

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

Docket No. CO-77-21-135

-and-

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In a decision in an unfair practice proceeding, the Commission, in agreement with the Hearing Examiner, reiterates its prior position that the adoption of the school calendar is not a required subject of negotiations, but the impact of that decision on the terms and conditions of employment is a required subject of negotiations. Yet, in this case, the Commission finds that the negotiated obligations of the Board concerning the adoption of the school calendar and any impact on the terms and conditions of the teachers' employment was delineated in Article VI of the collective negotiations agreement. The Commission finds that these obligations were adhered to by the Board and the Association presented no evidence to support a finding that the Board's obligations extended beyond that which the contract required. The Commission does not consider the validity of the findings of the Hearing Examiner concerning whether or not the Association was required to make a demand to negotiate the impact on the terms and conditions of employees with the Board.

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SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent:

Casper P. Boehm, Jr., Esq.

For the Charging Party:

Rothbard, Harris & Oxfeld, Esqs.
(Nancy I. Oxfeld, of Counsel)

DECISION AND ORDER

On July 30, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the Sayreville Education Association (the "Association") alleging that the Sayreville Board of Education (the "Board") engaged in an unfair practice in violation of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq., (the "Act"). Specifically, the Association alleges that, without the benefit of negotiations, the Board had unilaterally instructed all teachers to commence their work year the Thursday and Friday before Labor Day in 1976, while the work year for teachers for the previous thirteen years began after Labor Day. The Association contends that this is a violation of

N.J.S.A. 34:13A-5.4(a)(1) and (5). ^{1/}

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices, acting as the named designee of the Commission, that the allegations of the Charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 22, 1977. A hearing was held before Alan B. Howe, Hearing Examiner of the Commission, on July 26, 1977, at which both parties were represented and given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of hearing the parties submitted letters in lieu of briefs, the final letter being received on September 22, 1977. On October 24, 1977, 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 this Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof.

The Hearing Examiner divided the question into two parts: the decision to change the starting date for the school calendar and the impact of that decision on the teachers terms and conditions of employment. He found the decision itself to be permissive but he found that the impact of

^{1/} N.J.S.A. 34:13A-5.4(a)(1) and (5) provide that: "Employers, their representatives or agents are prohibited 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."

^{2/} H.E. No. 78-10, 3 NJPER ____ (1977).

of that decision on employees' terms and conditions of employment was mandatorily negotiable. However, he further found that the Board had not violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) because the Board did not have an obligation to negotiate with the Association concerning the impact, if any, of its decision to promulgate a school calendar changing the day on which teachers report to school by reason of the failure of the Association to have made a demand for negotiations.

Pursuant to the Commission's Rules, exceptions to the Hearing Examiner's Recommended Report and Decision were filed by both parties. The Association took exception to the application by the Hearing Examiner to the public sector in New Jersey of the private sector requirement that a demand for negotiations is a condition precedent to the obligation to negotiate. The Association also took exception to the conclusion of law that the Board had no obligation to negotiate with the Association by reason of the failure of the Association to demand negotiations. The Association relies on N.J.S.A. 34:13A-5.3^{3/} to support the contention that the Board had an obligation to notify the Association of the proposed change in the school calendar and to negotiate that change before its implementation.

The exceptions filed by the Board are threefold. First, the Board excepts to the framing of the issue by the Hearing Examiner. The issued framed by the Hearing Examiner reads:

"Did the Board commit an unfair practice within the meaning of the Act when it unilaterally adopted

^{3/} The relevant portion provides that,

"Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

a school calendar for the 1976-77 and 1977-78 school years, 4/ which changed the day for all teachers to report from a day after Labor Day to the Thursday before Labor Day, without negotiating with the Association the impact, if any, upon the teachers in the negotiating unit?"
H.E. No. 78-10 at p. 4.

The Board contends that the procedure called for in the collectively negotiated agreement 5/ between the parties was followed, and therefore, there was no impermissible unilateral implementation of the school calendar.

Secondly, the Board excepts to the fact that the Hearing Examiner took notice of the teachers' expectation of not commencing the school year prior to Labor Day. The Board alleges that this is "pure speculation." The third exception is to the finding that the Board has an obligation to negotiate the impact of its decision to change the school calendar. The Board contends that there was no change as the workload of the teachers has not been increased. The one hundred eighty-three (183) pupil contact days and the two (2) days when teachers are required to report prior to the pupil contact days are the same number of days as has been required of teachers in previous years.

4/ This Change only alleged a violation concerning the adoption of the calendar for 1976-77. However, both parties litigated and the Hearing Examiner's Report and Recommendation encompassed the calendars for both 1976-77 and 1977-78.

