P.E.R.C. NO. 89-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSIDE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-87-371

HILLSIDE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Hillside Education Association against the Hillside Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by repudiating and refusing to execute a ratified collective negotiations agreement covering security guards. The Association has shown *prima facie* that the Board refused to reduce a negotiated agreement to writing. The Board, however, proved that the parties intended to maintain the status quo regarding work hours and that the written agreement does not reflect that mutual intent.

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Charging Party.

Appearances:

For the Respondent, Yauch, Peterpaul & Clark (Frank J. Peterpaul, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine and Brooks (Mark J. Blunda, of counsel)

DECISION AND ORDER

On June 22, 1987, the Hillside Education Association ("Association") filed an unfair practice charge against the Hillside Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (5) and (6),[1/] by repudiating and refusing to execute a ratified collective negotiations agreement covering security guards.

1/ These subsections 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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

On August 11, 1987, a Complaint and Notice of Hearing issued. On August 31, the Board filed an Answer admitting that it had refused to sign the agreement, but asserting that the agreement erroneously provides for a paid lunch break.

On November 23, 1987, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties stipulated certain facts, examined witnesses and introduced joint exhibits. Both parties submitted briefs on January 29, 1988.

On June 30, 1988, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 88-66, 14 NJPER 520 (¶19221 1988). She found that both parties intended to memorialize the existing workday with its unpaid lunch period; but by mutual mistake, their written agreement provided for a paid lunch period and thus guaranteed one-half hour of overtime daily.[2/]

On July 20, 1988, the Association filed exceptions. It asks us to make these additions and modifications to the recommended findings of fact: (1) the Association's written contract proposal was given to the Board's attorney/negotiator, the Board's business administrator, and the Board member on the negotiating committee; (2) the Board's negotiator asked questions about the Association's proposals and clarifications were given; (3) the Association's negotiator proposed a one-half hour paid lunch through its

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2/ The Board Secretary testified it would not be feasible for guards to work a shorter workday to avoid overtime.

definition of the workday and believed the Board understood the proposal; (4) the Association never indicated to the Board's negotiator that the proposal continued the prior practice; (5) security guard Frazier Wylie testified that the memorandum of understanding reflected the parties' agreement; (6) the Association's negotiator testified that each provision was gone through at the Association's ratification meeting; (7) the Board's business administrator reviewed the Association's initial proposal and the memorandum of understanding before it was signed, and (8) the language in the proposal, the memorandum of understanding, and the formal agreement sent to the Board were identical. The Association argues that the record does not support the conclusion that the parties mutually understood that the workday would remain as it had been. It also argues that since the language of the signed memorandum is clear and unambiguous, the parol evidence rule bars considering testimony to add to or vary the terms of a complete written agreement. Finally, the Association argues that, absent fraud, the Board must accept the consequences of its inattentiveness.

We have reviewed the record. The Hearing Examiner's finding of fact (pp. 2-6) are accurate. We incorporate them. We add to the findings the above summary of the Association's exceptions to the findings of fact except to the extent they imply that either party knew during negotiations that the workday proposal might modify the status quo.

N.J.S.A. 34:13A-5.3 provides that "[w]hen an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." Subsection 5.4(a)(6) prohibits an employer's refusal to reduce an agreement to writing and to sign it.

In June 1986, the Association submitted written proposals to the Board. Those proposals included the disputed language on work hours. The parties met about 10 times and indicated their agreement to individual language by initialing a copy of the Association's proposal. They agreed to the work hours article at the first session. Eventually, with the assistance of a Commission mediator, they reached a tentative agreement.

On January 1, 1987, the negotiations teams signed a memorandum of understanding incorporating by reference the initialed Association proposals. By late January, both parties had ratified the agreement. The Association submitted a typed formal agreement to the Board for signature. The Board implemented the agreement's terms. In March or April, the Association raised with the Board the issue of unpaid overtime. The Board then refused to execute the final agreement because the Board did not agree with the Association's new interpretation of the work hours provision.

