P.E.R.C. NO. 86- 133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ORANGE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-85-200-13

ORANGE EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Orange Educational Secretaries Association against the Orange Township Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally lengthened the workday of secretaries on the days before the Thanksgiving and Christmas recess. The Commission finds, however, that the Board did not lengthen the workday on those days.

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Charging Party.

Appearances:
For the Respondent, Love & Randall, Esqs.
(Melvin Randall, Esq.)

For the Charging Party, Zazzali, Zazzali & Kroll, Esq.
(Paul L. Kleinbaum, Esq.)

DECISION AND ORDER

On February 11 and June 28, 1985, the Orange Educational Secretaries Association ("Association") filed an unfair practice charge and amended charge against the Orange Township Board of Education ("Board"). The charge, as amended, alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when (1) for the days before the 1984 Thanksgiving and

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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

Footnote Continued on Next Page

Christmas vacations, the Board required the secretarial staff to work until at least 1:15 p.m. and until 1:00 p.m., respectively, and (2) the Board adopted a 1985-86 school calendar, different from previous years, that indicated that secretaries would have to work past 12:45 p.m. These actions allegedly contravened a past practice permitting these employees to leave work at 12:45 p.m. on the day before Thanksgiving and Christmas. The charge also alleged that the Board's actions violated the parties' collective negotiations agreement. As a remedy, the Association sought overtime compensation for the additional time worked.

On July 18, 1985, a Complaint and Notice of Hearing issued. The Board then filed an Answer. It admits that it required secretaries to work until 1:15 p.m. and 1:00 p.m. but denies it violated any past practice or employees' rights.

On September 30, 1985, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post hearing briefs by November 18, 1985.

On December 4, 1985, the Hearing Examiner recommended dismissal of the Complaint. H.E. No 86-23, 12 NJPER 60 (¶17024 1985). (copy attached). He found that the collective negotiations

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1/ Footnote Continued From Previous Page

conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative;

agreement did not establish a clear contractual right to overtime compensation for the time worked beyond 12:45 p.m. He also found that there was no past practice of leaving at 12:45 p.m., although no administrator ever required a secretary to stay after that time. Finally, he concluded that the adoption of the 1985-86 calendar was the exercise of a managerial prerogative. Accordingly, he recommended dismissal of the Complaint.

On December 19, 1985, after receiving an extension, the Association filed exceptions. It asserts that the parties' agreement requires overtime for any time worked beyond 12:45 p.m. on the two days in question. There were numerous instances where the school calendar specified that "schools close for all students at 12:45 p.m."(emphasis supplied). The Association alleges that the failure to use similar language for these two days means that everyone, including staff, was permitted to leave at 12:45 p.m. It also contends that the secretaries' past voluntary acts of staying beyond 12:45 p.m. should not be used to deny the existence of a past practice which never required them to stay beyond 12:45 p.m. Finally, it asserts that when the Board adopted its 1985-86 calendar, it was a unilateral change in the secretaries' workday and not a non-negotiable adoption of the length or division of the school year. The change allegedly had no impact on when students will be dismissed. As to remedy, the Association requests overtime pay and rescission of the calendar changes.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are accurate.[2/] We incorporate them with the following additions.

We supplement finding of fact no. 2 to add that the negotiations unit consists of the following titles: secretary, administrative secretary, executive secretary and bookkeeper.

We supplement finding of fact no. 3 to add that the 1981-82 through 1984-85 school calendars each provide in nine places that "schools close for all students at 12:45 p.m. (emphasis supplied).

We supplement finding of fact no. 7 to add that principal Valente testified that while his secretaries probably worked until 2:00 p.m. on the two days in 1984, the regular dismissal time is 3:30 p.m. on all days including those.

We supplement finding of fact no. 8 to add that the two secretaries both testified they considered the normal dismissal time to be 12:45 p.m. on the two days in question.

The first question presented is whether the Board violated subsection 5.4(a)(5) of our Act when it required secretaries to remain at work until 1:15 p.m. on the day before Thanksgiving and 1:00 p.m. on the day before Christmas recess. To find such a violation, the charging party must establish (1) a change (2) in a term and condition of employment (3) without negotiations. The

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2/ The findings of fact were apparently misnumbered. We have renumbered them.

Board, however, could defeat such a claim if it has a managerial prerogative or contractual right to make the change. e.g., State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985).

