

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW PROVIDENCE BOARD OF EDUCATION,
Respondent,

Docket No. CO-76-282-13

-and-

NEW PROVIDENCE EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

The Chairman of the Commission, as the Commission's named designee, denies a motion made by the New Providence Board of Education to dissolve interim restraints against the Board in an Unfair Practice Proceeding. The Board, in P.E.R.C. No. 76-36, 2 NJPER 190 (1976) was ordered to notify its non-tenured teaching staff members, who had not been previously notified, that employment would not be offered for the ensuing school year and to negotiate with the Association concerning the impact on terms and conditions of employment of the Board's decision to reduce its teaching staff. The Chairman finds that the Board, at a hearing held to consider the Board's motion, failed to present any evidence or arguments which were not raised or considered prior to the issuance of the Order granting interim relief. The Chairman, while noting that the decision of the Appellate Division in Union County Regional High School Teachers Assn. Inc. v. Union County Regional High School Board of Education, ___ N.J. Super. ___ (1976) undermines his prior conclusion that the Association was likely to prevail on the merits of the charge, nonetheless declines to modify or dissolve his previous order as petitions for certification have been filed with the Supreme Court, seeking review of the Appellate Division's decision.

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Appearances:

For the Respondent, Pachman and Aron, Esq.
(Mr. Martin Pachman, Of Counsel and On the Brief)

For the Charging Party, Goldberg, Simon & Selikoff, Esqs.
(Mr. Gerald M. Goldberg, Of Counsel, Mr. Louis Bucceri,
On the Brief)

For Amicus Curiae, New Jersey School Boards Association
(Mr. John T. Barbour, Of Counsel)

DECISION ON MOTION

On April 27, 1976, the New Providence Education Association, (the "Association") filed with the Public Employment Relations Commission (the "Commission") an Unfair Practice Charge alleging that the New Providence Board of Education (the "Board") was engaging in conduct violative of subsections (a)(1) and (a)(5) of the unfair practice provisions of the New Jersey Employer-Employee Relations Act, (the "Act") as amended (N.J.S.A. 34:13A-5.4(a)(1) and (5)). The charge was accompanied by a request for interim relief pursuant to N.J.A.C. 19:14-9.1 et seq.

The charge alleges that the Association is the exclusive representative of the Board's non-supervisory professional employees; that the Board had determined that a reduction in force (RIF) of several of its non-tenured teachers would be necessary; that the

Board had notified several teachers that their contracts would not be renewed for the following year; that the Association had demanded to negotiate and the Board had refused to negotiate procedures relating to the RIF and the effects or impact on unit members' terms and conditions of employment of the RIF;^{1/} and that the Board by its refusal and proposed unilateral implementation of the RIF was in violation of the above-cited subsections of the Act.

On April 28, 1976, the undersigned, having been designated by the Commission to hear and determine requests for interim relief, presided at a hearing scheduled in connection with the Association's request.

Following the hearing, at which all parties^{2/} were given the opportunity to present evidence and arguments with respect to the requested relief, the undersigned issued an order (P.E.R.C. No. 76-36, 2 NJPER 190 (1976)) granting interim relief, which reads in operative part:

"IT IS on this 28th day of April 1976,
ORDERED that the Respondent, by no later than April 30, 1976, notify in accordance with the provisions of Title 18A of the New Jersey Statutes pertaining thereto, all non-tenured teaching staff members represented by the Charging Party and who have not been so notified heretofore, that employment for the ensuing year will not be offered, and it is
FURTHER ORDERED, that the Respondent, upon demand of the Charging Party, forthwith negotiate in good faith concerning the impact on terms

^{1/} Among the alleged effects of the Board's decision, listed in the Association's charge, which the Association seeks to mitigate through negotiations were recall rights for those terminated, severance pay, and the effects on terms and conditions of employment of the remaining teachers.

^{2/} The Board was represented by different Counsel at this proceeding.

and conditions of employment of unit employees, including but not limited to the procedures to be followed in selecting those unit employees to whom re-employment will not be offered, of the Respondent's decision to reduce its staff in the ensuing year."

In pressing both the request for interim relief and the underlying unfair practice charge, the Association has made it clear that it is not seeking to challenge the Board's judgment that certain non-tenured teachers be terminated because in the Board's judgment they lack the desired level of professional competence, nor the Board's judgment that the RIF itself was necessary.

Subsequently, on July 27, 1976, the Board, through its Special Labor Counsel, Martin R. Pachman, filed a Notice of Motion for Re-hearing as well as a Notice of Motion for Dissolution of Interim Restraints granted April 28, 1976. Those motions were accompanied by an affidavit as well as by a brief. Pursuant to the motions, an Order Granting Hearing was issued on August 6, 1976. That matter, which was originally scheduled to be heard on September 1, 1976, was subsequently re-scheduled at the request of Counsel and heard by the undersigned on October 13, 1976.

Prior to the hearing the Association filed a brief in opposition to the Board's motions.

At the October 13, 1976 hearing all parties had an opportunity to present evidence and arguments with respect to the motion. The Board in both the brief and at the hearing argued that the interim restraints had been improvidently granted and should be dissolved, on the grounds that the undersigned, on

April 28, 1976: (1) failed to take into account a purported "waiver" of the Association's claimed right to negotiate the subject matter in question by virtue of certain clauses in the parties' collectively negotiated agreement, and by virtue of the actual course of negotiations between the parties which culminated in the aforementioned agreement; (2) the subject matter in question was within the realm of the Board's managerial prerogatives and was not mandatorily negotiable; (3) an interim bargaining order cannot be based upon an obligation to bargain the unspecified "impact" of managerial decisions, and (4) there is no obligation to negotiate the "impact" of a managerial decision.

