P.E.R.C. NO. 93-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KITTATINNY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-92-21

KITTATINNY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Kittatinny Education Association against the Kittatinny Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it stopped allowing secretaries to work shortened hours during the summer of 1991 and required them to work 7 1/2 hours each day. The Association alleges that this requirement changed the contractual provision on work hours as modified by a past practice since 1976 and a grievance settlement in 1989. The Commission finds that by alleging that the grievance settlement was incorporated in the successor contract and then violated, the Association has alleged a mere breach of contract. Such allegations must be addressed through the parties' negotiated grievance procedures.

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Appearances:

For the Respondent, Schwartz, Simon & Edelstein, attorneys (Nathanya G. Simon, of counsel)

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

On July 17, 1991, the Kittatinny Education Association filed an unfair practice charge against the Kittatinny Board of Education. The charge alleges that the Board violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it stopped allowing secretaries to work shortened hours during the summer of 1991 and required them to work seven and one-half hours each day. The Association alleges that this requirement changed the contractual provision on work

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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"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment....

hours, as modified by a past practice since 1976 and a grievance settlement in 1989.

On August 5, 1991, a Complaint and Notice of Hearing issued. The Board's Answer asserts that it has a right under the collective negotiations agreement to require secretaries to work a full day during the summer. It relies upon this provision:

> "Regular working hours for secretaries shall be seven and one-half (7 1/2) hours a day including one-half (1/2) hour for lunch, five (5) days a week, twelve (12) months per year."

On November 13, 1991, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On June 5, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-38, ___ NJPER ___ (¶____ 1992). She concluded that the Board had a contractual right to increase the secretaries' work hours during the summer and therefore no duty to negotiate before conforming the secretaries' actual work hours to the contractual work hours. She also found that even if a grievance settlement amended the contract language, the Association's claim was for a breach of contract.

On July 17, 1992, after an extension of time, the Association filed exceptions. It asserts that a 1989 grievance settlement had modified the collective negotiations agreement and reduced the summer work hours of secretaries to five and three-quarter hours per day, with no coffee breaks, and that the

Board therefore had a duty to negotiate before returning to a seven and one-half hour summer work day. The Board filed a response urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are thorough and accurate. We incorporate them. We specifically accept her finding (H.E. at 5 n. 3) that Walker did not specifically tell Gill in settling the 1989 grievance that the summer work hours would become a negotiable issue with the Board. This finding is based on a credibility determination which we will not disturb.

The wording of the 1990-1992 collective negotiations agreement permits the Board to require secretaries to work seven and one-half hours a day. This clear wording negates any contrary past practice. We so held in a case involving the same contractual clause. Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) (contract gives the Board the right to have secretaries work a seven and one-half hour day throughout the year, thereby negating past practice of shorter work days during holidays and recess).

The Association argues that this case differs from Kittatinny because here a 1989 grievance settlement established a five and three-quarter hour work day and allegedly survived the execution of the 1990-1992 collective negotiations agreement. The Hearing Examiner concluded that the earlier grievance did not modify the collective negotiations agreement in existence then because it

was not reduced to writing and executed by both parties; and that even if it had modified the previous contract, the Association should have sought to include that modification in the 1990-92 contract instead of agreeing to language permitting a seven and one-half hour work day. We need not consider these conclusions because we agree with another ground relied upon by the Hearing Examiner to dismiss the Complaint: by alleging that the grievance settlement was incorporated in the successor contract and then violated, the Association has alleged a mere breach of contract. And a mere breach of contract is not an unfair practice. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-118, 10 NJPER 419 (¶15191 1984). Such allegations must instead be addressed through the parties' negotiated grievance procedures. While a repudiation of a contract could be an unfair practice, the circumstances of this case indicate at most a good faith dispute over the Board's contractual obligations.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: October 22, 1992
Trenton, New Jersey
ISSUED: October 22, 1992

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

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Zazzali, Zazzali, Fagella & Nowak, attorneys
Paul Kleinbaum, of counsel

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On July 17, 1991, the Kittatinny Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the Kittatinny Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] by unilaterally

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

increasing secretaries' summer working hours from a reduced schedule to the regular schedule of a seven and one-half hour workday.

On August 5, 1991, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer on August 15 relying on its pre-complaint position statement. The Board admits that it required secretaries to adhere to "regular hours" during the summer, but argues that it had a contractual right to do so. I conducted a hearing on November 13, 1991 at which the parties examined witnesses and presented evidence.[2/] The parties filed briefs on February 28, 1992 and the Board filed a reply brief on March 5, 1992. Based upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. The Association represents clerical employees within a broad-based collective negotiations unit of certificated staff and support personnel. The Board and the Association are parties to a collective negotiations agreement (J-20) covering the period July 1,

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1/ Footnote Continued From Previous Page

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.

2/ The transcript of the hearing will be referred to as "T- "; jointly submitted exhibits are identified as "J- "; and the Board's exhibits are referred as to "R- ".

