P.E.R.C. NO. 81-131

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODBRIDGE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-41-90

WOODBRIDGE TOWNSHIP FEDERATION
OF TEACHERS, LOCAL 822, AFT,
AFL-CIO,

Charging Party.

SYNOPSIS

In an unfair practice decision the Commission, in agreement with its Hearing Examiner, finds that the Woodbridge Township Board of Education did not negotiate in bad faith with the Federation concerning the topic of establishing an agency shop arrangement for employees represented by the Federation. While the Commission finds that a public employer may not insist upon an examination of an employee organization's financial records as a pre-condition to negotiation of agency shop, the Commission concludes that the totality of the Board's conduct during the negotiations which lasted only one session did not amount to bad faith. Additionally, the Commission holds that a public employer may not insist to the point of impasse that an employee organization agree to collect from non-members a representation fee in lieu of dues which is less than the maximum allowed by statute. (i.e. union dues minus the cost of benefits available only to members up to a maximum of 85%). The agency shop law contains procedures by which non-members who pay the representation fee can seek a determination as to whether the fee meets the statutory criteria. The Commission finds that the legislative intent in enacting the Agency Shop Law and the procedures to review amounts assessed as representation fees in lieu of dues were intended to insulate public employers from becoming involved in disputes concerning the amount charged by employee organizations as union dues or as representation fees in lieu of dues.

P.E.R.C. NO. 81-131

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOODBRIDGE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-81-41-90

WOODBRIDGE TOWNSHIP FEDERATION
OF TEACHERS, LOCAL 822, AFT,
AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Hutt, Berkow, Hollander & Jankowski, Esqs.
(Stewart M. Hutt, of Counsel)

For the Charging Party, Sauer, Boyle, Dwyer, Canellis & Cambria, Esqs.
(George W. Canellis, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on August 15, 1980 by the Woodbridge Township Federation of Teachers, Local 822, AFT, AFL-CIO (hereinafter "Charging Party" or the "Federation"), alleging that the Woodbridge Township Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"). The gravamen of the charge is that the Respondent, on July 31, 1980, refused to negotiate in good faith with the Charging Party with respect to an agency shop clause, the Respondent stating that it was philosophically

opposed to such provisions. The charge further alleges that the Respondent demanded access to confidential financial records of the Charging Party as a pre-condition to any further negotiations on agency shop. These actions were alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing were issued on January 14, 1981. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 12, 1981 in Newark, New Jersey, before Commission Hearing Examiner Alan R. Howe, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

On March 18, 1981, the Hearing Examiner issued his Recommended Report and Decision (a copy of which is attached hereto and made a part hereof), which recommended that the Complaint be dismissed. The Hearing Examiner concluded that the Board's position at the July 31, 1980 negotiating session did not amount to bad faith negotiations under the facts of this case. He based this conclusion, in part, upon the fact that the Federation filed the charge after only one negotiations meeting on the subject of

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" and "(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."

agency shop, which precluded the opportunity for future meetings in which the Board might have been prepared to alter its position.

Exceptions to the Hearing Examiner's report have been filed by the Charging Party, and an Answer thereto was filed by the Respondent on April 27, 1981. The matter is now before the Commission for determination. Upon review of the entire record in this matter, we affirm the Hearing Examiner's findings of fact and his conclusion that the Board's conduct at the July 31, 1980 negotiating session was not violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

The Agency Shop Law, N.J.S.A. 34:13A-5.5, Chapter 477, P.L. of 1979 (codified as N.J.S.A. 34:13A-5.9), provides that a public employer shall, on demand of the majority representative negotiate concerning the establishment of an agency shop arrangement. N.J.S.A. 34:13A-5.5(a). See, In re Wayne Board of Education, P.E.R.C. No. 81-106, 7 NJPER ___ (¶_____ 1981). The law does not mandate that an agency shop provision be implemented; it mandates only negotiation of such a clause upon demand. Given the fact that only one negotiations session on agency shop occurred, and the totality of the Board's conduct on the record in this case, we agree that the Board did not negotiate in bad faith.[2/] We thus reject exceptions #1A and 1B filed by the Charging Party.

