P.E.R.C. NO. 88-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-87-234

TRENTON EDUCATION ASSOCIATION,

Charging Party.

## SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Trenton Education Association against the Trenton Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it failed to negotiate in good faith over longevity payments for teachers with at least 30 years experience and failed to reduce to writing an agreement concerning these payments. The Commission finds that the Association did not prove its claim.

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TRENTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Smithson & Graziano, Esqs.
(Daniel J. Graziano, of counsel)

For the Charging Party, Ruhlman, Butrym & Friedman, Esqs.
(Richard A. Friedman, of counsel)

DECISION AND ORDER

On February 19, 1987, the Trenton Education Association ("Association") filed an unfair practice charge against the Trenton 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)(1), (5) and (6),[1/] when it failed to negotiate in good faith over

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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

longevity payments for teachers with at least 30 years experience and failed to reduce to writing an agreement concerning these payments.

On April 30, 1987, the Director of Unfair Practices dismissed the subsection 5.4(a)(6) allegation. D.U.P. No. 87-15, 13 NJPER 410 (¶18159 1987). However, on May 1, 1987, the Director issued a Complaint and Notice of Hearing on the remaining allegations.

On May 13, 1987, the Board filed its Answer asserting that the parties had no meeting of the minds on longevity payments.

On June 11, 1987, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On August 14, 1987, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 88-9, 13 NJPER ___ (¶_____ 1987). He concluded that the parties had not reached an agreement on longevity payments and suggested that negotiations on this issue continue.

On August 27, 1987, the Association filed exceptions. It excepts to the Hearing Examiner's conclusion that the parties had no agreement on longevity payments for 30-year teachers. On September 2, 1987, the Board filed a response. It urges adoption of the conclusion that there was no agreement.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. We adopt and incorporate them here.

We agree that the Complaint should be dismissed. The Association did not prove its claim that the Board agreed that

longevity payments for those with 30 years experience would be retroactive. In their previous contracts, the parties had provided that such payments would not be retroactive. The Association did not establish that the Board agreed to depart from this practice. Rather, the parties' agreement to eliminate the non-retroactive language was subject to the Board attorney's opinion that such language was illegal. Litigation was then pending which resulted in Giammario v. Trenton Bd. of Ed., 203 N.J. Super. 356 (App. Div. 1985), upholding the language. Thus, the attorney's opinion was that the non-retroactive language would remain.

Neither the memo's language nor the circumstances leading to its signing, indicate a clear intention of the parties concerning the retroactivity of the 30-year step. See Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983). After learning of Giammario, the Association's negotiations chairperson drafted an addendum to the memorandum of understanding. It stated:

> Notwithstanding the Board's rejection of the proposal to delete this [non-retroactivity] language from the Agreement, it is hereby understood by and between the parties that each and every member of the recognized unit shall receive longevity compensation at $800 for the 30 years experience level notwithstanding that they reached 30 years of experience prior to the effective date of this Agreement.

But the plain fact is that the Board did not agree to this language. Further, the Board's chief negotiator, who often met alone with the Association's chief negotiator, never agreed to the Association's interpretation. The Association's spokesperson testified that she had this conversation with the Board's spokesperson:

> He said we never discussed it. He said we never discussed what it meant and I said they were two -- they were two items. The 30 year at 800 was going to be no matter what and the retroactivity clause was something we were going to agree to with elimination if [the Board's Attorney] agreed to it [a reference to Giammario]. He said I agree with you but we never discussed what would happen if that retroactivity language wasn't gone. I said there was no need for us to do that because this was a separate item. That the 30 year level was going to be $800 no matter what, and he said, I don't agree with you on that but I said you've got two Board members that agree that that was our understanding Sammy and he said well that may be the case. [T90].

Thus, the Board did not agree with the Association's interpretation. Rather, the parties had no meeting of the minds. Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986); Bor. of Matawan, P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986); Jersey City Bd. of Ed. Consistent with our decision in Long Branch, we note that this ruling does not foreclose negotiations on this issue. In fact, the Board has agreed that there was no meeting of the minds. Therefore, further negotiations are appropriate so that this issue can be resolved.

