P.E.R.C. NO. 98-157

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLTS NECK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-305

COLTS NECK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Colts Neck Board of Education. The Complaint was based on an unfair practice charge filed by the Colts Neck Education Association. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it refused to pay personnel hired to teach in a before-school remedial program pro-rated salaries based on the teachers' salary guide. The Commission agrees with the Hearing Examiner that the charge essentially involved a good faith dispute over the proper interpretation of a negotiated agreement. The Commission also agrees that no facts support an assertion that the Board interfered with, restrained or coerced employees in violation of the Act or that it acted out of anti-union animus.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Kalac, Newman, Lavender & Campbell, attorneys (Howard M. Newman, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld and Randi Doner April, of counsel)

DECISION

On April 10, 1996, the Colts Neck Education Association filed an unfair practice charge against the Colts Neck Board of Education. The charge alleges that Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] by refusing to pay personnel hired to teach in a before-school remedial program pro-rated salaries based on the teacher's salary guide.

1/ These provisions 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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On June 12, 1996, a Complaint and Notice of Hearing issued. On June 22, the Board filed an Answer denying that it had violated the Act.

On December 9, 1996, the Board filed a motion for summary judgment supported by a brief, an affidavit and exhibits. The motion was referred to Hearing Examiner Elizabeth J. McGoldrick. See N.J.A.C. 19:14-4.8.

On January 9, 1998, the Hearing Examiner recommended granting the motion and dismissing the Complaint. H.E. No. 98-21, 24 NJPER 106 (¶29052 1998). She found, based upon a set of stipulated and uncontested facts (H.E. 98-21 at 2-4), that the charge essentially involved a good faith dispute over the proper interpretation of a negotiated agreement. Applying State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), she recommended dismissal of allegations that the Board violated its obligation to negotiate over terms and conditions of employment.2/ She also ruled that no facts supported an assertion that the Board had interfered with, restrained or coerced employees in violation of N.J.S.A. 34:13A-5.4a(1), or that it had acted out of anti-union animus in violation of N.J.S.A. 34:13A-5.4a(3).

2/ The Hearing Examiner noted that the charge did not specifically allege a violation of 5.4a(5) which prohibits refusals to negotiate in good faith over terms and conditions of employment.

On January 23, 1998, the Association filed exceptions asserting that the Board's action was a per se violation of its obligation to negotiate which could be remedied based on a charge alleging a violation of N.J.S.A. 34:13A-5.4a(1). On January 27, 1998, the Board filed a response urging adoption of the Hearing Examiner's recommendation.

We adopt the Hearing Examiner's recommendation dismissing the Complaint essentially for the reasons stated in her report. We observe that the Association's December 8, 1995 letter to the superintendent referenced specific contract articles and asserted that the payment of an hourly rate under one section of the contract rather than another violated the contract. This letter did not demand to negotiate.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: June 25, 1998
Trenton, New Jersey
ISSUED: June 26, 1998

H.E. NO. 98-21

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

In the Matter of

COLTS NECK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-305

COLTS NECK TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Colts Neck Township Board of Education did not violate the New Jersey Employer-Employee Relations Act by compensating employees hired for a before-school remedial program at the contractual rate of $21 per hour. The Hearing Examiner found that the dispute was essentially one of interpretation of the agreement between the Board and Colts Neck Township Education Association, and does not rise to the level of an unfair practice. She recommends that the matter be dismissed under State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 98-21

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

In the Matter of

COLTS NECK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-305

COLTS NECK TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Kalac, Newman, Lavender & Campbell, attorneys
(Howard M. Newman, of counsel)

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On April 10, 1996, the Colts Neck Township Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the Colts Neck Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"); specifically 5.4(a)(1) and (3).[1/] The charge alleges that the

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

Footnote Continued on Next Page

Board refused to place personnel hired for a before-school program on the teacher's salary guide.

On June 12, 1996, a Complaint and Notice of Hearing issued. On June 22, 1996, the Respondent filed an Answer denying that it violated the Act. On December 19, 1996 and June 4, 1997, the parties stipulated the facts:

Verbatim Stipulation of Facts

1. The Colts Neck Township Education Association is an employee organization pursuant to the provision of the New Jersey Employer-Employee Relations Act, as amended.

