P.E.R.C. NO. 86-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LONG BRANCH BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-262-4

LONG BRANCH SCHOOL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Long Branch School Employees Association filed against the Long Branch Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it failed to include stipends for head teachers in the parties' collective agreement. The Commission, in agreement with the Hearing Examiner, finds the Association failed to prove the charge's allegations by a preponderance of the evidence.

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LONG BRANCH SCHOOL EMPLOYEES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, McOmber & McOmber, Esqs.
(Richard D. McOmber, of Counsel)

For the Charging Party, Chamlin, Schottland, Rosen, Cavanagh & Uliano, Esqs.
(Thomas W. Cavanagh, Jr., of Counsel)

DECISION AND ORDER

On March 19, 1984, the Long Branch School Employees Association ("Association") filed an unfair practice charge against the Long Branch Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(6) and (7),[1/] when it failed to include stipends for head teachers in the parties' collective agreement.

1/ These subsections prohibit public employers, their representatives or agents from: (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (7) violating any of the rules and regulations established by the commission.

On July 17, 1984, a Complaint and Notice of Hearing issued. The Board then filed an Answer. It denies that it agreed to include stipends for head teachers in the parties' agreement.

On November 29 and December 19, 1984 and January 25, 1985, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by May 6, 1985.

On September 23, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-16, 11 NJPER ___ (¶_____ 1985) (copy attached). He found that the parties had not agreed to include head teacher stipends in the parties' agreement. Alternatively, he found there was no "meeting of the minds" regarding the inclusion of head teacher stipends in the agreement. Accordingly, he recommended the Complaint be dismissed.

On October 8, 1985, the Association filed its exceptions. It contends that the weight of the evidence presented at the hearing warrants a finding that the Board agreed to the inclusion of head teacher stipends in the parties' agreement. On October 21, 1985, the Board filed its response, urging adoption of the Hearing Examiner's report and recommended decision.[2/] On October 25,

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2/ The Board also contended that the Association's exceptions were untimely. The Hearing Examiner's report advised the parties that exceptions were due October 7, 1985. Although the exceptions were received one day later, the Association had mailed its exceptions October 4, 1985. Further, the Board's objection was untimely. N.J.A.C. 19:14-7.3(d). Given these circumstances, we will consider the Association's exceptions.

1985, the Association filed a reply.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-12) are accurate. We adopt and incorporate them here.

N.J.S.A. 34:13A-5.4(a)(6) prohibits "public employers from...refusing to reduce a negotiated agreement to writing and to sign such agreements". The Association has alleged that the Board violated this subsection[3/] when it failed to sign an agreement which included stipends for "head teachers." To succeed in this claim, the Association has the burden of proving its allegations by a preponderance of the evidence. N.J.A.C. 19:14-6.8; Jersey City Board of Education, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983). The Board's defense is that it did not so agree. Thus, the determinative question here involves an interpretation of the parties' memorandum of agreement to determine whether the parties agreed to increase stipends for head teachers. Applying principles of contract interpretation, we hold, in agreement with the Hearing Examiner, that the Association failed to prove by a preponderance of the evidence that such an agreement was made. Therefore, we dismiss the Complaint.

In Jersey City Board of Education, P.E.R.C. No. 84-64, 10 NJPER 19, 20-21 (¶15911 1873) we set forth the applicable principles in resolving questions of this kind:

3/ The Complaint also alleged the Board violated subsection 5.4(a)(7). No evidence was introduced to support this allegation and we, therefore, dismiss it.

> The polestar of contract construction is to discover the intention of the parties. Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953). As stated by our Supreme Court in Kearny P.B.A. Local #21 v. Town of Kearny, 81 N.J. 208 (1979):
>
> > [a] number of interpretative devices have been used to discover the parties' intent. These include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage and the interpretation placed on the disputed provision by the parties' conduct. Several of these tools may be available in any given situation -- some leading to conflicting results. But the weighing and consideration in the last analysis should lead to what is considered to be the parties' understanding....What occurred during negotiations frequently will throw light upon the parties' intent as expressed in the written contract. [Id. at 221-222]

The starting point in determining the parties' intention is their memorandum of agreement which provided for stipends as follows:

> All non-athletic extra-curricular compensation rates shall be incorporated in the new agreement. All contractual stipends, including those for athletic and non-athletic extra-curricular assignments, head custodians, head maintenance and night crew chiefs shall be increased by the same percentage as teachers' salaries increase in each year.