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. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
November 16, 1987
ISSUED: November 17, 1987

H.E. NO. 88-9

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-87-234

TRENTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges filed by the Trenton Education Association against the Trenton Board of Education. The Hearing Examiner finds that the Association did not prove by a preponderance of the evidence that it had reached agreement with the Board concerning the amounts of longevity payments for all teachers with thirty years experience. The Hearing Examiner also recommends that the Commission dismiss charges that Board representatives did not accurately present and support the alleged agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 88-9

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

In the Matter of

TRENTON BOARD OF EDUCATION,

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TRENTON EDUCATION ASSOCIATION,

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Appearances:

For the Respondent
Smithson & Graziano, Esqs.
(Daniel J. Graziano, Esq. of Counsel)

For the Charging Party
Ruhlman, Butrym and Friedman, P.A.
(Richard A. Friedman, Esq. of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On February 19, 1987, the Trenton Education Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Trenton 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. The Association alleged that the Board failed to implement and reduce to writing a portion of a memorandum of understanding reached by the parties concerning longevity payments for teachers with 30 years or more experience, in

violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6).[1/] On April 30, 1987, the Commission's Director of Unfair Practices dismissed that portion of the original charge alleging the failure of the Board to reduce the memorandum of agreement to writing. (D.U.P. No. 87-15, 13 NJPER 410 (¶18159 1987) Assuming the truth of the Association's factual allegations, the Director found that they only established that the Board failed to ratify a memorandum of agreement. Since it was undisputed that the memorandum of agreement preserved the right of the Board to ratify that agreement, the Director found "...under the circumstances, the Board does not have an obligation to ratify every tentative agreement presented to it by its negotiating team." 13 NJPER at 411 (Citations omitted).

Although the Director declined to issue a Complaint as to the alleged violation of subsection 5.4(a)(6), he issued a Complaint on May 1, 1987, concerning the remainder of the allegations. On May 13, 1987, the Board filed its Answer, effectively denying that the parties had a meeting of the minds with respect to the thirty year longevity step as advanced by the Association. On June 11, 1987, I

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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 conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

conducted a hearing in Trenton, New Jersey, where both parties had opportunities to examine and cross-examine witnesses, present documentary evidence and argue orally. Both parties filed post-hearing briefs, the last of which was received on August 3, 1987.

## FINDINGS OF FACT

1. The Trenton Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Trenton Education Association is an employee organization within the meaning of the Act, is subject to its provisions and is the majority representative of teachers employed by the Trenton Board of Education.

3. In the fall of 1985, the Board and the Association began negotiations for a successor agreement to their 1985-86 contract. After numerous negotiations sessions, the parties reached impasse, and a Commission mediator was appointed in August 1986. The mediator met with the parties twice at Commission offices. The second meeting, conducted on August 28, 1986, lasted approximately thirteen hours and resulted in a one-page handwritten Memorandum of Understanding (Exh. J-1). J-1 was signed by members of both negotiations teams and stated that it was "subject to ratification" (T at 40, 55 and 73).

4. The disputed portion of J-1 states:

> Subject to receipt of opinion from Board Attorney -- eliminate language regarding retroactivity of longevity schedule.
>
> Increase 30 year longevity step to $800.

5. The parties stipulated that their previous contracts included provisions stating that longevity payments would not be retroactive. The parties further stipulated that in practice, teachers who previously received a lower longevity payment would remain at that level even if they would otherwise qualify for a higher longevity payment under the terms of the successor agreement. The Association's attorney concurred with the Board attorney's explanation of longevity articles in prior contracts:

> When there was a negotiation to increase longevity for everybody [from $400] to $600, there was an added language that said these payments shall not be retroactive. The Board interpreted that in paying, for example, a 25-year teacher as follows: If a teacher reached the 25-year milestone after the effective date of the contract with $600 that teacher got $600. If the teacher had already passed the 25-year milestone when the increment was $400 they would continue to get $400 forever. (T49-50).