We do not believe the charging party established the requisite "change" in a term and condition of employment. The record does not establish that the Board unilaterally lengthened the workday. Rather, it is apparent that, in the past, secretaries, on the days in question, left when their work was completed. Although this varied from secretary to secretary, it is fair to conclude that it was "at or about 1:00 p.m."[3/] Therefore, on balance, the Board's memoranda did nothing more than memorialize the practice which had existed.[4/]

3/ We reject, however, the Hearing Examiner's analysis that the secretaries were not required to work past 12:45 p.m. in the past. The record is clear that these employees worked until approximately 1:00 p.m. The practice, therefore, was that secretaries would continue to work until approximately 1:00 p.m. and the Superintendent had a reasonable expectation that this practice would continue. See Barrington Board of Ecucation, P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981) aff'd on reconsid. P.E.R.C. No. 81-134, 7 NJPER 336 (¶12150 1981), dismissed as moot, App. Div. Dkt. No. A-4991-80 (4/29/82).

4/ We disagree, however, with the Board's suggestion that it could have extended the day until 3:30 p.m. That would have unilaterally extended the workday. The time limits set by the Board's memorandums represent the outer limit of the practice to have left work "at or about 1:00 p.m."

We next consider the changes in the 1985-86 school calendar. The Hearing Examiner found that the adoption of the calendar is a managerial prerogative citing Burlington County College Faculty Association v. Board of Trustees of Burlington County College, 64 N.J. 10 (1973). The Court in Burlington stated, however, that:

> [W]hile the calendar undoubtedly fixed when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members of their work loads or their compensation. These matters...are mandatorily negotiable under the Act though the negotiations are to be conducted in light of the calendar.
> Id. at 12.

The Board's managerial prerogative to adopt the school calendar for students does not empower it to mandate that unit employees work beyond the established quitting time without additional compensation. The Board's calendar change, however, did not necessarily mean that unit personnel would be required to work any longer on the two days in 1985 and the record was closed prior to any further Board action with regard to those two days. Accordingly, we dismiss that portion of the Complaint without prejudice.

ORDER

Accordingly, we dismiss the Complaint.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp, Reid and Smith abstained. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986

H.E. NO. 86-23

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

In the Matter of

ORANGE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-200-13

ORANGE EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate §5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused payment of additional compensation to twelve-month secretaries who worked after 12:45 p.m. on November 21, 1984 and December 24, 1984, those being the days before the Thanksgiving and Christmas vacations. The Hearing Examiner found that the collective negotiations agreement did not establish a clear contractual right to such additional compensation and therefore resort was had to past practice, which indicated clearly that twelve-month secretaries had worked beyond 12:45 p.m. voluntarily and without compulsion for many years. The Hearing Examiner also found that the Charging Party's request that the Board modify its 1985-1986 school calendar was non-negotiable.

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.

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Appearances:

For the Respondent
Love & Randall, Esqs.
(Melvin Randall, Esq.)

For the Charging Party
Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 11, 1985, and amended June 28, 1985, by the Orange Educational Secretaries Association (hereinafter the "Charging Party" or the "Association") alleging that the Orange Township Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et

seq. (hereinafter the "Act"), in that the Board adopted a school calendar for the 1984-85 school year, indicating that on Wednesday, November 21, 1984, and Friday, December 24, 1984, schools would close at 12:45 p.m.; and that the past practice has been for the Board to release the secretarial staff and professional staff at the same time and to abide by the calendar adopted by the Board; and on November 20, 1984, the Superintendent issued a memo that all administrative, secretarial and professional staff could be released at any time after 1:15 p.m. and while all professional staff were permitted to leave at 12:45 p.m., the secretarial staff was not permitted to leave until at least 1:15 p.m.; and on December 20, 1984, the Superintendent issued a memo requiring the secretarial staff to work until 1 p.m. on December 21, 1984; and on May 15, 1985 the Board adopted a calendar for the 1985-86 school year, which provided that on the day before the Thanksgiving vacation and the Christmas vacation schools would close for students at 12:45 p.m.; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

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."

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 18, 1985. Pursuant to the Complaint and Notice of Hearing, a hearing was held on September 30, 1985 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by November 18, 1985.

