

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL  
BOARD OF EDUCATION,

Respondent,

Docket No. CO-77-257

-and-

FREEHOLD REGIONAL HIGH SCHOOL  
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Special Assistant to the Chairman, acting on behalf of the entire Commission, issues an Interlocutory Decision denying the Association's request for interim relief during the pendency of an unfair practice proceeding. The Association had sought to enjoin the Board from continuing the implementation of a reorganization of the Board's supervisory staff that had resulted in the creation of a number of allegedly supervisory positions excluded from the negotiations unit represented by the Association filled by individuals who had previously been nonsupervisory teachers subsumed within the unit represented by the Association.

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After applying the two standards that have been developed by the Commission for evaluating the appropriateness of interim relief -- the substantial likelihood of ultimate success on the legal and factual allegations and irreparable nature of the harm that will result if interim relief is not granted -- the Special Assistant concluded that the facts of this case would not warrant such extraordinary relief. The undersigned found that an analysis of apposite Commission decisions mandates the conclusion that given the facts in this case, the Association would have little chance of establishing that the Board's reorganizational decisions, admittedly effectuated without prior negotiations with the Association, constituted a refusal to negotiate in good faith concerning terms and conditions of employment. The Special Assistant noted that all relevant documentation concerning the Association's request for interim relief in this matter related only to the decisional aspects of the supervisory reorganization and not its impact on the terms and conditions of employment of affected teachers. The Commission has determined that reorganizational decisions relating to staffing and manpower considerations are managerial prerogatives and are not required subjects for collective negotiations. The Commission has determined that its enforcement authorities in the context of allegations of a refusal to negotiate in good faith relate exclusively to terms and conditions of employment -- required subjects for collective

negotiations -- absent factors not relevant to the instant proceeding. The Special Assistant therefore concluded that it cannot be controverted that the Board's reorganization decision does not relate to a refusal to negotiate in good faith concerning a term and condition of employment.

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Appearances:

For the Charging Party, Chamlin, Schottland, Rosen  
& Cavanagh, Esqs. (Mr. Michael D. Schottland, Of Counsel)

For the Respondent, Murray, Meagher & Granello, Esqs.  
(Mr. Robert J. Hrebek, On the Brief)

INTERLOCUTORY DECISION

On March 7, 1977, the Freehold Regional High School Education Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Freehold Regional High School Board of Education (the "Board") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge alleged essentially that the Board had violated Subsections 1, 2 and 5 of Section 5.4 of the Act <sup>1/</sup> by unilaterally implementing

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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 administrative reorganization within the school district that, in part, resulted in the creation of a number of allegedly supervisory positions referred to as "teacher evaluators" and the attendant reduction of the number of non-supervisory teachers subsumed within the negotiations unit represented by the Association. The Association maintained that the Board could not establish administrative positions which would place an employee in the dual role of a statutory supervisor within the meaning of N.J.S.A. 34:13A-5.3<sup>2/</sup> and at the same time a regular certified teacher. Alternatively, the Association asserted that if the Board could legally establish the positions at issue, it could do so only after good faith bilateral negotiations with the Association.

A related Clarification of Unit Petition (CU-77-55) that concerned the negotiations unit status of the newly created teacher evaluator position was also filed by the Association on March 7, 1977. Pursuant to a Notice of Hearing, a Commission Hearing Officer conducted a hearing in this CU matter that lasted three days, at which time the Board and the Association were given an opportunity to examine witnesses, present evidence and argue orally with reference to their respective contentions relating to the unit

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<sup>2/</sup> N.J.S.A. 34:13A-5.3 reads in apposite part that "...nor, except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership..."

status of teacher evaluators. Briefs have been filed by the parties in that clarification of unit proceeding and the hearing officer's decision in that matter is forthcoming.

Prior to August 30, 1977 it appeared that the parties had agreed to hold the instant unfair practice charge in abeyance, pending the hearing officer's determination in the related clarification of unit proceeding. On August 30, 1977, however, the Association filed a request for interim relief along with a supporting affidavit, that while specifically directed at another unfair practice charge filed by the Association against the Board<sup>3/</sup>, also directly concerned the Board's reorganization decision that is the subject of the instant proceeding. Representatives of the Board and the Association were present on August 30, 1977 at a conference conducted by the undersigned that concerned the Association's proposed Order to Show Cause that had been filed with the Commission on that date.<sup>4/</sup> At the conclusion of this August 30, 1977 meeting the parties agreed that the Association would file an Amended Order to Show Cause along with a brief in support of the Association's application for interim relief that in part would relate to the instant unfair

<sup>3/</sup> This matter, Docket No. CO-77-259-8, related to assertions that the Board had unilaterally changed evaluation procedures affecting unit members represented by the Association and employed by the Board. A Complaint and Notice of Hearing with regard to this charge had been issued on August 4, 1977 and a pre-hearing conference and a hearing date had been scheduled at the time that the Association first sought interim relief.

