P.E.R.C. NO. 78-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL
BOARD OF EDUCATION,
Respondent,

-and-

Docket Nos. CO-77-22-42
and CO-76-337-43

MANALAPAN-ENGLISHTOWN REGIONAL
EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

The Commission adopts the findings of fact and conclusions of law of the Hearing Examiner in an unfair practice proceeding and finds the exceptions filed by the Education Association to be without merit. The Commission, in agreement with the Hearing Examiner, concludes that the Board in determining to eliminate 4 of 5 positions included within the negotiations unit, designated as permanent substitutes, and utilized in their place the services of non-unit regular substitutes did not engage in proscribed conduct in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3). The Commission notes that the Board offered full-time positions as classroom teachers to all four individuals who were not retained as permanent substitutes for the 1976-1977 school year and concludes that the Association has failed to prove by a preponderance of the evidence that the Board was motivated in whole or in part by anti-union animus. The Commission further concludes that in view of the noted facts in this case the Board's actions relating to the permanent substitutes could not be considered to be inherently destructive of employee rights. The Commission also does not find that the Board's conduct vis-a-vis the regular per diem substitutes was motivated by a decision to interfere with the Association's effort to organize these particular employees.

The Commission also denies the Association's request to amend the complaint relating to the substitute teacher matter to include an allegation of a (a)(5) violation. The Commission, in agreement with the Hearing Examiner, finds that the issue of a possible (a)(5) violation relating to the permanent substitute issue was not in fact fully litigated at the hearing. The Commission, therefore, dismisses the relevant complaint relating to the substitute question in its entirety.

The Commission did not issue a decision relating to the charge that the Board had committed an unfair practice by refusing

to negotiate regarding terms and conditions of employment for regular full-time teachers employed by the Board in the migrant labor education program for the summer of 1976 in violations of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). The Association and the Board presently disagree as to whether this matter has been resolved subsequent to the issuance of the Hearing Examiner's Recommended Report and Decision. The Commission will issue a decision with respect to this matter shortly if the matter is not voluntarily settled.

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MANALAPAN-ENGLISHTOWN REGIONAL
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Docket Nos. CO-77-22-42
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MANALAPAN-ENGLISHTOWN REGIONAL
EDUCATION ASSOCIATION,
Charging Party.

Appearances:
For the Respondent, Metzler Associates
(Mr. Stanley C. Gerrard, Consultant)

For the Charging Party, Chamlin, Schottland, Rosen and Cavanaugh, P.A. (Mr. Michael D. Schottland, of Counsel)

DECISION AND ORDER

On June 14, 1976, an Unfair Practice Charge, Docket No. CO-76-337-43, was filed with the Public Employment Relations Commission (the "Commission") by the Manalapan-Englishtown Education Association (the "Association"), alleging that the Board of Education of Manalapan Township (the "Board") engaged in an unfair practice in violation of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq., (the "Act"). Specifically, the Association alleges that the Board, for the purpose of discouraging Association activities in the District, unilaterally determined to eliminate four of five positions included in the negotiations unit, designated as permanent substitutes, and utilize in their place the services of non-unit regular substitutes, the Board having allegedly interfered with the Association's

attempts to organize these employees, thereby, in both instances, violating N.J.S.A. 34:13A-5.4(a)(1) and (3).[1/]

On August 2, 1976, the Association filed another, unrelated, charge, Docket No. CO-77-22-43, against the Board, alleging that the Board had committed an unfair practice within the meaning of the Act by refusing to negotiate regarding terms and conditions of employment for regular, full-time teachers employed by the Board in the migrant labor education program for the summer of 1976 in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[2/]

Both charges were processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices, acting as the named designee of the Commission, that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, two Complaints and Notices of Hearing were issued on October 13, 1976, along with an Order Consolidating Cases. On January 6, 1977, a hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent

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. (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.

2/ 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. (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."

to the close of the hearing the parties submitted memoranda of law, the final memoranda being received on February 28, 1977. On August 1, 1977, the Hearing Examiner issued his Recommended Report and Decision, 3/ which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof.

