Hearing Examiner that, when answered, and based upon the record evidence, leave the Association in the position of having failed to meet its burden of proof by a preponderance of the evidence that Sterrett, on behalf of the Board, agreed to the inclusion of TDI in the successor agreement to J-5. There is just no way that one situated as this Hearing Examiner could conclude that Sterrett, as the Board's chief spokesman, made a binding agreement on January 12, 1988, that the Board would provide TDI to the Association.

The financial implications of TDI being rampant, it would, therefore, logically follow that negotiations on the subject of TDI would be dealt with in plenary fashion and not in the sketchy fashion herein. This inheres from the fact that TDI is expensive and must be applied to all employees within a district in order for it to be effectuated. The Hearing Examiner takes administrative notice of this fact from his experience with TDI, not only in this case, but in other cases that he has heard.

Based on all of the above record evidence, the Hearing Examiner has no alternative but to conclude that the Charging Party has failed to carry its burden of proving by a preponderance of the evidence that the Board through Sterrett agreed to include TDI within the terms and conditions of a successor agreement to J-5. Accordingly, the Hearing Examiner will recommend dismissal of all of the allegations in the Association's Complaint.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:14A-5.4(a)(1), (5) and/or (6) when it refused to execute a collective negotiations agreement for the years July 1, 1988 through June 30, 1991, which included the New Jersey Temporary Disability

Insurance Program (J-1), notwithstanding the Memorandum of Agreement executed August 12, 1988.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint in this matter be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: December 29, 1989
Trenton, New Jersey