5/ Article VI, School Calendar, of the Agreement between Board of Education, Sayreville and Sayreville Education Association July 1, 1976 - June 30, 1978 is as follows:

SCHOOL CALENDAR

"A. The School calendar shall be prepared by the Superintendent who shall elicit the participation of the Association prior to the final adoption of said calendar by the Board.

B. School calendar shall be set forth in Schedule B, except in cases of emergency, but in any event shall include 183 teacher pupil contact days."

On January 10, 1978, the Association filed an answer to the Board's cross-exceptions which responds to the arguments made by the Board.

After careful consideration of the entire record, the Commission finds that the Board did not commit any unfair practice.

It is well settled that the adoption of a school calendar for students is not a required subject of negotiations, but that the impact of that decision on the terms and conditions of employment is a required subject of negotiations. In Burlington County College Faculty Association v. Board of Trustees, Burlington County Colleges, 64 N.J. 19 (1973), the court found:

"While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their workload or their compensation" at p. 12.

This Commission followed this holding in In re Rutgers, the State University, P.E.R.C. No.76-13, 2 NJPER 13 (1976). The Commission found:

"...the University is not required to negotiate the calendar with the AAUP but it must negotiate with the AAUP regarding the impact of the calendar on terms and conditions of employment of unit members (when they work, how long they work, their workload, etc.)." 2 NJPER at 17.

The Commission further held that the actual decisions on the academic calendar are premissive subjects of collective negotiations.

This determination has been consistently upheld by the Commission. See In re Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976); In re Board of Education of the Borough of Ridgefield, P.E.R.C. No. 77-9, 2 NJPER 284 (1976); In re Green Brook Education Association, P.E.R.C.

No. 77-11, 2 NJPER 288 (1976). Therefore, as to the conclusion of law that the Board is not required to negotiate the adoption of the school calendar with the Association, the Commission is in agreement with the Hearing Examiner. The Commission also agrees with the conclusion of law by the Hearing Examiner that the impact of the calendar decision, including a change in the starting date to before Labor Day, even without a change in the total number of days, is a required subject of negotiations. However, the Commission does not consider or pass upon the validity of the Hearing Examiner's findings on whether or not the Association was required to make a demand to negotiate the impact on the terms and conditions of employees with the Board, as the Commission finds that the Board has fulfilled its obligation given the specific facts of this case.

As part of its case, the Charging Party, the Association, entered into evidence eleven (11) ^{6/} school calendars; the oldest one covered the 1963-64 school year and the newest covered the 1977-78 school year. The Board introduced one calendar ^{7/} for the school year 1971-72. Of these twelve (12) calendars, seven of them required all teachers to report to school for two days prior to the date when pupils were required to commence school and five of them provided for only one day prior to the date pupils would begin attending school. All of the calendars except the two in issue (1976-77 and 1977-78) scheduled these pre-pupil contact reporting dates for teachers after Labor Day. ^{8/}

^{6/} Exhibits CP #1 through CP #11.

^{7/} Exhibit R-1.

^{8/} Some of these calendars required new teachers to report for more days than those required of returning teachers, and in some instances, to report prior to Labor Day while returning teachers always reported after Labor Day. The issue as presented by the Association is not concerned with the reporting date of new teachers; rather, the Charge is concerned with the starting date of "all teachers."

The Board introduced a letter ^{9/} from Blanche Y. Skwira, the president of the Association. The letter contained proposals for the school calendar for 1977-78. The proposals included (1) that all teachers report only one day prior to pupils, (2) that school start after Labor Day, (3) that there be a return to one hundred eighty (180) instead of one hundred eighty-three (183) pupil contact days, and (4) several suggestions concerning scheduling holiday time.

In its exceptions, the Board contends that the change in the school calendar was not unilaterally adopted. The Board argues that the collectively negotiated agreement (Article 6) ^{10/} provides the procedure for the setting of the school calendar. The Board claims that this procedure, as evidenced by the letter from Blanche Skwira, was followed in setting the calendar for 1977-78 and for all previous years. The Association did not refute this contention.

It appears from the record in this case that the Association has failed to meet the burden of proof as required in an unfair practice charge. ^{11/} Once again, it is important to note that while school calendar decisions, particularly those directed at the students reporting days, are not required subjects, the impact of such decisions is a mandatory subject of negotiations. The Board in its exceptions ^{12/} incorporated by reference its post-hearing brief. In the post-hearing brief, ^{13/} the Board contends that the parties have negotiated on the subject of the adoption of the school calendar and that the product of those negotiations is Article VI. We agree.

^{9/} Exhibit R-4.

^{10/} See footnote 5.

^{11/} N.J.A.C. 19:14-7.8.