The Hearing Examiner, after considering the language of the collective negotiations agreement, as well as the negotiating history of the parties, found that, although summer school teachers employed by the Board were regular, full-time faculty and represented by the Association, the position of summer school teacher was not part of the collective negotiations unit which the Association represents. Therefore, the Board was under no obligation to negotiate with the Association concerning the terms and conditions of employment of summer school teachers.

The Hearing Examiner also found that the Association had not met its burden of proving that the Board had interfered with the Association's efforts to organize the regular substitutes and, further that the Board's decision to eliminate four permanent substitute positions that are included in the negotiations unit represented by the Association and to replace them with regular substitutes who are not represented by the Association was not motivated by anit-union animus nor inherently destructive of employee rights. Accordingly,

3/ H.E. No. 78-2, 3 NJPER ___ (1977).

the Hearing Examiner recommended that the Commission dismiss both complaints in their entirety.

Pursuant to the Commission's Rules, exceptions to the Hearing Examiner's Recommended Report and Decision were filed by the Association on August 9, 1977. Although the Association filed exceptions with respect to both of the charges, the Association subsequently notified the Commission that, with respect to the charge concerning the migrant labor program, Docket No. CO-77-22-43, the parties have voluntarily resolved this matter. However, the Board, in a later letter, disputed the Association's interpretation of the agreement. The timing of these letters precludes our disposing of this charge at this time. We shall issue a decision with respect thereto subsequently if the matter is not voluntarily settled.

Concerning the second charge that the Board interfered with and discouraged union activities, the association excepts to the Hearing Examiner's finding that: "Here there was no direct evidence introduced of any anti-union animus and therefore, the Association must rely on the latter test.[4/] But the only actions proven by the Association were the following: refusing to supply the addresses of regular substitutes and providing a seminar, improving the calling system and increasing the potential work available for regular per diem substitutes. Nothing in these actions

4/ Under In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 2 NJPER 71 (1977), and In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, Appeal pending (1977), a twofold test was established for determining whether there has been a violation of N.J.S.A. 34:13A-5.4(a)(3): (1) an employer's conduct must have been motivated in whole or in part by an intent to discourage (Continued)

even when taken together can be characterized as activity inherently destructive of employees rights. Accordingly, the Association has not demonstrated the Board's action violative of §5.4(a)(3) of the Act.'

'Similarly, the Association has not proved by a preponderance of the evidence that the Board interfered with, restrained or coerced employees in the exercise of protected rights in violation of §5.4(a)(1)."

The Association contends that since the Board failed to offer any rationale to explain if the permanent substitutes were being eliminated, the Hearing Examiner acted erroneously in not drawing the logical inference that there was a nexus between this action by the Board and the activities of the Association.

It is well established in both the public and private sectors that where an employer's alteration of the manner in which he conducted his operation is detrimental to the interests of the union and its members, the employer will not be guilty of an unfair practice - discouraging or interfering with the exercise of employee rights - unless it is established that the employer's conduct was motivated by anti-union animus. NLRB v. Rapid Bindery, Inc., 293 F2 170, 48 LRRM 2658 (1961); Howmet Corp., 197 NLRB 471, 80 LRRM 1555 (1972); NLRB v. Lassing, 284 F2d 781, 47 LRRM 2277 (1960); Coatesville Area School District, PERA-C-3628-E, 4 PPER 155 (1974); Upper St. Clair School District, PERA-C-4799-W, 5 PPER 96 (1974). The burden is upon the charging party to prove the unfair practice

4/ (Continued) an employee from exercising the rights guaranteed to him by the Act; or (2) the employer's conduct was inherently destructive of employee rights, thereby eliminating the requirement of finding subjective anti-union motivation.

by a preponderance of the evidence. N.J.A.C. 19:14-6.8, In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

After careful consideration of the record, the Commission concludes, in agreement with the finding of the Hearing Examiner, that the Association has failed to meet its burden of proof that the Board's decision, to eliminate four of the five unionized positions of permanent substitute and utilize instead nonunionized temporary substitutes, was motivated by anti-union animus. In reaching this conclusion the Commission, in accord with the Hearing Examiner's finding, places substantial reliance on the fact that the Board offered full-time positions as classroom teachers to all four individuals who were not retained as permanent substitutes in the 1976-77 school year. Three of these individuals accepted positions and the fourth turned down two such offers for personal reasons.[5/] In view of the foregoing the Association's argument, concerning the Board's failure to offer any explanation for its decision to eliminate the four permanent substitute positions, is without merit.