<sup>4/</sup> The undersigned has been delegated by the Commission to act upon requests for interim relief on behalf of the Commission.

practice.<sup>5/</sup> It was further agreed that the Board would be given an opportunity to file a brief in opposition to the Association's application for the entry of an Order to Show Cause before the undersigned executed any order.

On September 14, 1977, the Association filed an Amended Proposed Order to Show Cause along with supportive documentation that formally sought interim relief in both the CO-77-259-8 evaluation procedures case and the CO-77-257 reorganization charge. The Board submitted thereafter a brief dated September 19, 1977 that concluded that the very act of executing an Order to Show Cause relating to these two matters would constitute an abuse of the Commission's interim relief procedures. The Board maintained that in accordance with analagous New Jersey Court Rules, R.4:67-1 et seq., any signing of a proposed order must be accompanied by an examination of the underlying merits of a case set forth in the moving papers in order to avoid abuse of the interim relief process. The Board concluded that if it was determined that the matters at issue could not be completely disposed of in a summary manner, then the very execution of an Order to Show Cause was inappropriate.

After careful consideration of the parties' submissions, the undersigned, on September 27, 1977, executed an Order to Show Cause relating to the reorganization charge that is the subject of

<sup>5/</sup> The Association's representative voluntarily agreed to withdraw the original proposed Order to Show Cause when it became apparent during the course of this meeting that the Association sought interim restraints in both the CO-77-259-8 "evaluation procedures matter" and the CO-77-257 "reorganization case".

this Interlocutory Decision. The undersigned had substantially modified the Order to Show Cause that had been submitted by the Association by deleting references to the CO-77-259-8 evaluation procedures charge. The undersigned concluded that the CO-77-259-8 matter could not be completely disposed of in a summary manner because of the existence of substantial and material disputed factual issues. The parties thereafter agreed that it would be unnecessary to schedule a formal Order to Show Cause hearing in this instant matter relating to the Association's request for interim relief. The Board was, however, given an opportunity to submit an additional brief in opposition to the Association's request for interim relief which prayed in part for an order restraining the Board from continuing the implementation of the reorganization concerning the creation of the position of teacher evaluator. The Board's brief was received by the Commission on October 13, 1977. The parties further agreed that the undersigned would thereafter issue a written Interlocutory Decision relating to the Association's application for interim relief after consideration of the charge and of the written submissions of the parties that had been submitted relating to the reorganization charge. This Interlocutory Decision is thus being prepared in accordance with the agreements of the parties.

It must first be borne in mind that this is an interim proceeding seeking extraordinary relief pursuant to N.J.A.C. 19:14-9.1 et seq. The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are of a rather stringent nature. These standards are quite similar to

those applied by the courts when confronted with similar applications. Basically, the test is twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the relief is not granted.<sup>6/</sup>

The undersigned concludes after reviewing all the materials submitted by the parties, that it cannot be said that the state of the law germane to this particular matter is so clearly in the Association's favor so as to concede to it the substantial likelihood of success before the Commission on the ultimate merits of this case. In fact, an analysis of apposite Commission decisions mandates the conclusion that given the facts in this case, the Association would have little chance of establishing that the Board's reorganizational decision regarding the creation of the position of teacher evaluator, admittedly effectuated without prior negotiations with the Association, constituted a refusal to negotiate in good faith concerning terms and conditions of employment.<sup>7/</sup>

<sup>6/</sup> See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976); In re Ridgefield Park Board of Education, P.E.R.C. No. 78-1, 3 NJPER \_\_\_\_\_, (1977); In re Newark Redevelopment and Housing Authority, P.E.R.C. No. 78-15, 3 NJPER \_\_\_\_\_ (1977).

<sup>7/</sup> It is important to emphasize at this juncture that all relevant documentation concerning the Association's request for interim relief in this matter appears to relate to the decisional aspects of the supervisory reorganization, i.e., the Association is seeking to enjoin the continued implementation of this administrative reorganization during the pendency of the unfair practice charge.