1990 through June 30, 1992. Article VI of that agreement provides in relevant part,

> Work Year for Secretaries, Clerk Typists and Aides
>
> 1. The regular working hours for secretaries shall be seven and one-half (7 1/2) hours a day including one-half (1/2) hour for lunch, five (5) days a week, twelve (12) months a year.
>
> * * *
>
> 4. All secretaries, clerk typists and aides shall be entitled to one (1) fifteen (15) minute break a day.

Identical language appeared in the 1988-90 agreement (J-19) as well as the 1986-88 agreement (J-18).

2. When school is in session, secretaries work a seven and one-half hour workday, including one-half hour for lunch and a 15-minute break. Secretaries work either 7:30 to 3:00 or 8:00 to 3:30. (T53; T65)

3. The Board had always given its superintendent discretion to control working hours for office personnel, including the authority to approve time off and set reduced hours during holidays, school break periods, and in the summer months (T108-T110). Each spring since at least 1976, the superintendent has issued a memorandum to office personnel announcing the hours for that summer. However, in 1988, the Board removed the superintendent's authority to approve secretaries' compensatory time off.

4. Secretaries have always worked shortened hours during the summer (T45). In recent years, secretaries worked 5 3/4 hours during July and August. Beginning in 1987, the secretaries staggered their summer hours to provide coverage for the offices for a longer period. Some worked 8:00 to 1:45, while others worked 9:15 to 3:00. (J-1; J2; J-3; J-4; J-5; J-6; J-7; J-8; T-48; T-53; T55; T72-T73).

5. Certain secretaries were told when they were hired that the district's practice was to permit secretaries to work a reduced schedule during the summer and during school recess periods. The guidance director told Constance Stevens when he hired her as a guidance secretary in 1985 that her hours during summers and school recess periods would be "much less" than her hours during the school year. The guidance director also told Lorraine Kensicki when he hired her as a guidance secretary in 1988 that her summer hours would be shortened. Charlene Nagy was appointed to a 12-month position in 1984. During her interview for the 12-month position, Superintendent Robert Walker told her she would be working shorter hours during the summers (T-45; T-52; T69-T71).

6. On June 20, 1989, Superintendent Walker advised all office personnel in writing that secretaries would work either 8:00 to 2:00 or 9:00 to 3:00 during July and August, 1989 (J-9).

7. At the secretaries' request, the Association initiated a grievance (T82). Association President John Gill and Vice-President Linda Crawn meet with Walker and the assistant

superintendent on July 10, 1989. At the meeting, Walker explained that the Board was concerned about office coverage and productivity (T-85). Gill pointed out that other area districts worked reduced hours in the summer (T84). Gill proposed as a compromise that the secretaries forego their contractual 15-minute coffee breaks and keep the 5 3/4-hour workday during the summer. Walker agreed to the compromise, but indicated to Gill that the Board wanted to pursue the issue of longer hours for secretaries, and that the Board was concerned with productivity and would it likely press the issue of longer hours again (T84-86).[3/]

The secretaries also agreed to the compromise, and Walker issued a revised memorandum on July 10, indicating,

> After meeting with KEA President John Gill and Vice-President Linda Crawn, a mutual understanding has been reached with regards to summer hours, that will satisfy all parties involved.
>
> Effective July 11, 1989, the summer hours will be:
>
> 8 A.M. - 1:45 P.M.
> OR
> 9:15 A.M. - 3:00 P.M.
>
> There will be no coffee break, however, coffee will be allowed at your desk.

3/ Gill testified in a general way that Walker indicated the issue would become a negotiable item with the Board (T86). Walker's hazy recollection was that he indicated to Gill that the Board would press for contract hours. I do not credit either as a specific recollection of what was said. The general sense of the conversation was that Walker was conveying the Board's pressure to lengthen the secretaries' hours.

Thereafter, secretaries worked 5 3/4 hours a day, without coffee breaks, for the remainder of the 1989 summer, and identical hours during the summer of 1990 (J-11; T45-T46; T54; T74).

8. In September, 1990, Walker advised the secretaries that they would no longer enjoy shortened hours during school recess periods (R-1). The Association filed an unfair practice charge on March 19, 1991, and that matter was litigated separately.[4/]

9. Through the summer and fall of 1990 and until March, the parties negotiated a successor agreement to the contract which expired on June 30, 1990. During these negotiations, neither the Association nor the Board raised the issue of secretaries' workhours. The Board did propose to lengthen the teachers' workday.

Until 1989, teachers worked a 6-hour-and-44-minute workday, notwithstanding a contractual provision requiring a seven-hour workday. In negotiations for the 1988-90 contract, the Board proposed an increase of the teachers' workday to seven and one-quarter hours. The parties agreed that the teachers would be required to actually work the full seven hours as provided in prior contracts. The parties modified the contract article VI language (J-19) to state,

> The 1986-87-88 contract agreement provides for a seven (7) hour teaching day, of which six hours and forty-four minutes were utilized. Beginning with the 1989-90 school year, the teacher day will consist of utilizing the full seven (7) hour day.

4/ Kittatinny Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991).

During negotiations for the 1990-92 contract, the Board again proposed to increase the teachers' workday to seven hours and 15 minutes. This was not ultimately agreed to however, and the teachers' workday remained at seven hours. Neither party raised any issue with regard to work hours for secretaries (T27).