This language does not evidence a dispositive answer to whether head teachers were intended to receive stipends, but the language above does not support the Association's position. First, the normal definition of the terms "extracurricular" suggests that "head teachers" were not included. The Hearing Examiner's discussion is applicable here:

> Extracurricular is defined as: of or relating to...organized student activities (or athletics) connected with school and usually carrying no academic credit. Webster's New Collegiate Dictionary (1981).
>
> That definition coincides with Korey's definition. A review of the extensive head teacher duties set forth in R-1 shows that head teacher duties are primarily connected to academic curriculum and instruction. Those duties do not include involvement in organized student activities. Thus, the head teacher position is not extracurricular. Similarly, the head custodians, and head maintenance and night crew chiefs are not extracurricular because they are not involved in student activities. However, since those latter positions were specifically included in C-5, they are entitled to benefit from the negotiated increase. The head teacher position, however, was not included in C-5, thus they are not entitled to any stipend increase. Slip opinion at 18.

Further, quite significantly, extrinsic evidence confirms that the parties intended the normal definition to apply. According to testimony credited by the Hearing Examiner,[4/] the chief negotiations spokespersons for the Board and the Association agreed to use the term extracurricular "with the understanding it would exclude head teachers." Thus, this extrinsic evidence strongly supports a finding that the parties' did not intend to include stipends for head teachers.

In reaching this result, we recognize that head teachers had been issued contracts headed "Contract for Extra-Curricular

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4/ We will not disturb the Hearing Examiner's credibility determinations. e.g. City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (¶15017 1983).

Activities." This evidence is some support for the Association's position since it can be argued that the Board, by its own usage, considered "head teachers" as doing extracurricular activities. As already noted, the usage the parties' place on language is a useful tool to discover the parties' intent. This evidence cannot be read in isolation, however. First, the contract pertained to individual employment contracts and was not the product of a negotiated agreement between the Board and the Association. Further, neither negotiations spokesperson was aware that the Board had used this form, thereby demonstrating that such evidence is of little consequence in determining the parties' intent during negotiations. Indeed, the superintendent testified credibly that the form was used only for "administrative convenience." Accordingly, considering the proofs as a whole, we cannot find that the Board agreed to include "head teachers" within the definition of extracurricular used by the parties. The negotiations history is directly to the contrary[5/] as is the normal definition of the term used.

Nor do we believe that the second sentence of the paragraph supports a finding that the Board violated subsection 5.4(a)(6). The concededly broad "all contractual stipends" is subsequently limited to only certain categories which do not include head

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5/ It is of no moment that the Association's chief negotiations spokesman did not have the authority to bind the Association. The Board was justified in relying on its acquiescence to demand that head teachers not be included.

teachers when the entire sentence is read together. When we read the paragraph in its entirety and in the context of all the attending circumstances especially including the negotiations history already referred to, we find that the Association failed to establish that the Board agreed to include head teachers within the agreement providing for salary increases for certain contractual stipends.[6/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Reid abstained. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
February 19, 1986
ISSUED: February 20, 1986

6/ We do not suggest that this decision should foreclose negotiations on the issue. Rather, we encourage it and note that the Board's answer admitted that "a misunderstanding existed" and "offered to seek resolution of the dispute by reopening negotiations to fix stipends for head teachers."

H.E. NO. 86-16

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

In the Matter of

LONG BRANCH BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-262-4

LONG BRANCH SCHOOL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Long Branch Board of Education did not violate the New Jersey Employer-Employee Relations Act by refusing to grant increases in the stipend for head teachers. The Hearing Examiner found that the head teacher stipend was not included in the parties agreement. Alternatively, the Hearing Examiner found that no meeting of the minds was reached regarding the inclusion or exclusion of the head teacher stipend. In either case, the Hearing Examiner recommended that the Complaint be dismissed in its entirety.

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.