The Commission accepts the Hearing Examiner's finding that the elimination of these four unionized positions is not a per se violation.[6/] In order to constitute such a violation the

5/ It should be noted that in Coatesville Area School District, supra, the employer's efforts to rehire those employees displaced by the Board's decision to alter its method of operations was a substantial factor which PLRB considered in deciding to dismiss the unfair practice charge.

6/ In reaching this conclusion the Commission rejects the Association's argument that Fibreboard Paper Products Corp. v. NLRB, 370 U.S. 203, 57 LRRM 2609 (1964) and In re Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976) held the elimination of job positions by an employer to be conduct inherently destructive of employee rights.

employer's conduct must be inherently destructive of the rights and interests of the union and its members. NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963); In re City of Hackensack, H.E. No. 77-1, 2 NJPER 232 (1976), affirmed, P.E.R.C. No. 77-49, 3 NJPER 143, Appeal pending, (App. Div. Docket No. A-2546-76, 1977). In view of the above noted facts in this case the elimination of four unionized positions out of a stipulated unit of 250.5 full-time teaching positions in 1975-76 and 247.2 such positions in 1976-77 can hardly be considered inherently destructive of employee rights.

Further, the Commission accepts the Hearing Examiner's finding that the Board's conduct in relation to the regular substitutes was not motivated by a desire to interfer with the Association's efforts to organize these employees. The decision to alter the method by which regular substitutes are called for work was motivated by complaints from some of these people concerning the inequity of the system, in that some regular substitutes were called more frequently than others. In agreement with the Hearing Examiner the Commission does not find credible the testimony of the Association's witness that the regular substitutes received a raise during the Association's organizational efforts in the fall of 1975.[7/] Nor does it appear from the record that the orientation seminar for regular substitutes was utilized by the Board as

7/ The Commission bases this conclusion on the testimony of the Board's witness that the raise in question was granted the prior year, 1974.

a vehicle for discouraging these employees from joining the Association. Accordingly, the Commission accepts the Hearing Examiner's Recommended Decision that the charged violations of N.J.S.A. 34:13A-5.4(a)(1) and (3) be dismissed.

The Hearing Examiner, in his Recommended Decision and Order, noted that the Association did not allege that the Board's decision, to eliminate the four unit positions of permanent substitute and transfer their work to non-unit regular substitutes, constituted a unilateral change in terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(5).

Accordingly, the Hearing Examiner declined to make a decision as to whether this action by the Board constituted an (a)(5) violation. In its exception the Association contends that this action by the Board is analagous to the subcontracting out of unit work which the Commission, in In re Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976), held mandatorily negotiable.[8/] Alleging that this issue of a possible (a)(5) violation was, in fact, litigated at the hearing, the Association has formally requested that the Commission consider a post hearing amendment to include an allegation of an (a)(5) violation in order to conform to the evidence presented.

After a careful evaluation of the transcript, the

8/ Although the Commission does not have to consider the issue of an (a)(5) violation, it wishes to point out that in In re Board of Trustees of Middlesex County College, P.E.R.C. No. 78-13, 3 NJPER ___ (1977), the Commission held that the decision to transfer unit work to non-unit employees is equivalent to subcontracting and, therefore, mandatorily negotiable.

Commission finds that at only one place in the record did a witness for the Association briefly testify - the testimony occupying less than one page of transcript - concerning a request that the Board negotiate the decision to switch four permanent substitutes to regular substitutes. This brief reference to a possible (a)(5) violation can hardly be considered a full and complete litigation of this issue which would justify amending the complaint. To allow an amendment at this time would be fundamentally unfair in that it would deny the Board an opportunity to answer the allegation. Further, the Association has not filed a motion to reopen the hearing pursuant to N.J.A.C. 19:14-4.2(b). Accordingly, the Commission denies the Association's request to amend the complaint to include an allegation of an (a)(5) violation.