The parties do not dispute that they agreed to the Association's work hour proposal, that the identical language was in the memorandum of understanding, and that the Board refused to sign

a final contract incorporating that language. Thus, the Association has shown *prima facie* that the Board refused to reduce a negotiated agreement to writing.

The Board, however, has raised the affirmative defense of mutual mistake. It claims that the parties intended to maintain the status quo regarding work hours and that the written agreement does not reflect that mutual intent.

Our starting point is illustrated in J. Calamari and J. Perillo, *Contracts*, 2d ed., §9-31 at 312 (1978) cited in *Steelworkers v. Johnston Industries*, __ *F. Supp.* ___, 120 *LRRM* 2695 (E.D. Mich. 1984)

> Contracts are not reformed for mistakes; writings are. The distinction is crucial. With rare exceptions, courts have been tenacious in refusing to remake a bargain entered into because of mistake. They will, however, rewrite a writing which does not express the bargain.

We are reluctant to allow a party to avoid its obligation to reduce an agreement to writing if a memorandum of understanding is clear and if its language is internally consistent on its face. *See Cajun Elec. Power Coop. v. Riley Stoker Corp.*, 791 *F*.2d 353 (5th Cir. 1986). The Board, therefore, must prove by clear, satisfactory, specific and convincing evidence that the written agreement does not accurately reflect what the parties intended. *Whener v. Schroeder*, 354 *N.W.*2d 674, 678 (N.D. 1984).3/

3/ Because the Board claims that the agreement does not set forth the parties' actual agreement, the parol evidence rule does not bar proof, in the form of parol or extrinsic evidence, of the claimed agreement. *Chimart Assocs. v. Paul*, 66 *N.Y.*2d 570, 489 *N.E.*2d 231, 498 *N.Y.S.*2d 344 (1986).

The Board has met its burden. Both parties intended that the workday would remain the same--eight hours of work with an unpaid lunch. The Board's intent is undisputed. The Association's intent was proved. It never intended to either reduce the workday by one-half hour or to provide compensation for lunch. George Huk, the Association's negotiator, testified that he could not say unequivocally that the Association intended the language to include a paid lunch period. At the Association's ratification meeting, Huk did not inform the membership of any alleged agreement to change the workday despite its overtime implications. Fraser Wylie, a member of the Association's negotiations team, testified that in developing the work hours proposal, no one from the Association said that the clause would establish a paid lunch. Nor was such a change noted at negotiations or at the ratification meeting. Wylie did not intend, through negotiations, to obtain payment for the lunch period that had been unpaid. In fact, he was "surprised" when he later heard the contention, first raised two months after ratification, that employees should be paid for lunch.

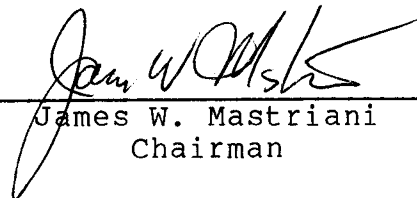
Under these unusual circumstances, we find that the memorandum of understanding does not reflect the parties' agreement. Harmonious labor relations would not be served by enforcing contract language that conflicts with both parties'

intent.[4/] Accordingly, we dismiss the allegation that the Board unlawfully refused to reduce a negotiated agreement to writing.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
November 22, 1988
ISSUED: November 23, 1988

4/ This decision does not excuse a party from the unintended consequences of a negotiated agreement. A party cannot expect relief merely because it did not realize the consequences of its assent.

H.E. NO. 88-66

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

In the Matter of

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Respondent,

-and-

Docket No. CO-H-87-371

HILLSIDE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Board did not violate section 5.4(a)(1)(5) and (6) of the New Jersey Employee Relations Act by refusing to execute a collective negotiated agreement. The Hearing Examiner finds that both parties intended to memorialize the existing workday but by mutual mistake, their written agreement provided for a shortened workday. Therefore, the Hearing Examiner recommended dismissal of Complaint.