2. The Colts Neck Township Board of Education is a public employer pursuant to the provisions of the New Jersey Employer-Employee Relations Act, as amended.

3. The Charging Party and the Respondent are parties to a Collective Bargaining Agreement effective July 1, 1993 through June 30, 1996. (Appendix A)

4. In December of 1995, the Colts Neck Board of Education hired two part time, remedial teachers to work 5 hours per week at $21.00 per hour through June 30, 1996, as a "Teacher for the Before School Remediation Program." (See Minutes of December 6, 1995, Appendix B)

5. Both positions had been posted and no member of the Charging Party applied therefor.

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

6. The salary paid is the same as that set forth under Article XVI, A.,3 and 4 of the Collective Bargaining Agreement aforesaid.

7. The teachers hired for the positions aforementioned were not paid in accordance with the salary guide set for under Article XVI, B.

8. The two individuals hired possess appropriate certification to be teaching staff members.

9. By letter dated December 8, 1995 the Colts Neck Education Association requested the certified personnel in question be placed on the appropriate step of the salary guide, prorated to the assignment. (Appendix C)

10. By letter dated December 11, 1995, the Superintendent of Schools denied the request of the Education Association. (Appendix D)

11. Prior to June 30, 1996, all special services personnel received a yearly stipend in a set dollar amount, as provided for in the negotiated agreement, for services required beyond the contractual school day.

12. In the matter of remuneration for summer school employment; summer school employment was a past practice existing before the passage of collective bargaining legislation with the rate of pay determined by the Board of Education. Summer school employment was not a regular event. As a past practice and not a certain and regular event, the parties did not include summer school employment as a negotiated item.

On December 9, 1996, the Board filed a motion for summary judgment, brief, affidavit of Superintendent Gregg R. Hauser, and exhibits. The Commission referred the motion to me for disposition. The Association does not dispute the accuracy of Hauser's affidavit (Charging Party's brief, page 2). Accordingly, I will consider the affidavit in this decision.

Hauser's affidavit adds these facts:

1. The December 8, 1995 letter (paragraph 9 of the Stipulation) was the only communication Hauser ever received from the Association regarding the issues in this case. To the affiant's knowledge, no other communication was sent by the Colts Neck Education Association and Hauser is "the person to whom the union communicates."

2. Each person selected was an aide working for the Board and had appropriate teacher certification.

3. The position was for one hour a day for each teacher.

Article 1, "Recognition", of the collective agreement states:

Those covered by the contract are identified as all regularly employed salaried and certificated personnel, excluding administrators.

Article XVI, A and B of the agreement provide:

A. Stipends

3. Curriculum Development/Revision Committee

It is understood that clear guidelines will be established as to the committee's function, specific tasks and time frame.

Compensation	(1993-96)
	$21 per hour

4. Home Instruction/Translation Services

a. Teachers providing home instruction shall be compensated at $21 per hour for 1993-96.

b. Translation services shall be paid at the same rate as 4.a.

B. Salaries

1. Teachers employed on a ten (10) month basis shall be paid in twenty (20) equal

> semi-monthly installments from September through June. Those wishing summer pay will have ten percent (10%) of their gross monthly salary deducted each month from September through June. Teachers selecting this option shall receive four (4) equal payments payable during July and August. Payments shall be made on the 15th and 30th of each month. Teachers selecting the ten (10) month option shall receive their final checks on the last working day in June...

The agreement also contains six salary schedules for the three school years from 1993 through 1996. Each schedule contains 22 steps. At Article III, the agreement contains a grievance procedure ending in binding arbitration.

The Association argues that the Board should have paid the employees hired for the before-school remedial program at a rate corresponding to an appropriate rate found in the salary schedules in the parties' agreement, commensurate with their certification and advanced degrees, if any, and prorated according to the hours they work. Alternatively, the Association argues that the Board should have negotiated which section of the contract applied to these employees. It argues that the Board's refusal to negotiate the selection of the appropriate contract provision constitutes a per se unfair practice.2/

2/ The Association did not plead a violation of 5.4a(5) which prohibits public employers, their representatives or agents from: 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.