ORDER

Accordingly, for the reasons set forth above, it is HEREBY ORDERED, that:

1. That the Complaint of June 14, 1976, which alleges that the Board, for the purpose of discouraging Association activities in the district, unilaterally determined to eliminate four of five unionized positions designated as permanent substitutes and utilized in their place the services of non-unionized regular substitutes, the Board having allegedly interfered with the Association's attempts to organize these employees, thereby violating N.J.S.A. 34:13A-5.4(a)(1) and (a)(3), is hereby dismissed.

2. It is FURTHER ORDERED that the Complaint of August 2,

1976, Docket No. CO-77-22-42 be severed from this consolidated proceeding in accordance with this decision.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision. Commissioner Forst voted against this decision. Commissioners Hipp and Hurwitz abstained.

DATED: Trenton, New Jersey
October 18, 1977
ISSUED: October 21, 1977

H.E. No. 78-2

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

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-77-22-42
CO-76-337-43

MANALAPAN-ENGLISHTOWN REGIONAL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner issues a Recommended Report and Decision to the Public Employment Relations Commission in which he recommends that two unrelated complaints filed by Manalapan-Englishtown Regional Education Association against the Manalapan-Englishtown Regional Board of Education be dismissed.

In one matter the Association claimed that the Board committed an unfair practice in refusing to negotiate over the terms and conditions of employment of teachers employed in a migrant labor education program in the summer of 1976. The Hearing Examiner found the Association failed to prove that on the basis of the contract between the parties, they had the right to negotiate on behalf of these employees.

In the other matter, the Board eliminated the position of permanent substitutes in four out of five schools in question and the permanent substitutes were offered positions as full time teachers. The Association claimed that the Board took this action to increase the work available for per diem substitutes, so that on the promise of this and other benefits they would resist joining the union. The Hearing Examiner held that the evidence introduced by the Association was insufficient to prove their allegations.

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 conclusions of law.

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

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-77-22-42
CO-76-337-43

MANALAPAN-ENGLISHTOWN REGIONAL
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For Manalapan-Englishtown Regional Board of Education,
Metzler Associates
(Stanley C. Gerrard, Consultant)

For Manalapan-Englishtown Regional Education Association,
Chamlin, Schottland, Rosen & Cavanaugh, P.A.
(Michael D. Schottland)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Manalapan-Englishtown Regional Education Association (the "Association"), employee representative of all certified non-supervisory personnel employed by the Manalapan-Englishtown Regional Board of Education (the "Board"), filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on June 14, 1976, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (the "Act") [1/] by unilaterally eliminating four of five positions held under the permanent substitute job title utilizing the services of

1/ It is specifically alleged that the Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (3). These subsections provide that an employer, its representatives or agents are prohibited 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 to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

part-time substitutes not represented by the Association in place of permanent substitutes.

On August 2, 1976, the Association filed another, unrelated, charge against the Board, alleging that the Board had committed an unfair practice within the meaning of the Act [2/] by refusing to negotiate over terms and conditions of employment of teachers employed by the Board in a migrant labor education program in the summer of 1976.

It appearing that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, two Complaints and Notices of Hearing were issued on October 13, 1976, along with an Order Consolidating Cases, and a hearing on both charges was held before the undersigned on January 6, 1977. [3/]

The two Association charges involve totally unrelated matters and will be dealt with here separately in the reverse order of their filing, as they were presented at hearing.

Summer Migrant Labor Education Program

In May of 1976 the Association President, Joseph Murphy, first learned informally from the Assistant Superintendent that the Board planned to implement a migrant labor education program that summer. Murphy expressed interest in the program and a desire on the Association's part

2/ The second charge specifically alleges that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5). These subsections provide that an employer, its representatives or agents are prohibited from:

"(1) [See note 1].

"(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."

3/ All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. All parties filed post-hearing briefs by February 28, 1977. Upon the entire record in this proceeding, I find that the Board is a public employer within the meaning of the Act and is subject to its provisions and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. Unfair Practice Charges having been filed with the Commission alleging that the Board has engaged or is engaging in unfair practices within the meaning of the Act, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

to negotiate soon over the terms and conditions of employment of the teachers in the summer program.

On the afternoon of June 6 or 7, just prior to a public Board meeting, Murphy met with Superintendent Barret in the Superintendent's office, along with Board President Engel. He told Engel that the Association would like to negotiate over the migrant labor program. Engel replied, according to Murphy's direct testimony, that the Board had some things it wished to discuss with the Association and the Association should submit its proposals to the Superintendent.