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. 88-66

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

For the Respondent, Yauch, Peterpaul & Clark
Frank J. Peterpaul of counsel

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks
Mark J. Blunda of counsel

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On June 22, 1987, the Hillside Education Association ("Association") filed an unfair practice charge against the Hillside Board of Education ("Board") with the Public Employment Relations Commission ("Commission"). The charge alleges that the Board violated subsections 5.4(a)(1), (5) and (6)[1/] of the New

1/ These subsections 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; (5) Refusing to

Footnote Continued on Next Page

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by allegedly repudiating and refusing to execute a collectively negotiated and ratified agreement between the parties covering security guards.

On August 11, 1987, a Complaint and Notice of Hearing issued. The Board filed an Answer to the Complaint, admitting that it refuses to sign the agreement, but asserting that the agreement erroneously provides a paid lunch break. The Board contends that this was contrary to the parties' mutual intention to memorialize the existing work day, including an unpaid lunch break.

On November 23, 1987, I conducted a hearing.[2/] The parties stipulated certain facts, examined witnesses and submitted joint exhibits. Both parties submitted briefs on January 29, 1988.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Association is the exclusive representative of a collective negotiations unit of security personnel[3/] employed by the Board.

1/ Footnote Continued From Previous Page

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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ The transcript of the hearing will be referred to as "T." Exhibits will be referred to as "J."

3/ The unit includes the titles public school law enforcement officers, attendance officers, hall aides.

2. The Board and the Association began negotiations for the guards' first collective agreement in June 1986. At the first negotiations session, the Association submitted its written contract proposals (J-1) to the Board. The work hours article of J-1 provides,

> B. The basic work week shall be Monday through Friday; the basic work day shall be eight hours, inclusive of a one-half hour lunch and two ten-minute breaks.
>
> C. Overtime shall be offered on a rotating basis by seniority and shall be compensated according to the following: 1/8 x annual salary/student days x number of hours x 1-1/2 for any time beyond an eight hour shift, or for any work on Saturday or a holiday.
>
> * * *

3. Working from these written proposals, the parties met in negotiations for about 10 sessions, and initialed items on a copy of the Association's proposal they were agreed. Article 5B, the "workday" article, was agreed to at the parties' first session, on June 3 (J-2).

4. The guards' workday has historically been 7:30 a.m. to 4 p.m. Guards take two ten-minute breaks and one thirty-minute lunch break within that period. [4/]

4/ Board Secretary Martin Lynch asserts that it would not be feasible for guards to work a shorter workday. Students arrive at 7:50 a.m. and normally leave at 3:00 p.m., although extra-curricular activities are held after school. Guards are needed to oversee building security during the entire time. For reasons that follow, I do not find the feasibility of a shorter workday to be relevant.

5. Although there were negotiations about the overtime formula (Article 5C), there were no discussions between the parties concerning a decrease of the employees' workday, or the impact of the work hours remaining the same vis-a-vis the payment of overtime to security guards for the lunch period.

6. The Board negotiators believed that this clause was a memorialization of the security guards' existing workday. Board Attorney and Negotiator Sandy Meskin understood that Article 5B continued the existing practice. Board Secretary/Business Administrator Martin Lynch, although not present in negotiations until the arrival of the mediator, was responsible for directing the negotiators' approval of proposals. He also understood the proposed Article 5B to be a confirmation of the status quo.

7. Association Negotiator George Huk acknowledged that he could not unequivocally state that he intended the workday to include a one-half hour paid lunch period (T-44). Frazier Wylie, a security guard and member of the Association's negotiating team, testified that in formulating the union's proposals the committee did not determine to propose a clause to change the lunch hour to a paid one, and in fact, the concept of payment for lunch was not discussed across the bargaining table nor mentioned in ratification. (T-46-47).

