

P.E.R.C. NO. 90-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-255

WILLINGBORO EDUCATION ASSOCIATION,

Charging Party.

Appearances:

SYNOPSIS

The Chairman of the Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Willingboro Education Association against the Willingboro Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act by requiring art, music and physical education teachers to cover for missing substitute teachers, thereby causing regular teachers to lose duty-free and conference-preparation time. The Chairman, in the absence of exceptions, dismisses the Complaint.

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Appearances:

For the Respondent, James P. Granello, Esq.

For the Charging Party, Selikoff & Cohen, P.A. (Joel S. Selikoff, of counsel)

DECISION AND ORDER

On April 5, 1988, the Willingboro Education Association filed an unfair practice charge against the Willingboro 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 subsection 5.4(a)(5),^{1/} by requiring art, music and physical education teachers to cover for missing substitute teachers, thereby causing regular teachers to lose duty-free time and conference-preparation time.

On August 10, 1988, a Complaint and Notice of Hearing issued. On April 17, the Board filed an Answer denying it committed

^{1/} This subsection prohibits public employers, their representatives or agents from: (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.

an unfair practice and claiming that the parties' contract authorized its action.

On March 13, 1989, Hearing Examiner Marc Stewart conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by June 6, 1989.

On September 29, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-12, 15 NJPER ____ (¶ ____ 1989). He found that the Board had a managerial prerogative to fill substitute positions with art, music and physical education teachers. He further found that the Association never demanded to negotiate over the severable issue of compensation for the increased workload for other teachers.

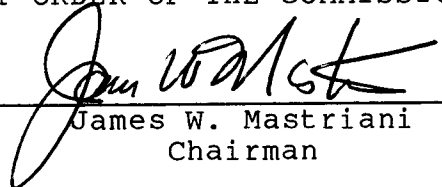
The Hearing Examiner served his decision on the parties and informed them of their right to file exceptions. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-6) are accurate. I incorporate them here. Acting pursuant to authority granted to me by the full Commission in the absence of exceptions, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
November 9, 1989

H.E. NO. 90-12

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

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Willingboro Board of Education did not violate the New Jersey Employer-Employee Relations Act when it assigned teachers of art, music and physical education to fill in for missing substitute teachers, causing regular teachers to miss preparation time normally provided by these teachers of art, music and physical education. The Hearing Examiner found that the Willingboro Education Association never made a demand to negotiate the impact of the Board's managerial decision to fill empty substitute slots with teachers of art, music and physical education.

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. 90-12

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent, James P. Granello, Esq.

For the Charging Party, Selikoff & Cohen, P.A.
(Joel S. Selikoff, Esq.)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 5, 1988, the Willingboro Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the Willingboro Board of Education ("Board"), alleging that the Board violated subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").^{1/} The Association alleged that the Board violated the Act by requiring teachers of art, music and physical education to replace missing

^{1/} This subsection prohibits public employers, their representatives or agents from: "(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."

substitute teachers, thus causing other teachers to miss their preparation periods as a result of having no relief instruction in art, music or physical education. The Association alleged that this practice began in September, 1987, and continues to the present time.^{2/} On August 10, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1).^{3/} On August 17, 1988, the Board filed an Answer to the Association's charge in which it denied having committed an unfair practice. The Board stated affirmatively that Article VII (A)(1) of the parties' contract permitted the actions taken by the Board in instances of "staffing exigencies" and; also, Article VII (B) indicated that where exceptional demands are placed upon particular teachers for time over and beyond the regular workday, the Board may "work out" an agreement for "compensatory time off or adequate compensation." A hearing was conducted on March 13, 1989. Both parties filed post-hearing briefs by June 6, 1989.

^{2/} There is some confusion in the record as to the period of time during which the Association alleges the unfair practice to have occurred. The Association's Charge states, in Count 2, that the unfair practice began in September 1987 and continues up to and until the date of the charge, April 5, 1988. However, during the course of the hearing in this matter, the Hearing Examiner granted the Association's motion to amend the pleadings to include additional violations allegedly occurring during the 1988-89 school year; and, ostensibly up to and including the date of the hearing in this matter (T*124).