2/ See, In re Council of New Jersey State College Locals, 141 N.J. Super. 470 (App. Div. 1976). For example, the record does not establish that the Board's initial position that it was philosophically opposed to agency shop clauses meant that it would never have agreed to such a provision. In fact, the record does indicate that the Board's negotiator was prepared to listen to reasons why the Board should agree to such a clause.

We do agree, however, with much of what is set forth in Exception #2 filed by the Charging Party. This Exception challenges the belief that the percentage amount of an agency shop fee is mandatorily negotiable. (See, H.E. No. 81-32 at 6-7). N.J.S.A. 34:13A-5.4(b) provides:

> The representation fee in lieu of dues shall be an amount equivalent to regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fees exceed 85% of the regular membership dues, fees and assessments.

The application of the equation contained in the foregoing language appears to mandate the amount of the agency shop fee that the majority representative is entitled to collect, if it can successfully negotiate for such a provision. As noted by the Charging Party, the Act contains a check on the amounts charged as a representation fee in lieu of dues through the demand and return system and provides for appeals therefrom to a three member Board established in the law, N.J.S.A. 34:13A-5.6. We also note that such proceedings are available only to persons required to pay fees to a majority representative. We believe the Legislature intended that public employers not become embroiled in disputes between majority representatives and the employees they represent as to the amounts to be paid as membership dues or representation fees in lieu of dues.[3/]

3/ See also, Red Bank Regional Education Ass'n v. Red Bank Regional H.S. Board of Education, 78 N.J. 127, 142 (1978), in which the Supreme Court noted that the Legislature has (continued)

However, because the percentage fee of the agency shop is not a mandatory subject of negotiations does not mean that it is per se illegal for an employer to make inquiries or request information on the organization's financial condition for the alleged reason of ascertaining the need for the agency shop proposal. The Federation is correct that an employer cannot make such a request a pre-condition for negotiations, that might be a per se violation; nor can it insist upon such disclosure to the point of impasse. However, absent the establishment of such conduct by an employer, the finding of a violation of a duty to negotiate in good faith is based on the totality of the employer's conduct in the negotiations. Evidence that the employer requested the disclosure of financial information to which it is not legally entitled is relevant to such an inquiry, but it is not dispositive of the question of a violation in and of itself.

The record in this case is based on only one negotiating session. The issue involved was new to the parties, new to the public sector in this State, and one on which many people have strongly felt opinions. The Federation has the burden to prove that the Board negotiated in bad faith, and/or that the Board's negotiator made the financial disclosure a pre-condition to further

3/ (continued)
assigned PERC, not the employers, responsibility for preventing unlawful conduct by a majority representative against the employees it represents. A similar scheme appears to be the procedure chosen for protecting employees against potential abuses of the agency shop clauses.

further negotiations.[4/] N.J.A.C. 19:14-6.8. Under the limited facts on this record, we cannot find that the totality of the Board's conduct amounted to bad faith negotiations. In re Council of New Jersey State College Locals, supra. Therefore, we must dismiss the unfair practice charge in this case.

ORDER

The Complaint in this matter is HEREBY ORDERED dismissed in its entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells and Suskin voted for this decision. Commissioner Hipp voted against this decision. Commissioner Newbaker abstained. Commissioner Graves was not present.

DATED: June 9, 1981
Trenton, New Jersey
ISSUED: June 10, 1981

4/ The record indicates that when the Federation's representative asked the Board's negotiator if financial disclosure was a pre-condition, she responded by saying that it might make the Board more receptive to agency shop if the Federation could show the added expense of representing non-members.

The only issue to which the Board responded with a flat "no" was the Federation's position that the language of the reopener clause on agency shop in the existing contract meant that the Federation already had such a clause. The Hearing Examiner agreed with the Board that the clause did not have that meaning, and we adopt that finding.

H. E. No. 81-32

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

In the Matter of

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-41-90

WOODBRIDGE TOWNSHIP FEDERATION OF TEACHERS,
LOCAL 822, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act by its conduct in negotiations on July 31, 1980 with the Federation regarding the incorporation of an agency shop provision in the parties' collective negotiations agreement. The Hearing Examiner found that considering the totality of the conduct of the Board at this single meeting there was an inadequate basis for finding that the Board was engaged in bad faith collective negotiations. The Board had only agreed to the reopening of an existing collective negotiations agreement for the negotiation of an agency shop. The Board, in agreeing to reopen negotiations, had not agreed in advance to the inclusion of an agency shop and thereafter to negotiate only as to its implementation.