An Unfair Practice Charge, as amended, 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 post-hearing briefs 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 Orange Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Orange Educational Secretaries Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The 1984-1986 collective negotiations agreement between the parties provides in Article VI, ¶A, that the work year for twelve-month employees is from July 1 to June 30 of each year and that they shall have earned vacations and holidays as set forth in the school calendar; ¶B provides that the regular workweek shall consist of 35 "on-duty" hours and that the normal workday shall consist of seven working hours; ¶C, pertaining to overtime, defines such as anytime spent at regular duties either before or after regular daily work hours and that it must be on a voluntary basis (J-1, p. 9).

2. There was introduced in evidence the school calendars for the years 1981-82 through 1985-86 (J-2 through J-6). The 1981-82 through 1984-85 school calendars provide uniformly that for the day before the Thanksgiving vacation and the day before the Christmas vacation "schools close at 12:45 p.m." The 1985-86 school calendar was modified, as a result of the filing of the instant Unfair Practice Charge, to provide that "schools close for all students at 12:45 p.m." (J-6)(emphasis supplied).

3. Notwithstanding the provision in the 1984-85 school calendar (J-5), which provided that schools would close at 12:45 p.m. without qualification the day before the Thanksgiving vacation and the day before the Christmas vacation, the Superintendent, Woodrow Zaros, issued a memorandum to supervision on November 20, 1984, two days before the commencement of the Thanksgiving vacation, which stated that all administrative, secretarial and professional

staff may be released from duty at any time after 1:15 p.m. (J-7). Further, the Superintendent on December 20, 1984, one day before the commencement of the Christmas vacation, issued a memorandum to supervision, directing them to release all professional staff, secretaries and aides after the dismissal of students at 12:45 p.m. and that this should occur after all reasonable duties and assignments have been completed (J-8).

4. The Charging Party produced four secretarial-clerical witnesses whose testimony established that: (1) The regular workday for twelve-month employees is 8:15 a.m. to 3:30 p.m. except in the administration building (Colgate) where the workday is 8:15 a.m. to 4 p.m.; (2) these employees have worked beyond 12:45 p.m. on the days before the Thanksgiving vacation and the Christmas vacation because of the necessity to "finish up" pending tasks, sometimes involving parents and students, which entailed staying five minutes to 15 minutes after 12:45 p.m.; and (3) there was no requirement to stay after 12:45 p.m., i.e., no administrator ever required that employees stay after 12:45 p.m. The Charging Party also adduced testimony from a teacher, who was also a representative of the teachers association, that: (1) the teaching staff was dismissed with the children either at or prior to 12:45 p.m. on both days involved herein in 1984; (2) just prior to the Christmas vacation several teachers had been told to remain in the building until 1:15 p.m. but, after a protest, all teachers in the district left at or before 12:45 p.m. on December 21, 1984; (3) in past years all

teachers have left at or before 12:45 p.m.; and (4) the teachers' contract provides that they may "leave at the end of their professional responsibilities."

5. The witnesses for the Respondent, including two principals, testified regarding the practice of the day before Thanksgiving vacation and the day before Christmas vacation that the secretaries could not and did not leave at 12:45 p.m. but rather stayed until at least 1 p.m. or shortly thereafter. Their testimony specifically denied that secretaries ever left with the teachers who left at the 12:45 p.m. bell. Edwin Valente, one of the two building principals who testified, supra, stated that his secretaries worked until about 2 p.m. on the day before the Thanksgiving vacation and the day before Christmas vacation in 1984.

6. The Respondent also produced two secretaries who testified that they never left at 12:45 p.m. because of necessary activity involving parents, children and telephones. Further, it was stipulated by way of eliminating cumulative testimony that six additional secretaries would, if called by the Respondent and sworn, have testified that: (1) they never left school on the days in question at 12:45 p.m.; (2) they remained in the building after the teaching staff, who left with the students, since it was necessary to collect keys, lock up supplies and man the telephones; and (3) they generally left their buildings at or about 1 p.m. on each day.

7. The Superintendent testified that in prior years the building principals had the right to release personnel at 12:45 p.m.

and that he was prompted to issue his memo of November 20, 1984 (J-7) as a result of secretaries having left Colgate "early" in the previous year (1983). The Superintendent testified further that he never knew of a secretarial employee who had finished her responsibilities by 12:45 on the day prior to the Thanksgiving vacation or the day prior to Christmas vacation and that typically such secretaries concluded their duties between 1:15 p.m. and 1:30 p.m..

DISCUSSION AND ANALYSIS

The Respondent Board did not violate §§(a)(1) and (5) of the Act when its secretaries worked beyond 12:45 p.m. on November 21, 1984 and December 24, 1984 without additional compensation nor did the Respondent Board violate the Act by its adoption of the school calendar for 1985-1986.