* "T" indicates the transcript of the hearing in this matter dated March 13, 1989.

^{3/} "CP" indicates Charging Party's exhibits. "R" indicates Respondent's exhibits. "C" indicates the Commission's exhibits. "J" indicates exhibits proffered jointly by the Charging Party and the Respondent.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Willingboro Board of Education is a public employer within the meaning of the Act (T9).
2. The Willingboro Education Association is a public employee representative within the meaning of the Act (T9).
3. Beginning in September 1987, the Board experienced a dramatic reduction in the number of available substitute teachers (T84). The number of available substitute teachers which generally ran between 150 and 200 dropped to 78 in September, 1987 (T84-T85).
4. As a result of the Board's inability to provide adequate substitute teachers to substitute for regular-teachers absences, the Board utilized teachers of art, music and physical education to take on the responsibilities of substitute teachers; and, by so doing, caused other regular classroom teachers, who received preparation periods during art, music and physical education instruction, to lose their preparation periods whenever the art, music or physical education teacher was substituting and unavailable for his or her regularly scheduled program (T20). Although there is conflicting testimony in the record as to the reason for the decrease in the number of available substitute teachers, the weight of the evidence appears to indicate that one of the major factors was a 1986 law which became effective during the summer of 1987 requiring the fingerprinting of all district personnel as a method of determining the presence of any previous

criminal history; and, the requirement that the individual pay a \$26 processing fee to cover the cost of this procedure (T87, T90).^{4/}

The record also contains some evidence indicating a reluctance by substitute teachers to work in Willingboro due to a "less than professional" attitude toward staff; and, a lack of administrative support in instances requiring student discipline (T51, T53-T54).

5. In an effort to obtain additional substitute teachers, the Board's personnel director requested on several occasions that the Board raise the per diem pay for substitute teachers beginning as far back as 1986 (T104); and, until August 1, 1988, when the Board approved a per diem increase from \$40.00 to \$55.00^{5/} for substitute teachers beginning in the 1988-89 school year (T104-T108). Additionally, the Board put signs in front of three of the school buildings advertising its need for substitute personnel (T96), and placed advertisements for substitute teachers at the local shopping plaza and in local newspapers (T96, T110). The Board further investigated the possibility of renting a billboard on Rt. 130 to advertise its need for additional substitute teachers (T97). The Board contacted the local unemployment offices, the Friendship Guild, an organization of retired personnel, and Fort Dix and McGuire Military Bases in an effort to obtain additional

^{4/} The record does not indicate whether substitute teachers in other districts were subject to this requirement and fee.

^{5/} The figure \$55 a day for substitute teachers appears to reflect the going rate, with respect to other districts, for substitute teachers in the Willingboro area (T50).

substitute teachers (T96-T97). The Board also implemented a telephone answering system to provide advance notification to teachers (T100) in instances of extended absences. The Board managed to increase the number of available substitute teachers from 78 in September of 1987 to approximately 180 in April of 1988 (T98).^{6/}

6. Although the Board and the Association were engaged in collective negotiations during the time the substitute shortage arose, the Association agreed not to raise the issue during negotiations and, in fact, did not raise it (T21). The Association further opted not to grieve the matter through the grievance procedure contained in the parties' previous and continuing collective negotiations agreement (J-1; J-2); but, instead chose to proceed by pursuing the instant Unfair Practice Charge.

7. The record establishes that teachers who lost preparation time were not compensated by the Board in any way (T30, T58).^{7/}

^{6/} That, notwithstanding, the record indicates that there were only approximately 123 teachers on the substitute list at the start of the 1988-89 school year.

^{7/} During the hearing the Association attempted to introduce unofficial records compiled by Association members detailing the number of instances in which teachers lost preparation time. The Board objected to the introduction of these unofficial records, suggesting instead that the Association should have requested and/or subpoenaed the Board's official records of the number of such instances. At that point, the

8. The Association failed to demand negotiations over the impact of its educational decision to utilize teachers of art, music and physical education to fill substitute positions (T42). The Association considered the filing of the instant unfair practice charge to be the proper method to challenge the Board's actions (T42).