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

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LONG BRANCH BOARD OF EDUCATION,

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LONG BRANCH SCHOOL EMPLOYEES
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Appearances:

For the Respondent
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For the Charging Party
Chamlin, Schottland, Rosen, Cavanagh & Uliano, Esqs.
(Thomas W. Cavanagh, Jr., of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 19, 1984, by the Long Branch School Employees Association ("Association") alleging that the Long Branch Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(6) and (7) of the Act by failing to include negotiated stipends for head teachers into the parties' collective agreement.[1/]

It appearing that the allegations of the Unfair Practice Charge may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 17, 1984. The Board submitted an Answer on August 24, 1984 denying the allegations in the Charge.[2/] The Board asserted that it did include negotiated stipends into the parties'agreement, but that head teachers were excluded from those stipends by the operative language of the agreement. The Board argued that it never agreed to include head teachers in the collective agreement.

Hearings were held in this matter on November 29 and December 19, 1984, and on January 25, 1985, in Trenton, New Jersey,

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1/ These subsections prohibit public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

Although the Association did not allege a violation of subsection 5.4(a)(5) of the Act in the Charge, it did allege that the Board failed to pay the stipend to the head teachers that it alleged was negotiated. That subsection of the Act provides that: This subsection prohibits public employers, their representatives or agents from: "(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/ The Answer was submitted by Malachi Kenney, the Board's labor attorney/chief negotiator. Once it became apparent that Mr.

(Footnote continued on next page)

at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.[3/] The transcripts were not all received until March 1, 1985, and both parties then filed post-hearing briefs, the last of which was received on May 6, 1985.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The Long Branch Board of Education is a public employer within the meaning of the Act and is the employer of the employees involved herein.

2. The Long Branch School Employees Association is an employee representative within the meaning of the Act and is the majority representative of the employees involved herein.

(Footnote continued from previous page)
Kenney would be required to testify in this matter a substitution of attorney was filed on October 23, 1984, and Mr. McOmber became the Board's attorney of record herein.

3/ The hearing was originally scheduled for August 28 and 29, 1984. However, pursuant to the Association's request the hearing was cancelled and then rescheduled for October 18, 1984, but by request of both parties the hearing was rescheduled again for November 29, 1984.

3. At hearing on November 29, 1984 the parties entered into a lengthy stipulation of facts (Exhibit J-1). The stipulations are paraphrased as follows:

a. The Board and Association were parties to a collective agreement which was effective from July 1, 1981 through June 30, 1983 and covered teaching staff members and nonprofessional support staff.[4/] In January 1983 the parties began negotiations for a successor agreement. The parties reached impasse, however, and on April 28, 1983 the Board filed a Notice of Impasse, and on May 18, 1983, the Commission appointed Joel Weisblatt as mediator. When mediation did not succeed, the parties waived fact finding and requested that Weisblatt serve as conciliator. Weisblatt was appointed conciliator on September 8, 1983.

b. On September 30, 1983 the Conciliator issued his Report and Recommendation (Exhibit C-3) which provided in the stipend section as follows:

The contract shall incorporate all non-athletic extra-

4/ The 1981-83 collective agreement did not incude a stipend for head teachers because the Association had not demanded negotiations regarding that position. (Transcript "T" 1 pp 35, 40). In its post hearing brief, the Association argued that the 1981-83 contract did not cover head teachers because that position did not exist when that contract was negotiated. However, the head teacher position did exist in the 1982-83 school year and there was no attempt by the Association to negotiate a stipend for that position in that year.

> curricular compensation rates. All stipends (including support personnel such as Head Custodian) shall be increased by the same percentages as the Teacher salary increases in each year.

On October 6, 1983 the conciliator issued a letter (Exhibit C-4) clarifying his Report. That letter provided the following clarification regarding stipends:

> The recommendation on stipends includes all contractual stipends specifically including: all athletic and non-athletic extra-curricular stipends; and head custodian, head maintenance and night crew chief stipends.

c. After receipt of C-4 the parties entered into a Memorandum of Agreement (Exhibit C-5) which provided for stipends as follows:

> All non-athletic extra-curricular compensation rates shall be incorporated in the new agreement. All contractual stipends, including those for athletic and non-athletic extra-curricular assignments, head custodians, and head maintenance and night crew chiefs shall be increased by the same percentages as teachers salaries increased in each year.