On June 17, just prior to another public Board meeting, Murphy and other members of the Association negotiating committee submitted a list of proposals, including one on the migrant labor program, to the Superintendent. There was at least some discussion of the migrant labor program and then Barret indicated he would get back to Murphy in a few days with a response from the Board after it had met for a work session.

It was apparently not until late June, however, that there was any response at all. At that time, Engel wrote to Murphy indicating that the Board chose not to reopen the two year contract for further negotiations pursuant to a clause providing for a reopening of negotiations only upon mutual agreement of the parties. 4/ In mid-July the Association drew up its charge alleging a refusal to negotiate and filed it with the Commission on August 2. The Board denies that the Association represents its summer employees.

The Association claims that it represents all of the certified teachers employed by the Board as evidenced by the recognition clause of the 1975-77 collective negotiations agreement. 5/ Since all of the teachers employed by the Board in the migrant labor program were regular full-time teachers in the school system, and as such were represented by the Association, the Association claims it is self-evident that it represents these teachers in their summer capacity as well. The migrant labor program was new in 1976 and could not have been anticipated, the Association reasons, in its negotiations for the 1975-77 contract. In its insistence on negotiations over the program after it was announced, the Association apparently relies on a specific clause of its contract as well as §5.3 of the Act;

4/ Exhibit A-2, §29.6.

5/ Exhibit A-2, §1.1.

both require negotiations over proposed changes in terms and conditions of employment of unit employees. 6/

In In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977), the Commission found that even though Stockton State College and an employee representative were parties to a multi-year agreement and, further, all courses but one taught in summer school over the last four years were taught by full-time regular faculty members, there was no contractual duty on the part of the College to negotiate over summer school faculty. In reaching a decision in this matter, the Commission looked to the language of the contract as a whole as well as the bargaining history of the parties and found that the summer school teachers were not part of the collective negotiations unit as contemplated in the contract. See also, In re Rutgers, the State University, P.E.R.C. No. 76-3, 2 NJPER 13 (1976).

In the instant matter as pointed out by the Board, summer employment for teachers is voluntary, is outside of their regular work year, requires separate application and appointment, and is not a term or condition of employment as regular, full-time teachers under the collective negotiations agreement. The Board claims, therefore, that it is under no obligation to negotiate with the Association over the migrant labor program, and that it properly declined to do so.

Further, the agreement limits the teacher work year to 182 days, 7/ a period which covers only the regular school year and excludes July and August. The salary guide, printed as an appendix of the agreement, contemplates salary payment for a regular school year only, not for the summer. 8/ Another provision indicates that "teachers shall receive their final check on the last working day in June when the teacher has completed final check out." 9/ In fact, there is no mention of any kind of a summer program, migrant labor or any other, anywhere in the agreement. Nor is there anything in the contract to bar the employer from appointing teachers to the summer school who were not Board employees during the regular school year and were not represented by the Association in any capacity at all.

6/ Exhibit A-2, §29.5.

7/ Exhibit A-2, §6.2.

8/ Exhibit A-2, §31.1 and §31.2.

9/ Exhibit A-2, §11.5.

Significantly, in the prior summer a Title One summer instructional program, as distinct from the migrant labor program, was instituted by the Board, yet there is no evidence that the Association made a demand upon the Board for negotiations, even though the contract had just come into effect on July 1, 1975. The apparent failure of the Association to seek negotiations when the contract was fresh in the parties' minds, creates a doubt as to whether the parties contemplated that summer would be included by virtue of the recognition clause. 10/

On the basis of all the evidence before me I find that the Charging Party has not shown by a preponderance of evidence that it represents summer school teachers employed by the Board. 11/ Accordingly, there was no obligation on the Board to negotiate over the terms and conditions of employment of summer school employees.