The Association further argues that the disputed employees have sufficient regularity of employment to satisfy the recognition clause of the contract, that they were hired as teachers and teach every day.

The Board argues that the parties agreed to binding arbitration as the sole and exclusive remedy for an alleged contract violation that in its December 8, 1995, letter the Association argues that the Board violated the contract. The Board argues this dispute must be resolved through binding arbitration. However, the Board points out that no grievance was ever filed, no demand for arbitration was ever made, and any grievance now filed under the contract is untimely, citing Brookdale College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983) and East Windsor Bd. of Ed., E.D. No. 76-6, 1 NJPER 59 (1976).

Alternatively, the Board argues that the Association never demanded negotiations. Rather, it requested that the two employees be placed on the appropriate step of the salary guide, prorated (December 8, 1995 letter). The Board argues that it relied on the collective negotiations agreement to determine the compensation for the new employees (Respondent's Brief at page 2).

It further argues that the facts, as pleaded, do not demonstrate violations of 5.4a(1) or (3) of the Act, under the standards in In re Bridgewater, 97 N.J. 235 (1984).

Finally, the Board argues that the Association does not represent these employees. It argues that one hour of work per day,

before the school day begins, does not constitute regular employment within the meaning of the recognition clause.

ANALYSIS

The gravamen of this charge concerns a contract dispute. The charge alleges the Board failed to compensate these employees in accordance with the negotiated salary guide. The Board's defense is that it complied with the contact; it paid the employees pursuant to Article XIV, Section A.

In effect, the parties have interpreted the contract differently. Here, the Board had the non-negotiable right to make the initial appointments. The Association, in turn, had the right to either demand negotiations, if it believed the new positions were not contemplated by the contract, or, to file a grievance if it believed the positions belong in the unit and were improperly compensated. It did neither. See, Trenton Bd. of Ed., P.E.R.C, No. 88-16, 13 NJPER 714 (¶18266 1987) (Commission found no unfair practice where the union bore the burden of demanding negotiations over compensation but failed to request bargaining). A public employer has a duty to negotiate an initial salary rate, but Charging Party does not allege that the Board refused to negotiate an initial rate, it alleges that the Board chose the incorrect rate. A good faith dispute over the proper interpretation of negotiated terms does not rise to the level of an unfair practice. State of New Jersey (Department of Human Services), P.E.R.C. No.

84-148, 10 NJPER 419 (¶15191 1984)(a mere breach of contract claim does not state a cause of action under 5.4a(5) which may be litigated through unfair practice proceedings. Parties must attempt to resolve such contract disputes through their negotiated grievance procedures)

This matter is not appropriate for deferral to arbitration because the Board argues that any grievance filed at this time would be untimely. The Commission will defer a case to the grievance arbitration procedure only where the arbitrator can reach the underlying merits of the dispute.

The 5.4(a)(1) Allegation

The Act at section 5.3 provides that:

> ...public employees shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

Any interference with those rights violates the Act. A public employer independently violates section 5.4(a)(1) of the Act if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification.3/

Nothing in the stipulated record demonstrates that the Board's conduct interfered, restrained or coerced employees in the

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3/ See, New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); and Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

exercise of their rights within the meaning of 5.4a(1) of the Act. The Board chose a pay rate found in the collective agreement. The Association neither demanded negotiations nor sought to enforce its interpretation of the contract through the grievance procedure. Based on the above record, I do not find that the Board's actions interfered with, restrained or coerced anyone in the exercise of rights guaranteed by the Act.

Charging Party has not proven its 5.4a(3) allegation. No facts in the record demonstrate discrimination in any term or condition of employment to encourage or discourage employees in the exercise of rights by the Act. Bridgewater.

Since the charging party did not make out an unfair practice, it is not necessary to determine if the positions in dispute are represented by the Association.

CONCLUSIONS OF LAW

The Colts Neck Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3) by compensating employees hired for the before-school program in December 1995 at $21 per hour.

RECOMMENDATION

I recommend the complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: January 9, 1998
Trenton, New Jersey