Before discussing the arguments raised by the Board, the undersigned wishes to point out that modification of orders granting interim relief will be entertained only in limited circumstances, especially since such orders by their very nature will exist for a limited duration. They will be supplemented by a final decision of the Commission following the disposition of the underlying unfair practice charge.

The Board's motions, in effect, allege that the original interlocutory order was based upon an erroneous assumption of law or fact, existing at the time the decision was made.

In determining whether or not the original order was erroneous, arguments or defenses relating to the efficacy of the original order, which were or could have been raised at or prior to the hearing leading to the original order should not normally be entertained on rehearing.

The Board's allegations in its first point are simply not borne out by the record of the April 28, 1976 proceeding. As pointed out by the Association in its brief, both aspects of the "waiver" issue were presented to the undersigned.^{3/}

Thus, this issue, having been raised and considered previously, cannot form the basis for the modification or dissolution of the previous order.

The third point raised by the Board is that the original order improperly directed negotiations upon unspecified impact of the Board's decision to effectuate a RIF. Since part of the impact was identified (procedures for selecting the non-tenured riffses), it is assumed by the undersigned that this argument is directed to the "including, but not limited to" language in the order. While some additional "impact" has been identified in the charge (see footnote 1, supra.) and in a subsequent interlocutory decision involving similar facts, which will be discussed below, the Board's argument here is unpersuasive, in view of the fact that the communications aspect of negotiations may well be necessary to identify how a management decision may have an impact on terms and conditions of employment.

The Board's remaining arguments attack the propriety of the Commission's so-called decision/impact dichotomy and the undersigned's conclusion that the "impact" in this case is mandatorily negotiable.

^{3/} Tr. 4/28/76 at 72-16, 77-18 to 78-10, affidavit of Robert A. Lachenauer, Board Secretary, dated April 28, 1976, Item 8.

As stated on the record at the October 13, 1976 rehearing, the undersigned does not intend to deviate in this decision from established Commission policy and previous Commission determinations regarding the scope of negotiations.^{4/} Even though the Board appears now to be taking more of a hard-line position against negotiability of this subject matter than it did at the April 28, 1976 proceeding,^{5/} both the decision/impact analysis and the basic question of negotiability were fully considered on April 28, 1976.

The Board, in urging dissolution of the April 28, 1976 order has failed to present any evidence or arguments which were not raised or considered at the hearing on the Association's requested restraint.

However, subsequent to the October 13, 1976 hearing, the Appellate Division reversed a similar interlocutory decision and order issued by the undersigned in connection with unfair practice charges filed against the Union County Regional High School Board of Education and the Cranford Board of Education.^{6/} While this decision undoubtedly undermines the undersigned's conclusion that the Associations were likely to prevail on the legal merits of the underlying unfair practice charges in those

^{4/} Tr. 10/13/76 at 46-22 to 47-11.

^{5/} Tr. 4/28/76 at 28-13 to 30-6.

^{6/} In re Union County Regional High School Board of Education, P.E.R.C. No. 76-43, 2 NJPER 221 (1976), reversed, sub. nom. Union County Regional High School Teachers Ass'n Inc. v. Union County Regional High School Board of Education, ___ N.J. Super. (App. Div. 1976), petition for certification pending, Docket No. 13,298.

cases and similarly in the instant case, both the Associations and the Commission have petitioned the Supreme Court to grant certification to review the Appellate Division's decision in that matter.^{7/}

As the Commission's orders are not self-enforcing, the Commission would have to apply to the Appellate Division, pursuant to N.J.S.A. 34:13A-5.4(f), to obtain enforcement of the interlocutory order issued April 28, 1976. In view of the current status of the Union County/Cranford litigation, it would be inappropriate to seek enforcement at this time.^{8/}

As discussed above, the Board has failed to raise any issues which were not presented to the undersigned at the time of the hearing on the request for interim relief. Since an interim order is normally of limited duration, designed to preserve the status quo and prevent irreparable harm pending a determination on the merits, it would be importune to modify the interim restraint previously granted, even in light of the still-

^{7/} With respect to the underlying Unfair Practice Charge, a Complaint was issued on August 6, 1976 by the Commission's Director of Unfair Practices, it appearing to the Director that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act. However, because of the pendency of appellate proceedings in Union County, supra., the case has not been set down for hearing and is being held in abeyance. Similar procedures have been followed with respect to additional unfair practice charges pending before the Commission which allege violations of the Act based upon conduct of public employers stemming from reductions in force.

^{8/} Moreover, the Association notes in its brief at p.6 that negotiations were held with the Board pursuant to the April 28, 1976 order, and that the Association acquiesced in the procedures the Board utilized to select the non-tenured teachers for the RIF when the Board advised the Association what the procedures were.

pending litigation in Union County/Cranford. However, because an interim restraint is based upon a forecast of success, rather than upon a plenary determination, the arguments raised by the Board in support of the instant motion may be pursued during the plenary aspects of this matter.

ORDER

The motion to dissolve the Order of April 28, 1976 is hereby denied.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
February 11, 1977