

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LONG BRANCH BOARD OF EDUCATION,

Respondent-Charging Party,

-and-

Docket Nos. CO-76-94-27
& CE-76-26-40

ASSOCIATION OF LONG BRANCH EDUCATIONAL
SECRETARIES AND CLERKS, INC.,

Charging Party-Respondent.

SYNOPSIS

The Special Assistant to the Chairman, on behalf of the Commission, denies the Board's Motion for Reconsideration filed in the instant proceeding. The Special Assistant concludes that the Board did not establish that any material error was made in the prior Commission decision relating to this matter [In re Long Branch Board of Education, P.E.R.C. No. 77-70, 3 NJPER (1977)] nor had it advanced any "extraordinary circumstances" that would require the reconsideration of the Commission's earlier decision. More specifically, the Special Assistant finds that the Board's contention that this matter should be reconsidered by the Commission by no less than four of its members, inasmuch as only three commissioners voted in the earlier matter, was without merit. The Special Assistant states that given the present complement of only six commissioners and as a result of certain interpretations of the New Jersey Conflicts of Interest Law by the Executive Commission on Ethical Standards and the application of the Commission's own Code of Ethics, the maximum number of eligible commissioners actually participated in the earlier decision. In response to further exceptions of the Board, the Special Assistant finds that the concept of reclassification at issue in the case concerned the process of pegging employees' salaries to the actual duties performed and was not considered to involve the promotional process as traditionally defined. He also concludes, in response to another exception of the Board that the portion of the Commission's order that mandates negotiations with the Association concerning future reclassifications of unit personnel goes outside the necessary framework of the instant dispute, that this aspect of the order is reasonably designed to protect against future statutory violations like or related to the violations already committed by the Board and should not be read as requiring negotiations with the Association in the future relating to criteria and qualifications for promotion.

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Appearances:

For the Board of Education, McOmber & McOmber, Esqs.
(Mr. John W. Wopat, III, on the Motion)

For the Association, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER ON MOTION

On June 22, 1977, the Commission issued its Decision and Order in the above-captioned unfair practice proceeding. In re Long Branch Board of Education, P.E.R.C. No. 77-70, 3 NJPER _____ (1977). The Long Branch Board of Education (hereinafter the "Board") filed a timely Motion for Reconsideration dated July 8, 1977, pursuant to N.J.A.C. 19:15-4.1, along with a statement in support of said motion submitted in certification form.

Pursuant to N.J.S.A. 34:13A-6(f), the Commission has delegated to the undersigned the authority to rule on this Motion for Reconsideration.

In its decision the Commission, in agreement with Commission Hearing Examiner Edmund G. Gerber, had concluded that

the Board committed an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)(5) and (a)(6) by refusing to enter into a negotiated agreement with the Association of Long Branch Educational Secretaries and Clerks, Inc. (hereinafter the "Association") in conformity with a Memorandum of Agreement entered into between the parties on November 3, 1974.

The Commission further concluded that the Board committed an unfair practice by unilaterally reclassifying the three members of the Association who did not participate in a strike by the secretaries and clerks (as well as school district teachers and custodians) against the Board in the fall of 1974, who thereby received salary increases of 10.5% as opposed to the 10% increase specified in the Memorandum of Agreement. During the negotiations leading up to the execution of an "Addendum to Collective Bargaining Agreement" in October of 1973, the Association had unsuccessfully sought to have these three secretaries placed at the levels to which they were "promoted" by the Board after the aforementioned strike. The Commission, while noting that striking was not a protected activity under the New Jersey Employer-Employee Relations Act (hereinafter the "Act"), determined, as did the Hearing Examiner, that the disparity of treatment accorded to these three secretaries -- the women apparently deserved higher classifications pursuant to administrative recommendations made in October, 1973, yet they could not get them through the efforts of the Association -- clearly discouraged employees in the exercise of their legitimate rights of representation, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3). The Commission found that the

resultant effect of the Board's actions concerning these three secretaries was to encourage employees to deal with the Board directly and bypass their designated representative, the Association, who pursuant to Section 5.3 of the Act was the exclusive representative for collective negotiations relating to terms and conditions of employment of the secretaries and clerical employees.

The Commission ordered in its decision, in apposite part, that the Board cease and desist from failing to execute and implement the agreement agreed upon by the parties on November 3, 1974, and cease and desist from discriminating in regard to any term and condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act. Furthermore, the Commission affirmatively ordered the Board to execute and implement the aforementioned agreement and to give retroactive effect to the provisions thereof; to negotiate with the Association concerning future reclassifications and salary increases of unit employees; to post appropriate notices; and to notify the Chairman of the Commission in writing of the steps taken to comply with said Order.

In its Notice of Motion for Reconsideration the Board raises several issues that will be discussed seriatim.

The Board first contends that the instant dispute should be reconsidered by the Commission by no less than four of its members. The Board asserts that due to the significance of this case the decision in question should not have been made by only three commissioners, with two others abstaining for unstated reasons.

In order to respond to this argument of the Board it is important to discuss the composition of the Commission and to explain why only three commissioners voted in this matter.