6. Ann Rowbotham, a Uni-Serv Field Supervisor for the New Jersey Education Association, was the non-voting chair of the Association's negotiations team. Sandra Heckleman was President of the Association and participated in the negotiations that led to J-1. Both Rowbotham and Heckleman testified that the longevity package had been discussed throughout negotiations with the Board. Although the Association originally sought a percentage longevity package, it proposed at later mediation sessions that teachers receive $800 after 30 years of service, while leaving other longevity payments at $600 as provided in the prior contract. As J-1 indicates, the parties reached a tentative agreement to provide

the $800 payment to teachers after 30 years of experience. Both Rowbotham and Heckleman testified that they were also seeking to change the longevity payment system prospectively by eliminating the retroactivity language. Rowbotham also testified that while the parties never discussed what would happen to the thirty year teachers if the retroactivity language was not removed from the contract, "...we did couch it within the terms of why it is the Board should agree to this thirty years at $800" (T56-60, 80-82 and 98).

7. Throughout their negotiations the parties were aware of litigation which had recently occurred between the Board, the Trenton Administrators and Supervisors Association ("TASA") and certain Board employees who were represented by TASA. The case concerned the allegedly disparate impact of a longevity article in the contract between TASA and the Board. The parties do not dispute that the longevity articles in both the TASA contract and the Association's contract with the Board were identically applied to "lock in" teachers at their respective longevity payments. In the litigation (Giammario v. Trenton Bd. of Ed., 203 N.J. Super. 356 (App. Div. 1985)), the Court dismissed the action and held that the longevity provisions did not violate statutes prohibiting discrimination on the basis of age.

8. The reference in the Memorandum of Understanding to the elimination of the retroactivity language "subject to receipt of opinion from Board attorney" reflected the parties' knowledge of and

discussions with respect to the Giammario decision. Heckleman testified that the parties could not agree to remove the retroactivity language from the longevity article and "therefore we got the language that Mr. Rottkamp, who was the attorney involved in the [Giammario] case would be contacted and if he so indicated that -- yes -- keeping that clause in the contract would be discriminatory -- it would then be removed." (T58).

9. Rottkamp advised the Board's labor counsel, and labor counsel advised Rowbotham on October 1, that "...the Giammario case did not require the elimination of the 'non-retroactive' clause in the TEA longevity schedule." (Exh. J-5).

10. On October 6, 1986, Rowbotham drafted an "Addendum to Memorandum of Understanding" (Exh. J-6). The Addendum confirmed that the new collective agreement would contain the non-retroactivity language from the prior agreement. The Addendum also stated:

> Notwithstanding the Board's rejection of the proposal to delete this [non-retroactivity] language from the Agreement, it is hereby understood by and between the parties that each and every member of the recognized unit shall receive longevity compensation at $800 for the 30 years experience level notwithstanding that they reached 30 years of experience prior to the effective date of this Agreement.

11. Rowbotham testified that she did not draft the Addendum out of concern over what the parties agreed to. Instead, she testified that "...since this retroactive sentence was not being eliminated from the Contract there would be some confusion in reading the Contract and understanding that the 30 years was $800

but that the other levels were going to continue to be applied as they had. Therefore I wrote the Addendum so that there would be clarification of the Agreement to represent what was agreed to at the bargaining table." Both Rowbotham and Heckleman testified that the Addendum was consistent with their objectives and with their view of the agreement reached in the thirteen hour mediation session.2/ Rowbotham further testified that she discussed the Addendum with Graziano, and that Graziano disagreed with her concerning the agreement of the parties (T71, 84).

12. In view of this disagreement with Graziano, Rowbotham informed him that she would contact the two Board members who were present at the final mediation session and who signed the Memorandum of Understanding. Rowbotham testified that she contacted both Phil Plumeri and Donald Dileo and that each agreed with her understanding of the negotiations (i.e. that the retroactivity clause would not apply to the thirty year teachers). She further testified that both Dileo and Plumeri indicated that they would speak with Graziano concerning the issue. After speaking to Plumeri and Dileo,

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2/ The Association also offered testimony concerning the role and representations of the mediator in the dispute. As noted at hearing, such testimony is strictly hearsay and, absent corroboration, could not be relied upon to establish facts in the case. See In re Howard Savings Bank, 143 N.J. Super. 1, 8 (App. Div. 1976). Moreover, subsequent to the hearing in this matter, the Commission issued its decision in Rutgers, The State University, P.E.R.C. No. 88-1, 13 NJPER ___ (¶_____ 1987), holding that the Commission's mediation rules preclude testimony by any party to a mediation concerning the representations of the mediator (slip opinion at p. 11).