Permanent Substitutes

Since the 1970-71 school year, collective negotiations agreements between the Board and the Association have included a permanent substitute job title. Prior to the Board action which led to this charge, one permanent substitute each was assigned to five of the six schools in the district. None was assigned to the smallest school. Permanent substitutes are fully certified classroom teachers who are hired on a yearly contract basis just as regular classroom teachers are hired. They work full time at their assigned schools and so become familiar with the curriculum, the classroom teachers and the students. If a teacher is absent for any reason, the permanent substitute is the first person to be called in to take over that teacher's classroom. Regular per diem substitutes, not members of the collective negotiations unit and often not certified as teachers were, until the 1976-77 school year, only called in when more than one teacher in a school was absent, except at the smallest school where there was no permanent substitute and a regular substitute would be called as soon as one teacher was absent.

10/ In fact, the Association also demanded negotiations for the Title One organization in 1976. Although funding for the two programs was separate, in 1976 the programs were run in conjunction with each other, in the same location, with virtually the same instructional staff and over roughly the same time period. They were often referred to as if they were one program during hearing and elsewhere in the record.

11/ The Association is free, of course, to seek recognition from the Board or certification from the Commission in order to represent said employees.

In the spring of 1976, the Superintendent announced at an Association meeting and at building staff meetings that for the 1976-77 school year permanent substitutes would no longer be used at four of the five buildings where they were then assigned. One permanent substitute was kept at the junior high school, Pinebrook, which is the largest school in the district. 12/

Murphy testified that, following the announcement, the Association wrote a letter to the Board requesting negotiations over the matter pursuant to a reduction in force provision in the agreement between the Board and the Association. 13/ The reply from the Board was that there was no reduction in force and, therefore, no need to negotiate. On June 3, the Association drew up its charge alleging unilateral changes in terms and conditions of employment motivated by anti-union animus. The charge was filed with the Commission on June 14.

Uncontroverted testimony revealed that the four individuals who were not retained as permanent substitutes in the 1976-77 school year were all offered full-time positions as classroom teachers in the district for that school year. Three accepted and the fourth, according to Moorcroft, Assistant to the Superintendent, turned down two such offers for personal reasons. This fourth teacher is no longer employed by the Board in any capacity.

Testimony further revealed that approximately three teachers who had been employed by the Board in 1975-76 were not rehired for the 1976-77 school year until about the end of September and, consequently, lost about one month's pay. Murphy claimed this was due to the fact that the permanent substitutes had seniority over these regular teachers and were moved into regular teaching spots which would otherwise have been occupied by these regular teachers, and that it was not until the end of September that, due to leaves of absence, the displaced teachers were reabsorbed in the system. Moorcroft

12/ The record is unclear as to whether the original announcement excepted Pinebrook, or whether the decision to retain a permanent substitute at Pinebrook was made subsequent to the original announcement.

13/ Exhibit A-2, §10.7. "Any proposed reduction in the number of teachers employed shall be negotiated with the Association. This negotiation shall concern itself not with the reduction per se, but the terms of separation in accordance with Title 18A New Jersey Statutes Annotated and Public Law 123."

denied that the one-month hiatus from work of three classroom teachers pertained to the transfer of three permanent substitutes to regular classroom positions, but no other explanation was offered by him, or sought by Association counsel.

There was considerable testimony on both sides as to the actual number of full-time equivalent teaching positions in the district in 1976-77 as opposed to 1975-76, but no one had exact figures. The Association claimed a reduction in 1976-77 and Moorcroft said he believed there was actually one more position in 1976-77. The matter was not resolved at hearing but it was agreed by counsel for both parties that Board records would be examined and accurate information would be supplied to the undersigned to be included as part of this record. After consultation and examination of Board records, both parties agreed that in 1975-76 there were 250.5 full-time equivalent teaching positions, and in 1976-77 there were 247.2 such positions. 14/

It must be noticed that the Association had not alleged that the Board refused to negotiate over the impact of a reduction in force in violation of §5.4(a)(5) of the Act, but rather as stated in its charge the Association claims the Board's "unilateral change in the terms and conditions of employment, is anti-union conduct, being done to discourage the substitutes from becoming members of the bargaining unit," in violation of §5.4(a)(1) and (3). 15/ Accordingly, the undersigned will not make a determination as to whether or not a §(a)(5) violation occurred 16/ and will consider

14/ This information was supplied along with letters from Moorcroft to the undersigned dated January 21 and February 3, 1977. No explanation of the decrease from one year to the next was offered.

15/ In its brief the Association states that no reduction in force took place.