^{12/} Exceptions, dated December 19, 1977, at p. 3.

^{13/} Post-hearing brief, dated September 22, 1977, at p. 3.

On the basis of the record, the Association has not proved by a preponderance of the evidence that the Board has refused to negotiate in good faith concerning the impact of the school calendar on the terms and conditions of employment of unit members. Uncontroverted testimony of witnesses for both the Association and the Board established the fact that the contractual obligation of Article VI has consistently been followed. The only evidence of compliance with Article VI was introduced by the Board. ^{14/} That letter, when read in conjunction with Article VI of the agreement, leads to the conclusion that the Board has complied with Article VI of the collectively negotiated agreement and that compliance is the only obligation required in this case. ^{15/}

ORDER

Accordingly, for the reasons set forth above, it is **HEREBY ORDERED** that the Association's complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION


Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Parcels voted for this decision. Commissioner Hurwitz abstained. Commissioners Hipp and Hartnett were not present.

DATED: Trenton, New Jersey
January 19, 1978
ISSUED: January 24, 1978

^{14/} See footnote 9.

^{15/} On December 19, 1977, the Association requested oral argument. The Commission hereby denies this request. We note that the parties were provided an opportunity to present evidence and to argue orally before the Commission Hearing Examiner and we are satisfied that this matter has been fully litigated.

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a charge of unfair practices filed by the Sayreville Education Association against the Sayreville Board of Education. The charge alleged that the Board had failed to negotiate in good faith over the impact of the school calendar adopted for the 1976-77 school year upon terms and conditions of employment. The 1976-77 school calendar required teachers to report prior to Labor Day rather than after Labor Day as had been the case in past school years.

The Hearing Examiner's recommendation was based upon the narrow ground that the Education Association never made a demand upon the Board for impact negotiations.

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 conclusions of law.

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Appearances:

For the Sayreville Board of Education
Casper P. Boehm, Jr., Esq.

For the Sayreville Education Association
Rothbard, Harris & Oxfeld, Esqs.
(Nancy I. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 30, 1976, by the Sayreville Education Association (hereinafter the "Charging Party" or the "Association"), alleging that the Sayreville Board of Education (hereinafter the "Respondent" or the "Board") 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 the Board unilaterally promulgated a change in the school calendar for the 1976-77 school year to the extent that all teachers were to report on the Thursday and Friday prior to Labor Day rather than after Labor Day, such change having been made by the Board without negotiations with the Association over the impact of the change. The foregoing was alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1) and (5) of the Act. ^{1/}

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 22, 1977.

Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 26, 1977, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were submitted by the Charging Party and Respondent, respectively, on September 6 and September 28, 1977.

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 the filing and consideration of briefs by the 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 Sayreville Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

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

3. The Board and the Association have been parties to a series of collective negotiations agreements covering many years. The most recent collective bargaining agreement provides in Article VI, School Calendar, as follows:

"A. The School calendar shall be prepared by the Superintendent who shall elicit the participation

^{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 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."

of the Association prior to the final adoption of said calendar by the Board.

B. School calendar shall be as set forth in Schedule B, except in cases of emergency, but in any event shall include 183 teacher pupil contact days."

4. Essentially, from the 1963-64 school year through the 1975-76 school year, with the exception of the 1971-72 and 1972-73 school years, the school calendars provided that all teachers should report after Labor Day.

5. The school calendars for 1971-72 and the 1972-73 school years specifically provided that new teachers only would report before Labor Day and all teachers would report after Labor Day.

6. The school calendars for the 1976-77 and the 1977-78 school years provide that all teachers are to report on the Thursday and Friday before Labor Day. The number of pupil contact days remained unchanged, as provided specifically in the collective negotiations agreement, supra.

7. The Superintendent typically has submitted as many as six or seven proposed school calendars to the Board and to the Association for consideration prior to the adoption by the Superintendent of the final calendar and its approval by the Board.

8. Beginning with the 1976-77 school year the Board and the Superintendent, in changing the day on which all teachers report to the Thursday and Friday before Labor Day, determined as a matter of major educational policy that it was desirable to commence classes two days earlier in the school year so that classes could end earlier in June of the following year.

9. The Board did not offer to negotiate with the Association over the impact, if any, upon teachers in the negotiating unit as a result of the aforesaid changes in the 1976-77 and 1977-78 school calendars.

10. The Association did not make a demand upon the Board to negotiate the impact, if any, upon teachers in the negotiating unit ^{2/} but instead filed the instant charge on July 30, 1976.

^{2/} In so finding, the Hearing Examiner has duly considered the testimony of Blanch Skwira (Tr. 17, 18) and Exhibit R-4, which deals with comments on the decision to change the school calendar and not the impact of the decision.