N.J.S.A. 34:13A-5.2 states in part that "[t]he commission shall consist of 7 members to be appointed by the Governor, by and with the advice and consent of the Senate. Of such members, 2 shall be representative of public employers, 2 shall be representative of public employee organizations and 3 shall be representative of the public including the appointee who is designated as chairman." At present there is one vacancy on the Commission.

On June 21, 1977, Commissioners Charles H. Parcels and Francis A. Forst voted for the decision that was rendered in this particular matter. Commissioner Bernard M. Hartnett, Jr., voted against this decision.^{1/}

Chairman Jeffrey B. Tener abstained from voting on this decision because of his previous involvement as a mediator in the contractual dispute involving the Board and the Association in the fall of 1974.

^{1/} It is noted that the official minutes of the June 21, 1977 Commission meeting, at which time the Long Branch decision, among others, was voted upon, reflect that Commissioner Hartnett agreed with the final result of the decision, but did not agree with the ground upon which the Commission predicated its determination that the Board committed a separate unfair practice by unilaterally reclassifying the three non-striking secretaries. Commissioner Hartnett would have found the Board to have violated its duty to negotiate in good faith with the majority representative of the affected secretaries with reference to the reclassification issue, pursuant to N.J.S.A. 34:13A-5.4(a)(5), but he did not agree that there was an (a)(3) "discrimination" violation by the Board relating to the reclassification,, inasmuch as the Association had engaged in unprotected activity by striking.

outside the necessary framework of the instant dispute, besides mandating the forfeiture of the Board's managerial prerogatives relating to the reclassification and promotion of its employees.

Regarding the first aspect of this particular argument of the Board, the Commission at pages 8 and 9 of the slip opinion carefully considered this position. The Commission stated the following:

"...However, Schedule D [~~a listing of~~ all unit employees by name, classification or grade, and step within grade] was not directly a promotional limitation, but rather a means of pegging the employees' salaries to the duties performed. Compensation is incontrovertably [sic] a term and condition of employment. Moreover, there is no evidence in the record that anyone was actually promoted by Schedule D inasmuch as its creation marked the beginning of a classification system. While some employees may have gotten higher wages that is no more than a negotiated change in compensation." (Footnote omitted)

The Commission added in a footnote^{3/} that the Hearing Examiner correctly noted in his Recommended Report and Decision that only the setting of promotional qualifications and criteria were managerial rights and that procedures for promotions were mandatorily negotiable.

The undersigned further notes in this regard that the Commission, in a recent decision,^{4/} stated that if it found that an employer was motivated, at least in part, by reasons proscribed by the Act to discriminate against public employees it would find that the Act had been violated even though the discrimination may have dealt with a subject that would not be categorized as being

^{3/} See note 9 on page 9 of the slip opinion.

^{4/} In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), appeal pending, Docket No. A-2546-76.

mandatorily negotiable, e.g. involuntary transfers, reassignments, promotional criteria. The contrary conclusion would mean that a public employer could take discriminatory action with respect to issues such as tenure and job placement with impunity, surely a result which the New Jersey Legislature could not have intended in prohibiting employer discrimination "in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4(a)(3).

The next contention to consider is whether that portion of the Commission's Order that mandates negotiations with the Association concerning future reclassifications of unit personnel goes outside the necessary framework of the instant dispute. The undersigned finds that this aspect of the Commission's Order is reasonably designed to protect against future statutory violations like or related to the violations already committed. Again it must be emphasized that this part of the Commission's Order must be read in pari materia with the section of the Commission's decision that emphasizes that, for purposes of this decision, the concept of reclassification was considered as simply the process of pegging employees' salaries to the actual duties performed and was not considered to be a promotional process as traditionally defined. Nothing in the Commission's Order should be read as requiring negotiations with the Association, in the future, relating to criteria and qualifications for promotions.

The last point raised by the Board in its Notice of Motion for Reconsideration is a request for a stay of the effectiveness

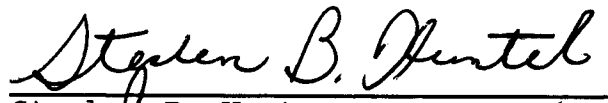
of the aforementioned Commission decision pending further proceedings before the Commission or the Superior Court of New Jersey, Appellate Division. N.J.A.C. 19:15-4.1 provides the mechanism for Commission reconsideration. This rule specifically states that the filing and pendency of a motion for reconsideration shall not operate to stay the effectiveness of a Commission decision unless otherwise ordered by the Commission. For the reasons set forth above, the undersigned, as the Commission's named designee, must conclude that the Board's request for a stay be denied.

The undersigned further concludes that the Board has not established that any material error was made in the prior Commission decision relating to this matter, nor has it advanced any "extraordinary circumstances," as referred to in N.J.A.C. 19:15-4.1, that may require the reconsideration of the Commission's earlier decision.

ORDER

In accordance with the above discussion, the Motion for Reconsideration filed by the Long Branch Board of Education is hereby denied.

BY ORDER OF THE COMMISSION



Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
July 29, 1977