8. Eventually, with the assistance of a Commission mediator, the parties reached tentative agreement. On January 1, 1987 the respective negotiations teams signed a memorandum of

agreement (J-2) incorporating by reference the marked-up copy of the Association's proposals (J-3).

9. By late January 1987 the Board and the Association had each ratified the agreement. When the Association presented the agreement to its membership for ratification, Huk did not mention a decrease in the workday or the possibility that the employees would be compensated an extra half hour per day (T40-T42).

10. After ratification, Huk transmitted a typed formal agreement to the Board for its signature.

11. Sometime in late January, the Board implemented the new agreement, paid the employees the new rate, and issued retroactivity checks. Those payments did not include payment for the extra half hour, nor did the Board alter the length of the workday (T-42-43). After the Board implemented the settlement, Wylie met with Lynch about his retroactivity pay but did not mention payment for the lunch period.

12. Sometime in March or April, unit members brought the matter of payment for the extra half-hour to the attention of shop steward Tim Diffley, who then took the complaint to Association Negotiator George Huk. Huk then "complained" to the Board Secretary about employees having to work "one-half hour overtime a day."

Wylie was surprised when he heard for the first time in March or April, 1987, that the guards were contending that they should be paid for the lunch period. He testified that it "was not his notion" that guards were supposed to be paid for the lunch period when he signed the memorandum of agreement (T46-48).

13. Sometime in March or April, 1987, after several requests, the Board told the Association that its was unwilling to execute the final agreement because the Board did not agree to the Association's interpretation of Article 5 Section B" (Exhibit J-3).

ANALYSIS

N.J.S.A. 34:13(a) 5.3 provides that employers and employee representatives shall meet and negotiate in good faith concerning terms and conditions of employment, and that, "...when an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed...."

N.J.S.A. 34:13(a) 5.4(a)(6) provides that a refusal to reduce a negotiated agreement to writing and to sign it constitutes a violation of the Act.

The Association charges that the Board has engaged in a violation of 5.4(a)(6) by its refusal to sign the final contract where terms and conditions of employment were negotiated, ratified, and reduced to writing.

The Board asserts that it was never the intention of either party during negotiations to alter the work hours of the employees, nor to provide for overtime payments on a daily basis for employees working the existing work schedule. Thus, the Board argues that the

language concerning the workday in the Memorandum of Agreement was simply a mutual mistake by the parties.[5/]

The Association has the burden of proving its allegations by a preponderance of the evidence. N.J.A.C. 19:14-6.8. In this case, the Association alleges that the Board refuses to sign the contract containing a workday clause providing for an 8-hour shift with a half-hour paid lunch period. To succeed in its claim, then the Association must show that there was mutual agreement on terms and conditions of employment, including the workday clause, and that that agreement is accurately reflected in the language of the contract. The Board's defense is that there was no such agreement. Thus, the question here is whether the parties agreed to a paid lunch hour. I find that the parties did not so agree.

"To establish a violation, the Association must establish that the contract it prepared incorporated the parties' agreement." Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983) ("Jersey City"). The inquiry must focus on the intentions of the parties. As the Commission noted in Jersey City, our Supreme Court has set forth standards for reviewing intentions of contracting parties:

5/ Alternatively, the Board argues that there was no meeting of the minds between the Association and the Board, since the Board continuously believed that the clause was intended to mirror the past practice with regard to hours of work, and thus the Board asserts that the language was a unilateral mistake by the Board.

> A number of interpretative devices have been used to discover the parties' intent. These include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage and the interpretation placed on the disputed provision by the parties' conduct. Several of these tools may be available in any given situation--some leading to conflicting results. But the weighing and consideration in the last analysis should lead to what is considered to be the parties' understanding.... Kearny PBA Local #21 v. Twp. of Kearny, 81 N.J. 208, 221-222 (1979).