After C-5 was completed the Board drafted a new agreement. During the period between the execution of C-5 and the completion of a draft for a new agreement, the Board implemented the agreed upon compensation increases but did not implement increases for head teachers.

d. The initial proposal by the Association (J-1 Exhibit D) made only a single reference to extracurricular compensation as follows:

Proposals--Teachers

8. Increments and scale for extracurricular activities.

e. Prior to the execution of the new collective agreement (Exhibit J-2) effective July 1, 1983-June 30, 1986, the Association advised the Board that head teachers were entitled to the same increases in stipends as had been provided under the Agreement for non-athletic extracurricular compensation. The Board rejected that claim, however, and the parties subsequently agreed to execute J-2 without reference to head teachers with the understanding that the execution of that Agreement would be without prejudice to the parties respective positions regarding head teachers.

f. Head teacher assignments are only given to individuals already employed in the district as full-time teachers. The duties of head teacher are directly related to the district's academic program. The head teacher job duties as set forth in the job description, Exhibit R-1, include the responsibility for planning, development and implementation of the instructional and curriculum program.

g. For the 1983-84 school year head teachers were issued individual employment contracts such as Exhibit C-6 which were designated at the top of the form as:

"Contract for Extra-Curricular Activities"[5/]

4. Although the parties stipulated that the Conciliator issued C-4 to clarify C-3, there was no stipulation as to why a clarification of C-3 was needed. The record shows that C-4 was issued in response to concerns raised by the Board. After C-3 was issued, the Board's Superintendent, Herbert Korey, interpreted the stipend language in C-3 to exclude head teachers because they were not, in his opinion, extracurricular. (T 2 pp 31-32)[6/] However,

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5/ The Associations argument in this case was that head teachers were (are) "extra-curricular" and were therefore entitled to the contractual stipend increases. The primary basis for the Association's argument was that head teachers received individual employment contracts (C-6) which were entitled "Contract for Extra-Curricular Activities". The Board argued that head teachers were not extracurricular and that it only used those individual employment contracts out of administrative convenience. Thus, a primary issue in this case is whether head teachers are "extra-curricular".

6/ At T 2 p 31, the Association's attorney asked Korey:

> Are you telling us, today, that the language in this qualification indicated to you that these head teachers were being excluded from the negotiations? (Emphasis added)

The transcript shows that Korey began his response as follows:

> I'm telling you that my interpretation of what was in this language, was that the head teachers were included from the -- (Emphasis added)

But he was cut off by another question, and responded at T 2 p 32.

(Footnote continued on next page)

Korey recognized that the stipend language in C-3 might be unclear, or subject to different interpretations, and, therefore, he asked Board attorney, Malachi Kenney, to seek a clarification of C-3. (T 2 p 30)

Kenney testified that he too was concerned about the language used by the Conciliator in C-3. Kenney had testified that during the conciliation process he, the Conciliator, and the Association representative, John Malloy, met alone, and that he and Malloy agreed to use the term "extra-curricular":

> "... with the understanding that that would exclude the head teachers..." T 2 p. 113

I credit Kenney's testimony that he and Malloy agreed that the term "extra-curricular" excluded head teachers. Malloy only

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(Footnote continued from previous page)
They're <u>included</u> by my interpretation of the fact that head teachers are not super engaged in extra-curricular activities. (Emphasis added)

Although the transcript attributed Korey with having used the word "included", I find that the transcript is in error. That word (included) is out of context with the question, and out of context with Korey's and the Board's position herein. The Board and Korey have argued that head teachers were not extracurricular, and that is one of the issues to be resolved by this hearing. I specifically recall Korey's testimony to be that head teachers were "excluded" by this interpretation of C-3, and I have corrected the transcript as cited to reflect that Korey said "excluded" not "included".

I am not finding that Korey used the word "included" but that he really meant "excluded". Rather, I am specifically finding that the transcript was incorrect, and that Korey did use the word "excluded".

testified that he could not recall any side-bar discussion with Kenney concerning the term "extra-curricular" (T 3 pp 13, 15, 24-25). He admitted, however, that there may have been such a meeting (T 3 p 25), and he never directly contradicted Kenney's testimony.

