P.E.R.C. NO. 78-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

Docket No. CO-76-330-75

-and-

NEW BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission denies a Motion for Reconsideration filed by the Board with respect to a previously issued Decision and Order, P.E.R.C. No. 78-47, 4 NJPER 84 (Para. 4040 1978). The Commission's Rules provide for a Motion for Reconsideration because of "extraordinary circumstances". The Board's Motion for Reconsideration alleges no such extraordinary circumstances but rather raises issues which are without merit or which were given full consideration in the Commission's earlier decision.

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Appearances:
For the Respondent, Murray, Meagher & Granello, Esqs.
(Mr. James P. Granello, On the Motion)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford B. Oxfeld, of Counsel)

DECISION AND ORDER ON MOTION

On January 24, 1978, the Public Employment Relations Commission issued its decision in the above-captioned unfair practice proceeding. In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (Para. 4040 1978). In that decision the Commission, after carefully considering the record, briefs, exceptions and oral argument, adopted the Hearing Examiner's findings of fact, conclusions of law, and recommended order with certain modifications and amplification necessitated by the additional arguments raised in the Board's exceptions.

In its major exception to the Hearing Examiner's Recommended Report and Decision, the Board contended that the employees in question -- guidance counselors, psychologists, learning consultants, social workers and special education teachers -- where covered by Salary Schedule F of the 1975-76 agreement. This schedule

provided weekly compensation for summer school employment which was substantially lower than the compensation which these employees received under an established practice. The Board argued that where, through such an established practice, an employer grants a more generous benefit than that provided by the contract, the contract provision takes precedence over the past practice. Since the Board could only be held to the obligation it contracted for, it asserted that a unilateral return to the lesser contractual benefit could not constitute an unfair practice.

The Commission found that Schedule F, on its face, did not clearly and unambiguously apply to the employees in question and concluded, after a review of relevant portions of the contract as well as the practice in the district, that Schedule F applied only to those teachers who normally work ten months and not to the employees subject to the instant dispute. Therefore, we concluded that there was an established practice of summer compensation for these employees which took precedence. Under N.J.S.A. 34:13A-5.3, when a public employer, during the term of an agreement, desires to alter an established practice governing working conditions which is neither an explicit nor an implied term of the agreement through a "maintenance of benefits" or other similar provision, the employer must first negotiate such proposed change with the employees' representative prior to its implementation. Accordingly, the Commission found that, even though under the then existing law,[1/] the Board could

1/ See In re Fair Lawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975). This case was subsequently reversed by In re Piscataway Township Board of Education, P.E.R.C. No. 77-37, 3 NJPER 82 (1977), which held that public employers must negotiate a decision to shorten an employee's work year.

unilaterally alter the practice of eleven month contracts, it could not unilaterally alter the established salary practice for this eleventh month of employment without first negotiating the issue.

By Notice of Motion dated February 13, 1978, the Board filed a Motion for Reconsideration and a letter brief, pursuant to N.J.A.C. 19:14-8.4, in which it requested reconsideration of the Commission's decision. Several grounds were asserted as the basis for this request. There being a "zipper" clause in the 1977-79 agreement between the parties, the Board contends that the Commission might reach a different conclusion as to whether there exists a viable established practice which takes precedence over the contract. Further, it argues that the question of whether Schedule F applied to these employees was not a disputed issue of fact before the Commission. Next, the Board contends that the inclusion of Schedule F in the 1977-79 contract, with a negotiated increase in salaries and without differentiation among professional groups, evinces that the parties intended to arrive at one salary schedule for all summer school positions. The Commission's interpretation of Schedule F as not applicable to the employees in question is also assailed. Finally, the Board requests that the Commission reconsider its refusal to defer to arbitration of this dispute. The Association opposes the Board's motion.

The Board's motion is hereby denied. N.J.A.C. 19:14-8.4 provides for a motion for reconsideration because of "extraordinary circumstances". The Board's motion and brief allege no such extraordinary circumstances, but rather raises issues which are without merit or which were given full consideration in the Commission's decision.

A review of the decision confirms that the Commission's interpretation that Schedule F was not applicable to the employees in question was arrived at after a careful and thorough consideration of the relevant contract provisions and the record as it pertains to the surrounding circumstances and the conduct of the parties.