Rowbotham called Graziano and informed him of her conversations with Plumeri and Dileo. Rowbotham testified that during that conversation Graziano still disagreed with her view of the parties' agreement:

> He said we never discussed it. He said we never discussed what it meant and I said they were two -- they were two items. The 30 year at $800 was going to be no matter what and the retroactivity clause was something we were going to agree to with elimination if Rottkamp...agreed to it. He said I agree with you but we never discussed what would happen if that retroactivity language wasn't gone. I said there was no need for us to do that because this was a separate item. That the 30 year level was going to be $800 no matter what, and he said well, I don't agree with you on that but I said you've got two Board members that agree that that was our understanding; and he said well that may be the case [T90].

13. Plumeri and Dileo testified that they received phone calls from Rowbotham subsequent to the thirteen hour mediation session and the emergence of the dispute about the thirty year teachers. In addition, Dileo testified that he encountered Rowbotham at a restaurant and also discussed the topic with her there. Neither Plumeri nor Dileo confirmed Rowbotham's testimony with regard to the thirty year issue. Instead, each testified that they did not agree with her interpretation of the clause either when they spoke to her or as of the hearing date. Plumeri could not recall discussing the thirty year retroactivity issue during the thirteen hour mediation session, while Dileo testified that it was not discussed during the session. Dileo further testified that in his post-mediation discussions with Rowbotham, "I felt like she was

lobbying for something extra beyond what we agreed to at the mediation session." (T28, 31-37 and 42-48).[3/]

14. On October 21, 1986, the Association ratified the Memorandum of Understanding (J-1), together with the Addendum to the Memorandum of Understanding (J-6)(T108, 118). The Board ratified the Memorandum of Understanding on October 22, 1986 but refused to accept the terms of the Addendum as it concerned the thirty year teachers. Dileo did not attend the October 22nd meeting since he had resigned from the Board effective September 15, 1986. Plumeri was ill and did not attend the October 22nd meeting (T38, 91; Exh. J-7 and 8).

15. Subsequent to the respective ratification votes, Rowbotham continued to try to resolve the disagreement. She contacted Pedro Medina, President of the Board:

> In my discussion with Mr. Medina, he implied that when he was present at the presentation of the Memorandum of Understanding to the Board for ratification, the presentation implied that...the Addendum was asking for retroactive reimbursement to these people equaling the amount of $800 and that Board would not ratify that. And I said, "No, that in fact is not what we were asking for." And the only reason it ever became an issue is so that it was in conflict with the fact that the longevity

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3/ The Association argues that adverse inferences should be drawn from the Board's failure to call Graziano as a witness. In view of the fact that both Plumeri and Dileo attended the thirteen hour mediation session, were signatories to the Memorandum of Understanding and were members of the Board, the Board cannot be fairly said to have failed to offer testimony as to matters within the personal knowledge of its members. While Plumeri and Dileo were both called as witnesses by the Association, the Board Attorney noted on the record that the testimony of Dileo and Plumeri was consistent with the Board's position. (T122)

> sentence was still in the Contract and we were giving $800 to everybody at the 30-year level. And he said, "Well, that's not what I understood at the meeting," and I said, "We were not present at the meeting but that's what we negotiated." and he said, "Well, that's -- I have no problem with that." "Put it in writing to us and that will all be corrected and those people will get their money." [T115]

16. After her conversation with Medina, Rowbotham confirmed that conversation in a letter of November 6, 1986, to Graziano (Exh. J-9).

17. Graziano informed Rowbotham that the Board's Public Employee Relations Committee "would present a recommendation to the Board at their January meeting with regard to retroactive application of the $200 increase in the 30-year longevity step." (Exh. J-10). The parties do not dispute that the Board did not formally vote on a reconsideration of the thirty year longevity issue (T16, 96, 114 and 122). The issue remains unresolved, and the parties have held a related grievance in abeyance pending this decision.