Here, I find that the parties' mutually understood that the workday would remain as it had been--eight hours of work and an unpaid lunch period. The Board's intention to maintain the existing workday of eight working hours and an unpaid lunch is not disputed. I agree with the Association that if this intent were only the Board's unilateral, and unexpressed intent, would be insufficient to establish an agreement. Newark Publishers' Assn. v. Newark Typographical Union, 22 N.J. 419 (1956) at 427. However, it is clear from the Association's own witnesses, that the Association also never intended to either reduce the workday by a half hour, or to provide compensation for the lunch break. Huk and Wylie both acknowledged that they could unequivocally say that was the Association's intent, and in fact, Wylie was surprised when in March, 1987 he discovered the contract appeared to provide a paid lunch . There were no negotiations about the hours of work. Additionally, the Association, in formulating its proposals, did not determine to formulate a proposal to alter the workday. Nor did Huk inform the employees during the ratification process that the Association had

secured a reduction in the workday or a paid lunch hour. For the foregoing reasons, I find that the Association also did not intend to contract for a eight-hour workday including a paid lunch period. Since clearly neither party intended to alter the workday of the security guards, I infer then, that the parties mutually intended to retain the status quo.

The Board asserts that the wording of the contract was a mutual mistake made by both parties. I agree. "Mutual mistake" is defined by Black's Law Dictionary (rev. 5th ed. 1979) as

> [O]ne common to both contracting parties, wherein each labors under the same misconception as to past or existing material fact (citations omitted). Mutual mistake with regard to contract exists where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties. Id. at 920.

Clearly, the writing as contained in the parties' memorandum of agreement does not reflect their mutual intent to maintain the existing workday. Therefore, I find that the language is a mutual mistake. The Courts will not make a different or better contract than the parties themselves have seen fit to enter into. Communications Workers of America v. Monmouth County Board of Social Services, 96 N.J. 442 (1984). Surely the Commission should not give effect to that mistake by enforcement of a contract which gives the employees more than what both parties mutually negotiated for.

The Association cites Barnegat Tp. Bd. of Ed., P.E.R.C. No. 87-131, 13 NJPER 351 (¶18142 1987), aff'd App. Div. Dkt. No. A-4872-86T8 (3/18/88); Bergen County Prosecutor's Office, P.E.R.C. No. 83-90, 9 NJPER 75 (¶14040 1982); Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985) for the proposition that where the agreement is clear and unambiguous, there is no need to look further to discover the parties' intentions. However, in each of these cases, the Commission did examine the intent of the parties, and found in each case, that the parties had different understandings of what was agreed to. Therefore, citing Newark Publishers' Assn. v. Newark Typographical Union, 22 N.J. 419 (1956), the Commission found that "the intent of the parties, as clearly expressed in writing, controls." Here, I have found that the parties had the same intent. Exclusive reliance on the written memorandum of agreement here would be inappropriate, since the inartfully drafted contract language does not reflect what the parties mutually intended.

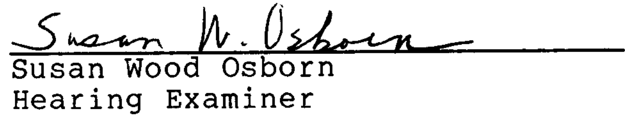
CONCLUSIONS

I conclude that the Association has not proven by a preponderance of the evidence that the parties agreed to reduce the workday to eight hours, nor to provide for a paid lunch hour. Thus, I find that the Association has failed to demonstrate that the Board refused to sign a negotiated agreement in violation of 34:13A-5.4(a)(6). I also find that the Board did not repudiate the agreement of the parties in violation of 5.4(a)(5) since the

parties did not mutually agree to a change in the existing workday.

RECOMMENDATION

I recommend that the Charge be dismissed in its entirety.



Susan Wood Osborn
Hearing Examiner

DATED: June 30, 1988
Trenton, New Jersey