Schedule F was interpreted by the Commission as covering only teachers who, being regularly employed for a ten month year, are paid according to the schedule for the additional services they provide in a separate summer school program. Accordingly, the Commission reiterates its conclusion (found at page 11 of the decision) that the inclusion of the schedule, as renegotiated in the 1977-79 agreement, has no affect on the viability of the established salary practice for the employees in question. Further, the Commission, in refusing to reconsider its decision not to defer to arbitration, reaffirms this conclusion.

The Board unilaterally terminated this established practice in May 1976, claiming that these employees were covered by Schedule F of the 1975-76 agreement. It is this contract which is relevant, not the 1977-79 agreement. The 1975-76 contract does not include a "zipper clause". Moreover, the fact that such a clause was included in the 1977-79 agreement does not, as the Board asserts, "/have/ the effect of terminating reliance on the application of any past practices not expressly incorporated within the terms of the contract."

Such clauses usually recite that the contract contains

the full bargain of the parties and that each waives its right to bargain, and agrees that the other is not obligated to bargain, on any subject during the term of the contract. But this will not constitute a defense to a unilateral change in a term and condition of employment. Thus, an employer can rely on such clauses to refuse to bargain on any new proposals, whether previously discussed or not, for the life of the agreement, but it cannot utilize them to assert a right to make changes in the status quo without new negotiations.[2/] Therefore, the inclusion of this clause in the 1977-79 agreement does not establish that the Association was subsequently accepting the Board's position that it had a right to unilaterally terminate the established salary practice and apply Schedule F to these employees.[3/]

The question as to the applicability of Schedule F to these employees was squarely before the Commission. The Board in its exception, brief in support thereof, and especially in its supplemental letter brief, consistently argued that in relation to these employees Schedule F took precedence over the established practice.[4/] The Association, at oral argument before the Commission, clearly took the position that there was no contractual provision applicable to these employees.

The Board's motion also contains a request for information

2/ NLRB v. Jacobs Manufacturing Co., 94 NLRB 1214, 28 LRRM 1162 (1951) enforced 196 F.2d 680, 30 LRRM 2098 (2nd Cir. 1952), C & C Plywood v. NLRB, 385 U.S. 421, 64 LRRM 2065 (1967).

3/ At page 11, footnote 19 of the Commission's Decision and Order, the testimony of Association President Sincaglia to the same effect is noted.

4/ Oral argument before the Commission, December 20, 1977, page 19.

regarding Commissioner Hurwitz' role in this decision, copies of Commission minutes regarding this matter, and copies of reports, papers or memoranda prepared by any person for the Commission and the Hearing Examiner in this matter.

The minutes of the Commission meeting of January 19, 1978, which was the only time this matter was discussed by the Commission aside from the December 20, 1977 oral argument which was transcribed, are quoted below in their entirety as they relate to this matter:

> "Next for consideration by the Commissioners was the decision in In re New Brunswick Board of Education, Docket No. CO-76-330-75. Under protest, Commissioner Hurwitz refrained from consideration of this decision. Commissioner Forst moved to adopt the decision. Commissioner Parcells seconded the motion. The motion to adopt the decision was approved by a vote of 3 in favor (Chairman Tener, Commissioners Forst and Parcells), none opposed."

As stated in the minutes, Commissioner Hurwitz abstained from consideration of this matter under protest. The Commission's Code of Ethics adopted pursuant to the Conflicts of Interest Law has been interpreted as requiring his total nonparticipation in matters involving district boards of education.[4/]

The Board has not indicated the basis for its request or the nature of any materials sought. However, the Commission does not believe that it would be appropriate to make available to any party litigating a matter before the Commission copies of

4/ Commissioner Hipp was not present at this meeting but he, too, would not have participated in this matter because the employee organization is an affiliate of the New Jersey Education Association.

any purely internal intra-Commission research or draft reports, papers or memoranda prepared either for the Commission or the Hearing Examiner, assuming that such existed in this case.

The Commission, having determined that the Board failed to establish "extraordinary circumstances", hereby denies the Motion for Reconsideration.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett and Parcells voted for this decision. None opposed. Commissioners Hipp and Hurwitz abstained.

DATED: Trenton, New Jersey
March 16, 1978
ISSUED: March 22, 1978