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. 81-32

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

In the Matter of

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-41-90

WOODBRIDGE TOWNSHIP FEDERATION OF TEACHERS,
LOCAL 822, AFT, AFL-CIO,

Charging Party.

Appearances:

For the Woodbridge Township Board of Education
Hutt, Berkow, Hollander & Jankowski, Esqs.
(Stewart M. Hutt, Esq.)

For the Woodbridge Township Federation of Teachers,
Local 822, AFT, AFL-CIO
Sauer, Boyle, Dwyer, Canellis & Cambria, Esqs.
(George W. Canellis, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 15, 1980 by the Woodbridge Township Federation of Teachers, Local 822, AFT, AFL-CIO (hereinafter the "Charging Party" or the "Federation") alleging that the Woodbridge Township Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent on July 31, 1980 refused to negotiate in good faith with the Charging Party with respect to agency shop fees, the Respondent stating that it was philosophically opposed to such legislation, and further, that the Respondent demanded access to confidential financial records of the Charging Party as a pre-condition to any further negotiations, all of which was alleged to be a violation of

N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. [1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 14, 1981. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 12, 1981 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Woodbridge Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Woodbridge Township Federation of Teachers, Local 822, AFT, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. In contemplation of the enactment of a "fair share" or "agency shop" law the Charging Party was successful in negotiating into its 1979-81 collective negotiations agreement Section 17.3 of Article 6, which provides as follows:

> "If statutory authority to negotiate regarding public sector agency shop fee is enacted and made effective prior to the expiration of the agreement on June 30, 1981, negotiations shall be reopened upon written request of the union for the sole purpose of negotiating regarding the issue of agency shop within the framework of such legislation." (J-1, pp.40, 41).

(See page 3 for footnote 1)

4. Chapter 477, L. of 1979, was enacted on February 27, 1980 and became effective on July 1, 1980. By this law the Act was amended to provide that public employers and public employee majority representatives were free to negotiate upon the request of the majority representative concerning the subject of requiring payment by all non-member employees in the collective negotiations unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative and where agreement is reached, it is to be embodied in writing and signed by authorized representatives of the parties. (R-1).

5. Following the enactment of R-1, and prior to its effective dates July 1, 1980, the Federation made a demand in writing upon the Board to negotiate the maximum allowable amount of the fair share or agency shop fee, i.e., 85%. After the effective date of the Act, and at the request of the Federation, a negotiations meeting took place on July 31, 1980 on the subject of agency shop. 2/

6. The negotiations meeting on July 31, 1980 was attended by five individuals on behalf of the Federation, namely, the President, Gerald A. Pajak, the Vice-President and three members of the Negotiations Committee. In attendance on behalf of the Board were two Board members and Toth, as Chief Negotiator. Pajak, as spokesman for the Federation, proposed the maximum fee of 85% permitted by law as the agency shop fee. In so doing

---

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."

2/ Prior to the convening of this meeting, the full Board of the Respondent had instructed its Chief Negotiator, Elizabeth L. Toth, to negotiate with the Federation as requested on agency shop but not to agree to its inclusion in the collective negotiations agreement.

Pajak was aware that the Board had in the past been philosophically opposed to the agency shop. Pajak acknowledged on cross-examination that the Federation's view of Article 6, Section 17.3, was that it would enable the Federation to take the position of seeking implementation of the agency shop and that the negotiations were concerned only with the mechanics. Toth expressed a flat "no" to this position of the Federation. She outlined the Board's philosophical opposition and made additional comments regarding her view of the law, such as it being a "labor pay-off".

7. Thereafter, Toth and the two Board member caucused and then returned to the negotiations meeting with the proposal that the Federation open its books to the Board in order to justify the charging of an 85% agency shop fee and that if this was done the Board might be more receptive in the future to entering into an agreement including the agency shop. Pajak asked if this was a pre-condition to negotiations, to which Toth responded that she was having a difficult time with the Board and that it might be easier if the Federation demonstrated the actual expense of representation of non-members. Pajak flaty refused, stating that the law does not require that the Federation accede to such a request. Pajak also stated that if the Board was genuinely concerned about the cost of administration of the agreement it could get such data from its own records which indicate time spent for grievances and on arbitration.