First, it is true that the collective negotiations agreement (J-1) provides in Article VI, ¶A, that twelve-month employees "...shall have the earned vacations and holidays as set forth in the school calendar...". However, in the opinion of the Hearing Examiner, neither this provision nor ¶C of Article VI, pertaining to overtime, establishes the contractual right to additional compensation in instances where twelve-month secretaries work beyond 12:45 p.m. on the day before the Thanksgiving vacation or the Christmas vacation. If the contractual right to such compensation was clear, then there are a legion of decisions, both in the public and private sectors, which hold that evidence of past practice to the contrary is neither admissible nor relevant.

Having concluded that the contractual language in Article VI of J-1 is not conclusive on the compensation issue raised by the Charging Party, the Hearing Examiner next considers the evidence of past practice adduced at the hearing. Notwithstanding that the school calendars from 1981 thru 1985 provided uniformly that "schools close at 12:45 p.m." the day before the Thanksgiving vacation and the day before the Christmas vacation, the Charging Party produced four secretarial-clerical witnesses whose testimony established that they have worked beyond 12:45 p.m. on the days in question because of the necessity to finish up pending tasks, which entailed staying five minutes to fifteen minutes after 12:45 p.m.. This over-staying occurred notwithstanding that there was no requirement to stay after 12:45 p.m. and that no administrator had ever required these individuals to stay beyond that time.

The teachers appear to be in a different category by virtue of practice and their own agreement, which provides that they may leave at the end of their professional responsibilities. The Hearing Examiner finds no probative value to the secretaries' situation by virtue of what the practice has been as to the teachers.

Additionally, the secretarial witnesses for the Respondent testified that they never left at 12:45 p.m. due to the necessary activity involving parents, children, and telephones. The stipulated testimony of six additional secretaries established that they never left school on the days in question at 12:45 p.m. due to

the necessity to collect keys, lock-up supplies and man the telephones, all of which resulted in their leaving their buildings at about 1:00 p.m.

Thus, taking the evidence adduced through some twelve secretaries as witnesses for both the Charging Party and the Respondent, and disregarding completely the testimony of two building principals and the Superintendent, it is crystal clear that there is no past practice, which establishes that twelve-month secretaries ever left their buildings before 12:45 p.m. on the day before Thanksgiving or the day before Christmas, notwithstanding that there was no administrator who ever required a secretary to stay in the building after 12:45 p.m. It is noteworthy that the Charging Party in its brief at page 7 concurs in this conclusion by the Hearing Examiner wherein it states: "...However, this was not because they were required to do so. Instead, these were gratuitous acts by secretaries who were concerned about being conscientious. (T 37, 116-117). ..."

The fact that the secretaries were motivated for whatever reason to remain voluntarily beyond 12:45 p.m. on the days in question does not entitle them to additional compensation for having acted as volunteers. They could have left at 12:45 p.m. on those days since they were only acting as volunteers but elected not to do so.

Although the Hearing Examiner does not subscribe to the Board's argument that the "work load increase, if any, is de minimus

...", the Hearing Examiner does note with approval the language from the Appellate Division decision in Caldwell-West Caldwell Education Association vs. Caldwell-West Caldwell Board of Education, 180 N.J. Super. 440 (App. Div. 1981) where the Court stated, inter alia, that "...Boards of education must be given some room to manage between contracts without being forced to bargain over every move they make. There must be some rounding of the edges of contention. ...Disputes of a relatively minor nature arising in the interim must be quelled..." (180 N.J. Super. at 449).

Thus, for the foregoing reasons, the claim of the Charging Party for additional compensation for twelve-month secretaries who work beyond 12:45 p.m. on November 21, 1984 and December 24, 1984 must be denied.

Finally, the Hearing Examiner finds and concludes that the Charging Party may not successfully attack the Board's establishment of the 1985-1986 calendar since the adoption of a calendar is plainly a managerial prerogative: Burlington County College Faculty Association vs. Board of Trustees of Burlington County College, 64 N.J. 10, 13, 16 (1973).

* * * *

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

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused to pay additional

compensation to twelve-month secretaries who worked after 12:45 p.m. on November 21, 1984 and December 24, 1984, nor when it refused to modify the 1985-1986 school calendar.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

Dated: December 4, 1985
Trenton, New Jersey