When Kenney saw the word "All" underlined in C-3 he knew that there were stipends for positions which were not extracurricular and he was concerned that the word "All" might be construed to go beyond "non-athletic extra-curricular". (T 2 pp 118-119, 121) As a result of his and Korey's concern, Kenney asked the Conciliator for a clarification of C-3. Kenney testified that the stipend wording in C-4 relieved his concerns. (T 2 pp 121, 124) He indicated that the use of the phrase "all contractual stipends specifically including" in C-4 would effectively exclude any stipend position which was not extracurricular because the specific list following the "specifically including" language was limited to extracurricular positions, and the head custodian, head maintnenance and night crew chief stipends. (T 2 p 124)

After receipt of C-4, Kenney met with the Board and advised them of the agreement he reached with Malloy regarding the exclusion of head teachers from the stipend increases, and further advised them that the "non-athletic extra-curricular" language used in C-4 would also exclude head teachers. (T 2 p 62, 68, 125) Based upon those representations, the Board agreed to the language in C-5, but

it never agreed to include head teachers in the parties agreement. (T 1 p 61, T 2 p 126)[7/]

5. The record shows that neither Kenney nor Malloy had the independent authority to bind their respective clients to an agreement. Both the Board and the Association reserved the right to ratify any agreements that were reached by the negotiators. (T 2 p 174, T3 pp 6-7, 13) Kenney testified that he thought Malloy agreed that head teachers were not extracurricular because the Association had authorized such an agreement. He admitted, however, that he did not know whether the Association had actually authorized such an agreement. (T 2 p 175)

6. The Association's proposal for stipends was limited to one sentence: "Increment and scale for extra-curricular activities." The Association had only negotiated for coaching positions in previous negotiations and it never defined what it meant by "extra-curricular activities" or what assignments were included therein. (T 2 p 101) Malloy testified that he understood that proposal to cover

> all people who provided an extra-curricular, or co-curricular activity. (T3 p 11)

However, he did not recall any specific discussion regarding head teachers (T 3 p 12), he did not recall any discussion about the

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7/ The uncontradicted testimony by Korey and Kenney was that the Board only ratified C-5 knowing that head teachers were not included therein. (T 1 p 61, T 2 pp 125-126, 128)

meaning of "extra-curricular" (T 3 p 24) and, he did not recall whether any specific positions were being sought in connection with that demand. (T 3 p 46)

Korey defined extracurricular generally as, "a sport, or club activity, as opposed to strict academic instruction". (T 2 p 73) He gave several examples of extracurricular activities, such as: adviser to the student newspaper, band adviser, yearbook adviser, adviser to the music program, drama club adviser, math league adviser, and student council adviser. (T 1 pp 21-22, 40)

7. The record shows that the individual employment contract form used in C-6 and CP-1 was used for all stipend positions whether or not they were extracurricular positions. (T 1 pp 38, 66-69) Korey admitted that he used C-6 and CP-1 for head teachers despite knowing that their duties were not extracurricular. (T 1 pp 65-66, 76, T2 p 26) He testified, however, that he used the C-6, CP-1 form out of convenience (T 2 p 35), because he was waiting for contract negotiations to be completed and the issue of stipends to be clarified. (T 1 p 76) The record shows that in addition to the head teachers, the form used in C-6 and CP-1 was used for other stipend positions which were not extracurricular, such as: the lead teachers or team leader, audio visual aid coordinator, substitute caller, and computer education specialist. (T 1 p 69, T 2 pp 57-58)

8. The job description for head teachers, R-1, provides in large part that head teachers assist in the scheduling of teacher assignments, and assignments to student teachers and substitute teachers; assists teachers with student discipline and in preparing lesson plans; and, assists in budget preparation and in ordering supplies and equipment.

ANALYSIS

The Association's case rests upon its argument that because head teachers received individual contracts for their additional work (which were entitled "Contract for Extra-Curricular Activities", C-6 and CP-1) that the title on C-6 and CP-1 meant that their particualar stipend position was extracurricular and that they were therefore entitled to the raises set forth in the stipend section in C-5. The Association maintained that the parol evidence rule should be applied to prevent any other interpretation of C-6 and CP-1. I cannot agree with the Association's assessment of the facts or its application of the parol evidence rule. Head teachers were not extracurricular in the traditional sense, and neither C-3, C-4, nor C-5 were sufficiently clear on their face to prevent the introduction of parol evidence.

Alternatively, there was no meeting of the minds regarding the inclusion of head teachers in the parties agreement.