LEGAL ANALYSIS

The Board takes the position that the lack of available substitute teachers and the resulting loss of preparation time resulted from an emergency situation in which the Board had a clear managerial right to assign teachers of art, music and physical education to substitute, as part of its managerial responsibility to facilitate its educational objectives. The Board further argues that any resulting loss of preparation time to teachers was a necessary result of the Board's implementation of its managerial right and cites Woodstown-Pilesgrove Reg. Dist. Bd. of Ed., 81 N.J. 582 (1980), in support of its argument.

The Association argues that although the Board has a managerial right to assign personnel to substitute in emergency

7/ Footnote Continued From Previous Page

Association moved for a subpoena to obtain the Board's official records. The Hearing Examiner denied the Association's motion and the Association's attempt to introduce unofficial records on the theory that the Association should have requested such official records of the Board prior to the hearing in this matter. Moreover, the granting of the Association's motion would have required an additional day of hearing which was not otherwise needed.

situations, this did not relieve the Board from negotiating the impact (increased pupil contact time) of its managerial decision. The Association particularly stresses the fact that this alleged "emergency" continued for, at least, most of the 1987-88 school year and that this, in fact, was not the case. Instead, the Association alleges that to the extent any "emergency" existed at all, by definition, the shortage of substitute teachers could not have constituted an "emergency" for an entire year. Moreover, the Association argues that the Board's lack of available substitute teachers was a result of its economic decision not to raise the per diem pay for substitute until the 1988-89 school year.

There is little doubt that the Board's educational responsibility to fill teaching positions with substitute or regular teachers in instances of teacher absence, is a managerial prerogative. See, Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 24 (App. Div. 1977); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-33, 13 NJPER 78 (¶18036 1986). Generally, regardless of the reason for the shortage of substitute teachers, it is the Board's managerial prerogative to provide coverage for absent teachers in any way it can. There is also ample authority for the proposition that compensation for the loss of preparation time and increase in pupil contact time is a mandatorily negotiable subject. Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987); Byram Tp., supra; Buena Reg. Bd. of Ed., P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985); Buena Reg. Bd. of Ed., P.E.R.C. No. 79-6, 5 NJPER 123

(¶10071 1979); Newark Bd. of Education, P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. No. A-2060-78 (2/26/80).

However, the Association had the obligation to initiate negotiations on the severable issue of compensation. Trenton Bd. of Education, P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987). It did not do so. Instead, it filed the instant unfair practice charge. An unfair practice charge does not constitute a request to negotiate. Trenton Bd. of Education, *supra*; Monroe Tp. Bd. of Education, P.E.R.C. No. 85-35, 10 NJPER 569 (¶15625 1984).

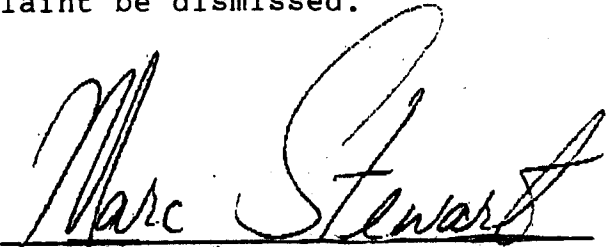
CONCLUSIONS OF LAW

1. The Board experienced an emergency situation during the 1987-88 school year caused by the reduction in the number of available substitute teachers, necessitating the implementation of its managerial prerogative to assign art, music and physical education teachers to "fill in" for unavailable substitute teachers.
2. The resulting loss of preparation time and increase in pupil contact time led to a situation which appeared to cause a unilateral change in terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act.
3. However, the Board's decision to fill substitute positions with teachers of art, music and physical education in order to provide teacher coverage to all students at all times was a valid exercise of its managerial prerogatives; and, the Association never made a demand to negotiate the severable issue of the

resulting increase in workload as a result of the Board's managerial decision. Hence, no violation of N.J.S.A. 34:13A-5.4(a)(5) occurred.

RECOMMENDATIONS

I recommend that the complaint be dismissed.



Marc Stewart
Hearing Examiner

Dated: September 29, 1989
Trenton, New Jersey