THE ISSUE

Did the Board commit an unfair practice within the meaning of the Act when it unilaterally adopted a school calendar for the 1976-77 and 1977-78 school years, which changed the day for all teachers to report from a day after Labor Day to the Thursday before Labor Day, without negotiating with the Association the impact, if any, upon the teachers in the negotiating unit?

DISCUSSION AND ANALYSIS

The Position of the Parties

It is the position of the Charging Party that the Respondent has violated §§(a)(1) and (5) of the Act by unilaterally changing the school calendar for the years in questions without entering into collective negotiations over the impact of the change in school calendars upon the teachers in the negotiating unit.

It is the position of the Respondent that it has not violated the Act, as alleged, for the reason that the Board may unilaterally institute a major educational policy decision without negotiations with the Association. It is the Board's position that the changes that it made in the 1976-77 and 1977-78 school calendars fell within the purview of a major educational policy decision.

The Controlling Authorities and Decision

There is ample authority to support the position of the Board in this case that the decision to adopt a school calendar is a major educational policy decision which does not have to be negotiated with the employee representative prior to adoption. See, for example, Burlington County College Faculty Association v. Board of Trustees of Burlington County College, 64 N.J. 10 (1973); Rutgers, the State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); Board of Education of the Borough of Ridgefield, P.E.R.C. No. 77-9, 2 NJPER 284 (1976); and Green Brook Township Board of Education, P.E.R.C. No. 77-11, 2 NJPER 288 (1976).

Under the P.E.R.C. decisions above cited, the adoption of a school calendar is not a mandatory subject of negotiations but is, rather, a permissive subject of negotiations, as to which the Board is free to negotiate with the Association if it so desires. It is well settled under P.E.R.C. decisions that, as to a permissive subject of negotiations, the impact of the permissive decision is mandatorily negotiable. See, for example, Board of Education of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75, 76 (1976); Council of New Jersey College Locals, etc. and State of New Jersey (Stockton State College), P.E.R.C. No. 76-33, 2 NJPER 147, 148 (1976); City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66, 68 (1976).

Although no specific evidence of impact was adduced at the hearing, the Hearing Examiner takes notice of the fact that the teachers in the negotiating unit in prior years had the expectation of not returning until after Labor Day. The unilateral change in 1976-77 and 1977-78 may have had an "impact" upon teachers who had summer employment terminating on the Labor Day weekend. In such cases the argument of an economic loss might be justified, and the Board might be persuaded in negotiations to compensate affected teachers for such loss.

However, the Hearing Examiner has found that the Association did not make a demand for negotiations on impact, but instead filed charges of unfair practices prior to the implementation of the calendar. Although there are no P.E.R.C. decisions on the specific issue of whether or not a demand need be made before an obligation to negotiate arises, there is ample precedent from the private sector that a demand for negotiations is a condition precedent to an obligation to negotiate and that there can be no violation of the duty to negotiate without such a demand. See for example, PFM Industries, Inc., 217 NLRB No. 28, 88 LRRM 1549, 1550 (1975); Motion Picture and Television Producers, Inc., 204 NLRB No. 134, 85 LRRM 1464-1466 (1973); and Taylor Instrument Cos., 169 NLRB 162, 67 LRRM 1145, 1147 (1968).

Thus, notwithstanding that the Board was under an obligation under P.E.R.C. decisions to negotiate the impact of its decision to change the school calendars for the years 1976-77 and 1977-78, the failure of the Association to have made a demand for negotiations precludes a finding and

conclusion that the Board violated its obligation and duty to negotiate within the meaning of §(a)(5) of the Act.

Upon the foregoing, and the entire record in this case, the Hearing Examiner makes the following:


CONCLUSIONS OF LAW

1. The Respondent did not have an obligation to negotiate with the Charging Party concerning the impact, if any, of its decision to promulgate a school calendar changing the day on which teachers report from after Labor Day to the Thursday before Labor Day for the school years 1976-77 and 1977-78, by reason of the failure of the Charging Party to have made a demand for negotiations, and its action in refusing to do so does not constitute a violation of N.J.S.A. 34:13A-5.4(a)(5).

2. The Respondent's conduct above does not constitute a violation of N.J.S.A. 34:13A-5.4(a)(1).

RECOMMENDED ORDER

Respondent, Sayreville Board of Education not having violated the Act, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.^{3/}



Alan R. Howe
Hearing Examiner

DATED: October 24, 1977
Trenton, New Jersey

^{3/} While recommending dismissal, the Hearing Examiner notes that the Charging Party is not precluded by the Act or the Commission's Rules from demanding impact negotiations with respect to the 1977-78 school calendar and, if necessary, refiling a charge of unfair practices.