16/ Although not in its original pleadings the Charging Party does raise in its brief a claim that the instant matter is a "clear case of contracting out," but gave no citation or legal reference for such a claim. The contracting out issue first arose in the Board's brief by way of an assertion that contracting out was not an issue in this case. [Although briefs in this matter were due simultaneously, counsel for the Association requested and was granted an extension of time in which to file a brief due to illness]. Although as stated above, the Charging Party never alleged an (a)(5) violation in its pleadings or argument, subcontracting out is essentially an (a)(5) issue. In their brief, the Board cited Fibreboard Paper Products Corp. v. NLRB, 370 U.S. 203, 57 LRRM 2609 (1964). The Commission adopted the holdings of Fibreboard,

continued...

only the §(a)(1) and (3) allegations.

The testimony revealed [17] that the Association obtained from a school secretary an old list of about 45 regular substitutes. These people were invited to an Association meeting in October 1975. The meeting was held in the library of the Clark Mills School, the same building which housed the district's administrative offices. About 15 regular substitutes attended. There was discussion of the possibility of the regular substitutes joining the Association and being represented by it in collective negotiations with the Board.

Subsequent to the meeting, the Association wrote to the Board requesting a current list of all substitutes used in the district, along with their addresses and telephone numbers. The Board replied that these would not be made available, and when asked why, explained that such information was confidential. Shortly thereafter, in order to satisfy complaints apparently voiced by some of the regular substitutes, the Board adjusted its calling system for regular substitutes. Further, the Board conducted a seminar to acquaint the regular substitutes with the operations of the schools. [18]

16/ Continued.... supra, and discussed its reasoning at length in In re Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976). The Commission found that a township had violated §(a)(1) and (5) of the Act by unilaterally advertising for subcontracting bids for sanitation collection services previously performed by unit employees. In both Fibreboard, supra, and Little Egg Harbor, supra, the employer wanted to take work from unit employees and contract this work out to independent subcontractors; consequently, unit members would be discharged.

In the instant case there were no subcontractors and none of the employees in question -- the full-time substitutes -- lost their jobs or was even transferred outside of the unit. A subcontracting argument in the instant case is clearly inappropriate.

17/ Evidence of prior attempts by the Association to organize the regular substitutes and the Board's resistence to those efforts was introduced to demonstrate the intent of the Board to discourage protected activity. However, the undersigned sustained an objection to the introduction of such testimony for the purpose of proving an independent unfair practice not alleged in the Association's charge. There was no attempt by the Association to amend its charge.

18/ The Association witnesses in their testimony inferred that the regular substitutes also received a raise at this time. However, the Board witnesses testified that the raise in question occurred a year earlier. These Board witnesses were not challenged and in the absence of any additional evidence, I cannot credit the allegations of the Association.

The Association claimed a direct cause-and-effect relationship between its organizing efforts on the one hand, and the changes with respect to regular substitutes and permanent substitutes on the other. The Board flatly denied any interference in the Association's organizing efforts and any anti-union animus whatsoever in its decisions regarding regular and permanent substitutes.

The Commission has in In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 3 NJPER ___ (1977) and in In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER ___ (1977) created a twofold test for determining whether an unfair practice has been committed in discrimination cases - 1) an employer's conduct would be a violation of the Act if it only in part was motivated by an intent to discourage the exercise of protected rights - 2) the existence of such motivation to discourage protected activity may be presumed and need not be proved, if the conduct is inherently destructive of employee rights. Here there was no direct evidence introduced of any anti-union animus and therefore, the Association must rely on the latter test. But the only actions proven by the Association were the following: refusing to supply the addresses of regular substitutes and providing a seminar, improving the calling system and increasing the potential work available for regular per diem substitutes. Nothing in these actions even when taken together can be characterized as activity inherently destructive of employees rights. Accordingly, the Association has not demonstrated the Board's action violative of §5.4(a)(3) of the Act.

Similarly, the Association has not proved by a preponderance of the evidence that the Board interfered with, restrained or coerced employees in the exercise of protected rights in violation of §5.4(a)(1).

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, it is hereby recommended that the Commission order the two complaints in this matter be dismissed in their entirety.

Edmund G. Gerber
Hearing Examiner

DATED: August 1, 1977
Trenton, New Jersey