(Continued)



The Commission has determined that reorganizational decisions relating to staffing and manpower considerations are basic managerial prerogatives and are not required subjects for collective negotiations,<sup>8/</sup> but are permissive subjects for collective negotiations.<sup>9/</sup> The Commission has determined that its enforcement authorities in the context of allegations of a refusal to negotiate in good faith relate exclusively to terms and conditions of employment -- required subjects for collective negotiations -- absent factors not relevant to the instant

7/ (Continued) The Association's charge does in part refer to the Board's refusal to negotiate the impact on terms and conditions of employment of the abolishment of existing teacher positions and the creation of a new position. In addition, a June 18, 1976 letter from an Association representative, Walter Holcomb, to the Superintendent of Schools in the district relating to the Board's reorganization, states in part that the Association "takes the position that it is the right of the Board to create any administrative position that it wishes" and requests "impact" negotiations. However, the materials submitted in conjunction with the Association's request for interim relief challenged the Board's right to reorganize its supervisory network and do not relate to impact considerations.

The undersigned further notes that the Board acknowledges its obligation to negotiate regarding the effect or impact of its reorganization decisions on the terms and conditions of employment of negotiations unit members.

8/ See, e.g., In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66 (1977) and In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975).

9/ The Commission has defined a permissive subject for collective negotiations as one which is neither illegal nor required. Therefore, if a party chooses not to negotiate upon it, the other party cannot require that it be negotiated, but conversely, if it is raised the parties are permitted to negotiate upon it and reach agreement if they can, and that agreement, incorporated in the contract, is enforceable as part of the contract through recourse to arbitration or a court of competent jurisdiction. See, e.g., In re City of Jersey City, supra.

proceeding.<sup>10/</sup> Therefore, it cannot be controverted that the Board's reorganization decision<sup>11/</sup> does not relate to a refusal to negotiate in good faith concerning a term and condition of employment.

In its submissions the Association also questions the legality of the Board's actions relating to the reorganization decision, even if that decision in the abstract was considered to be only a permissive subject for collective negotiations. The Association refers to a provision within the recognition clause of the 1976-1978 agreement between the parties which states in part that: "the exclusion or inclusion in the negotiations unit of any new position which may be created hereinafter, failing agreement by the parties, shall be determined through petition to the Public Employment Relations Commission." The Association maintains that this clause creates a condition precedent to the actual implementation of any reorganization that results in the creation of a new position, i.e., the parties had to await a decision by the Commission concerning the clarification of unit petition relating to the status of teacher evaluators referred to hereinbefore, before the Board could implement any reorganization affecting its supervisory staff.

<sup>10/</sup> See, e.g., In re Piscataway Board of Education, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), appeal pending, App. Div. Docket No. A-3621-76 and In re Newark Redevelopment and Housing Authority, P.E.R.C. No. 78-15, 3 NJPER \_\_\_\_ (1977). Contractual provisions relating to permissive subjects are enforceable through grievance arbitration or through judicial action but they are not enforceable normally before the Commission in the context of unfair practice proceedings.

<sup>11/</sup> Again, the impact or effect of the Board's reorganization decision is not at issue in this interlocutory proceeding.

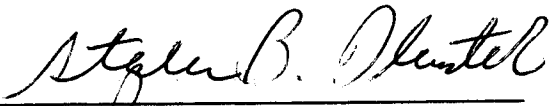
The undersigned does not find merit to this contention of the Association. There is nothing within the cited contractual provision that places restrictions on the Board's ability to reorganize its supervisory staff. Moreover, a clarification of unit petition has been filed, processed and heard concerning the unit status of the new teacher evaluator position. While it is true that the Board has unilaterally excluded teachers now holding the position of teacher evaluator from the negotiations unit represented by the Association while the aforementioned CU proceeding was pending on the basis that they are now supervisory personnel, the Commission has determined that actions of this type do not constitute per se violations of the Act.<sup>12/</sup> The Board, however, by its actions, may be found to have committed a violation of the Act if a Complaint is issued in this charge matter and the case proceeds to a plenary hearing, if it is determined in the related CU proceeding that teacher evaluators are still properly included in the teachers' negotiations unit.<sup>13/</sup>

In summary, since the Association's request for interim relief relates to the decisional aspects of the Board's reorganization decision and not to the impact, if any, of the reorganization on terms and conditions of employment, and given the present

<sup>12/</sup> See In re Passaic County Regional High School Board of Education, P.E.R.C. No. 77-19, 3 NJPER 34 (1977).

<sup>13/</sup> See In re Passaic County Regional High School Board of Education, supra.

state of the law relating to the negotiability of said decision, the application for interim relief is hereby denied.<sup>14/</sup>

  
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Stephen B. Hunter  
Special Assistant to the  
Chairman

DATED: Trenton, New Jersey  
December 9, 1977

<sup>14/</sup> In light of the undersigned's determination that the Commission's substantial likelihood of success standard has not been satisfied, it is unnecessary to determine whether the Commission's "irreparable harm test" is satisfied in this matter.