10. The 1988-90 contract provided at Article II :

> (A) During its term, this Agreement shall not be modified in whole or in part by the parties, except by mutual agreement to reopen for negotiations, and by a written amendment duly executed by both parties.
>
> (C) This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiations....

Identical language appeared in the 1990-92 contract. During the 1990 negotiations, the Association made no proposal to integrate the grievance settlement into the secretaries' workday article in the successor contract (T34).

11. The Association advised Walker on March 20, 1991 that its membership had ratified the 1990-92 contract (J-12).

12. By memorandum on March 25, 1991 Walker advised the secretaries that "contract hours will be adhered to...regular working hours will occur during spring recess and through the summer months of June, July and August (J-13).

The Association grieved the loss of summer hours, first with Walker (J-14) and then with the Board (J-15). The Board denied the grievance (J-16), and by memorandum of June 5, 1991 Walker confirmed that "regular working hours" would be adhered to during

the summer (J-17). The Association did not pursue the matter to arbitration.[5/]

ANALYSIS

The Association alleges that the Board violated the Act by eliminating its long-standing practice of shortened summer hours for secretaries without negotiating in good faith with the Association.

N.J.S.A. 34:13A-5.3 provides, in part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

An employer violates N.J.S.A. 34:13A-5.4(a)(5) when it implements a new rule or changes an old rule concerning a term and condition of employment without first negotiating in good faith or having a managerial prerogative or contractual defense authorizing the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

Here, the union has proven that the Board changed the secretaries' summer hours without negotiating that change with the Association. There is no contention that the Board had a managerial prerogative to do so. Therefore, I must now consider whether the

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5/ Although Gill testified that he believed the contract provided only for advisory arbitration, Article III, section C, (5), provides that arbitration is final and binding for all "arbitrable" grievances. Section D defines "non-arbitrable" grievances.

Board had a contractual right to lengthen the secretaries' summer hours.

A public employer meets its negotiations obligation when it acts pursuant to its collective negotiations agreement. If the parties' collective agreement clearly and unequivocally authorizes the employer to make the change, then the Commission will find that the majority representative has waived its right to negotiate the change. Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. Ed., 78 N.J. 122, 140 (1978); Hamilton Twp. Sewer Authority, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87), certif. den. 108 N.J. 198 (1987); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13202 1982); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980).

Moreover, the Commission has frequently found that where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by ending a past practice granting more generous benefits and by returning to the benefit level set by the contract. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) ("Kittatinny I"); Burlington Cty. Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1991); Passaic Co.

Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Here, the parties' agreement specifically provides for "regular working hours of seven and one-half hours a day...twelve months a year." The Commission has previously determined that this contract provision meets the "clear and unequivocal" test. Kittatinny I. In that decision, the Commission found that the Board had a contractual right to discontinue its past practice of shortened hours during school recess periods. The Commission found that this contract provision gives the Board the right to have a seven and one-half hour workday throughout the year, and therefore, the Board did not violate the Act when it required secretaries to work the contractual hours.

Accordingly, I find that the parties' clear and unequivocal contract language permitted the Board to change the secretaries' summer hours.

The Association also argues that the grievance settlement worked out between the Superintendent and the Association in June, 1989, effectively modified contract article VI. I disagree.

Article 2 of the 1988-90 contract provided that the agreement could only be modified by a written amendment duly executed by both parties. This grievance settlement was not reduced to writing and executed by the Association and the Board.[6/] If

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6/ The Association argues in its brief that the Superintendent had the authority to bind the Board by agreeing to the settlement. It is not necessary for me to consider this issue, since no written amendment to the contract was signed by the Association.

the grievance settlement had effectively amended the contract, then it would follow that the Association would have sought to include the alleged amendment in the 1990-92 contract. It did not do this. In negotiations for the successor contract, the parties reverted back to the same seven and one-half hour workday.7/

I find that the grievance settlement did not alter the parties' contract language. Therefore, the Board's elimination of reduced summer hours was permitted by the parties' contract.

Finally, the Association argues that the Board's announcement to unilaterally eliminate summer hours rather than placing the issue on the negotiations table, as the Board had done with the teachers' workday issue, amounted to negotiating in bad faith.

The contract language gave the Board the right to require a full workday day for its secretaries at any time. The Board was under no obligation to negotiate for a right it already had. Once the parties completed negotiations for the successor agreement, the Board relied on the contract language the parties had just agreed to, and demanded a full seven and one-half hour workday from the secretaries. It had a right to do this at any time.

7/ Even if the grievance settlement had acted as an amendment to the contract language, then the Association's claim here would amount to no more than an allegation of contract violation. The Commission will not decide cases of pure contract violations as unfair practices. State of New Jersey, Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) ("Human Services").

RECOMMENDATIONS

I recommend that the Commission find that the Kittatinny Board of Education did not violate 5.4(a)(1) and (5) of the Act when it implemented full contractual hours for secretaries. I recommend that the Commission dismiss the Complaint.

Susan W. Osborn

Susan Wood Osborn
Hearing Examiner

Dated: June 5, 1992
Trenton, New Jersey