8. There was no counter-proposal made by the Board at the negotiations meeting on July 31, 1980. There were no further negotiations scheduled and the parties have never met again regarding the subject of the agency shop. The instant Unfair Practice Charge was filed on August 15, 1980.

THE ISSUE

Did the Respondent Board violate Subsections (a)(1) and (5) of the Act by its conduct at the negotiations meeting on July 31, 1980 with respect to the agency shop?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate Subsections (a)(1) and (5) of The Act By Its Conduct At The Negotiations Meeting On July 31, 1980

The first thing to be noted is that there was only one negotiations meeting with respect to the issue of agency shop. Instead of seeking further negotiations, the Federation, after the first meeting on July 31, 1980, elected to file the instant Unfair Practice Charge on August 15, 1980.

The Hearing Examiner finds and concludes that, considering the negotiating conduct of the Board, in its totality, and in the light of applicable authorities, the Board fulfilled its collective negotiations obligation to the extent required by law and did not negotiate in bad faith on July 31, 1980.

The leading case on the subject is State of New Jersey and Council of New Jersey State College Locals, etc., E.D. No. 79, 1 NJPER 39, aff'd, State of New Jersey v. Council of New Jersey State College Locals, etc., 141 N.J. Super. 470 (App. Div. 1976). In that case the Executive Director of the Commission was affirmed in his refusal to issue a complaint upon a charge alleging that the State's failure to acquiesce during negotiations on salaries and fringe benefits constituted "bad faith bargaining." The Executive Director, drawing upon established principles of labor law in both the private and public sectors, found that: "It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred...The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an

open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement." (Emphasis supplied). [1 NJPER 40].

The Executive Director then went on to note as follows:

> "It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith. Were the State to have been inflexible on the salary issue, which it appears not to have been, a refusal to negotiate in good faith would not be found without an evaluation of its conduct throughout the negotiations on all issues." (Emphasis supplied). [1 NJPER 40].

The Executive Director concluded in State of New Jersey, supra, that while the State had been adamant on the issue of salaries it had given reasons for its position, and no indication of a desire or intention not to reach an agreement could be found, which might constitute a refusal to negotiate in good faith.

So, too, did the Commission conclude in Township of Hillside, P.E.R.C. No. 77-47, 3 NJPER 98 (1977) that "...the totality of the Township's bargaining conduct reveals no violation of the duty to bargain in good faith..." (Emphasis supplied). See also, Township of Parsippany-Troy Hills, P.E.R.C. No. 78-35, 4 NJPER 32 (1977).

It is the Hearing Examiner's view of this case that the Federation has misconstrued exactly what it negotiated with the Board when Article 6, Section 17.3 was incorporated into the agreement. President Pajak made clear in his testimony that he perceived Section 17.3 as meaning essentially that the Board had agreed to the incorporation of an agency shop proposal in the agreement, and that the only area for negotiations was implementation, which was essentially the negotiating of an agreement on the percentage level of the agency shop fee. The Federation's opening position on July 31st was that

the fee should be 85% and the Federation never indicated during the meeting that it would agree to any lesser percentage.

The Hearing Examiner cannot conclude that the Board acted in bad faith merely by having instructed its Chief Negotiator, prior to the meeting, that she was authorized to negotiate but not to agree to the inclusion of an agency shop in the agreement. A firm negotiating position is not per se bad faith. Since there was only one collective negotiations session held on the subject, it is difficult to speculate on what might have been negotiated subsequently at future meetings where trade-offs might have been suggested or a counter-proposal might have been proposed by the Board. In other words, the instant Charge was filed prematurely.

Thus, for the foregoing reasons, the Hearing Examiner will recommend a dismissal of the Complaint and Unfair Practice Charge.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by its conduct in collective negotiations on July 31, 1980 with respect to the agency shop.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe

Dated: March 18, 1981
Trenton, New Jersey

Alan R. Howe
Hearing Examiner