The Memorandum of Agreement

The operative agreement herein is the stipend language in C-5, not the Conciliator's language in C-3 and C-4. The Conciliator's language is merely an aid to interpreting C-5. The first sentence in the relevant part of C-5, "All non-athletic extra-curricular compensation rates shall be incorporated in the new agreement" is, standing alone, clear on its face. It provides, in essence, that only stipends for extracurricular positions will be included in the agreement. Stipend positions that were not extracurricular would not be included in the agreement. However, the second sentence of
the relevant C-5 language "All contractual stipends, including those for," etc, standing alone, confuses the interpretation of the first sentence. The second sentence, standing alone, gives the impression that all contractual stipends, whether extracurricular or not, are to be increased. No definition of "contractual" is provided, however, and it is unclear whether "contractual" refers to individual contracts such as CP-1, or whether it refers to positions listed in the parties collective agreement. In either case, the C-5 language, as a whole, is not clear on its face. The parol evidence rule was intended to restrict the admission into evidence of information or other agreements that would change the "clear" terms of a written agreement. Casriel v. King 2 N.J. 45 (1949); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953) However, in order to apply the parol evidence rule, the contract must first be clear on its face. Where, as here, the language in the agreement is not clear, parol evidence is admissible.

The Court in Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485 (App. Div. 1963), certif. den., 40 N.J. 226 (1963), best described the application of the parol evidence rule

> [T]he parol evidence rule does not even come into play until it is first determined what the true agreement of the parties is -- i.e., what they meant by what they wrote down. Only when that is determined is one in an appropriate position to raise the bar of the parol evidence rule to prevent alteration or impugnment of the agreement by the asserted contradictory prior or contemporaneous agreement. In other words, interpretation and construction must necessarily precede protection against forbidden contradiction or modification. And in the process of interpretation and construction of the integrated agreement all relevant evidence pointing to meaning is admissible because experience teaches that language is so poor an instrument for communication or expression of intent that ordinarily all surrounding circumstances and conditions must be examined before there is any trustworthy assurance of derivation of contractual intent, even by reasonable judges of ordinary intelligence, from any given set of words which the parties have committed to paper as their contract. Construing a contract of debatable meaning by resort to surrounding and antecedent circumstances and negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule. And debatability of meaning is not always discernible at the first reading of a contract by a new mind. More often it becomes manifest upon exposure of the specific disputed interpretations in the light of the attendant circumstances. 78 N.J. Super. at 496

Since C-5 is not clear, then all of the circumstances surrounding it - including parol evidence - must be considered. When all of the antecedent circumstances surrounding C-5 are examined, it becomes clear that only extracurricular

positions were meant to be included in C-5, not all contractual stipends, and that head teachers were not extracurricular.

Regarding the first part of the examination concerning which stipends were meant to be included in C-5, there is sufficient evidence to support a finding that C-5 was limited to extracurricular stipends, and not all stipends. First, as evidenced by its own negotiations proposal, the Association only demanded negotiations for extracurricular stipends, not for all stipends. Second, where the terminology used by the Conciliator in C-3 may have been confusing, the language in C-4, given the circumstances that precipitated C-4, evidenced an intent to limit the clause to extracurricular activities, and the other activities specifically listed therein.

I agree with Mr. Kenney's interpretation of C-4. By using the phrase "the recommendation on stipends includes all contractual stipends specifically including:" (emphasis added) the Conciliator meant to include only those areas that were specifically listed. The Conciliator then listed those areas as "all ... extra-curricular stipends,: and head custodian, head maintenance and night crew chief stipends". (emphasis added)

The legal maxim expressio unius est exclusio alterius is applicable in this case. That maxim means that when certain persons or things are specified in a contract (or law or will), an intention to exclude all others from its operation may be inferred. Black's

Law Dictionary (Fourth Edition 1968). The New Jersey Supreme Court indicated that that maxim is an aid to interpretation, and in Reilly v. Ozzard, 33 N.J. 529 (1960) it held:

> The final question is whether in a given context an express provision with respect to a portion of an area reveals by implication a decision with respect to the remainder. The issue is one of intention. The answer resides in the common sense of the situation. 33 N.J. at 539.

A common sense interpretaion of the instant facts shows that by listing extracurricular activities, and then listing specific custodial, maintenance and night crew stipends in C-4, the Conciliator demonstrated that the custodial, maintenance and night crew positions were not extracurricular, otherwise they would not have been specifically listed. Since those were the only non-extracurricular positions that were listed in C-4, there was an intent to exclude all other non-extracurricular stipended positions. Since the stipend language in C-5 was taken from the language in C-4, the parties intent was to include only extracurricular stipends, and those non-extracurricular stipends which were specifically listed.

The Employment Contract

Regarding the second part of the examination, concerning whether head teachers were extracurricular or not, several factors were considered. The Association argued that since C-6 and CP-1 - the Contract for Extra-Curricular Activities - was clear on its

face, the parol evidence rule should be applied to prevent a finding that head teachers were anything other than extracurricular. I do not agree. The Board admitted that head teachers received C-6 and CP-1. It admitted that C-6 and CP-1 were entitled "Contract for Extra-Curricular Activities". The issue is not the title of the form, but the inference one draws regarding those people who receive the form. The Association argued that the inference must be that head teachers are extracurricular. But the Board argued that head teachers were not extracurricular and that it has always used C-6 and CP-1 for stipended positions, and that employees holding other non-extracurricular stipended positions also received C-6 and CP-1.

The Board's argument, therefore, was to entirely undermine or overthrow C-6 and CP-1 to the extent that an inference could be drawn therefrom that all recipients of that form were extracurricular. The parol evidence rule was not intended to prevent the introduction of outside evidence for that purpose. The Court in Emerson New York - New Jersey, Inc. v. Brookwood Television, Inc., 122 N.J. Super. 288 (Law Div. 1973) held,

> The parol evidence rule precludes ...the introduction of evidence of antecedent negotiations or agreements to alter a subsequent writing ...The rule, however, does not preclude evidence that would tend to subvert or overthrow the writing entirely, Union Fur Shop v. Max Melzer, Inc., 133 N.J. Eq. 416 (E. & A. 1943). 122 N.J. Super. at 292.

Since the parol evidence rule does not apply to C-6 and CP-1, a review of all of the antecedent facts surrounding C-6, CP-1, and the meaning or definition of "extracurricular" is appropriate. The mere use of C-6 and CP-1 does not prove that head teachers are extracurricular. The facts show that the Association never defined "extracurricular", or what was included therein, during the negotiations process, and it never contradicted Korey's general definition of extracurricular as a "sport, or club activity, as opposed to strict academic instruction". Extracurricular is defined as:

> of or relating to ...organized student activities (as athletics) connected with school and usually carrying no academic credit. Webster's New Collegiate Dictionary (1981).

That definition coincides with Korey's definition. A review of the extensive head teacher duties set forth in R-1 shows that head teacher duties are primarily connected to academic curriculum and instruction. Those duties do not include involvement in organized student activities. Thus, the head teacher position is not extracurricular. Similarly, the head custodians, and head maintenance and night crew chiefs are not extracurricular because they are not involved in student activities. However, since those latter positions were specifically included in C-5, they are entitled to benefit from the negotiated increase. The head teacher position, however, was not included in C-5, thus they are not entitled to any stipend increase.

To the extent that the definition of "extracurricular" is still in doubt, or as to whether head teachers were meant to be included in that definition, then parol evidence - the oral agreement between Kenney and Malloy - becomes important. I have already credited Kenney's assertion that Malloy agreed that head teachers were not included within the meaning of" extracurricular".

Failure of the Meeting of the Minds

Even if the above arguments are not persuasive, the facts show that although the Association was not bound by the agreement between Kenney and Malloy to exclude head teachers from the meaning of extracurricular, that agreement precipitated a failure of the meeting of the minds between the parties on that issue because the Board relied upon that agreement (and the language in C-4) in ratifying C-5.

If the Association ratified C-5 believing that head teachers were included therein based upon C-6 and CP-1, the Board certainly believed, based upon C-4 and the Kenney/Malloy agreement, that head teachers were not included therein. Consequently, a failure of the meeting of the minds
occurred regarding the placement of head teachers in C-5, and the Association failed to prove by a preponderence of the evidence that the Board violated the Act.

Accordingly, based upon the facts and the above analysis I make the following:

Conclusions of Law

The Board did not violate N.J.S.A. 34:13A-3.4(a)(5), (6) or (7) by not increasing the stipend for head teachers.[8/]

Recommended Order

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

Dated: September 23, 1985
Trenton, New Jersey

8/ The §5.4(a)(7) allegation was dismissed because there was no showing that the Board violated any rule or regulation established by the Commission.