## Analysis

The Association and the Board agree that they reached agreement for academic years 1986-87 through 1987-88 on all substantive issues. The parties' dispute is limited to the application of the longevity article in the case of teachers who reached thirty years of service prior to the effective date of the contract. The Board maintains that, as in prior agreements, only teachers who reach the thirty year threshold during the tenure of the new agreement would receive the increased longevity payment of

the new agreement. The Association maintains that the parties reached an agreement to apply the new longevity amount to all teachers who have thirty years credit, irrespective of when they reach(ed) that threshold.

The Commission has decided numerous cases presenting similar post-ratification disputes. Where an agreement between parties was clear and unambiguous the Commission has found violations of the Act by the party which refuses to execute a contract replicating the agreement. Bergen County Prosecutor's Office, P.E.R.C. No. 83-90, 9 NJPER 75 (¶14040 1982); Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985); Matawan-Aberdeen Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987); and Twp. of North Caldwell, P.E.R.C. No. 87-71, 13 NJPER 57 (¶18024 1986). Where the agreement was not clear and unambiguous, and the parties had divergent intentions as to a substantive term of the agreement, the Commission has found no violation of the Act because the parties did not reach agreement or have a meeting of the minds. Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); Borough of Matawan, P.E.R.C. No. 86-87, 12 NJPER 135 (¶17052 1986); and Long Branch Bd. of Ed., P.E.R.C. No. 86-97, 12 NJPER 204 (¶17080 1986).[4/]

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4/ Compare Lower Twp. Bd. of Ed., P.E.R.C. No. 78-32, 4 NJPER 25 (¶4013 1977) and Passaic Valley Water Comm., P.E.R.C. No. 85-4, 10 NJPER 47 (¶15219 1984) where the Commission found that the parties did not reach agreement in the pre-ratification context.

Thus, the instant matter turns on the parties' Memorandum of Understanding: Did the parties agree to pay the higher level longevity payment ($800) to all teachers who reached the thirty year threshold irrespective of when the threshold is reached? The inquiry must focus on the intentions of the parties. As the Commission noted in Jersey City Bd. of Ed., our Supreme Court has set forth standards for reviewing intentions of contracting parties:

> 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. Kearny PBA Local #21 v. Twp. of Kearny, 81 N.J. 208, 221-222 (1979).

The starting point in determining the parties' intentions is an examination of the parties' August 28, 1986 Memorandum of Understanding. As noted by the Commission in Jersey City Bd. of Ed., 10 NJPER at 21, "[i]t is a fundamental canon of construction that the intent of the parties, as clearly expressed in writing, controls. See e.g., Newark Publishers' Assn. v. Newark Typographical Union, 22 N.J. 419, 427 (1956)."

The disputed language, replicated at Finding of Fact No. 4, consists of two sentences which are listed in consecutive but separate entries in numbered paragraph two of the Memorandum of

Understanding. Each is clear in its own right. However, neither sentence references the other, nor does the Memorandum of Understanding at any point indicate what interrelationship, if any, exists between the two sentences.

The ambiguity of the Memorandum of Understanding as concerns the dispute between the parties is not clarified by the testimony of the parties. While the Association witnesses were clear, determined and credible as to their belief that the $800 applied to all thirty year people regardless of when they achieved that threshold, witnesses for both the Association and the Board testified that the interplay of the $800 and the possible nonremoval of the retroactivity language was never discussed (see Findings of Fact Nos. 6 and 13).

In view of the ambiguity of the interplay of the disputed clauses, and in the absence of any express language in the Memorandum of Understanding which would clarify the issue, the Association must demonstrate that the circumstances leading to the Memorandum compel the Association's interpretation rather than the Board's. However, since the record shows that the parties never discussed the interplay of the clauses prior to signing the Memorandum, the Association cannot demonstrate by a preponderance of the evidence that the parties reached a meeting of the minds to pay all thirty year teachers the $800 longevity payment irrespective of when each teacher reached the thirty year threshold. This conclusion is buttressed by the fact that the parties all knew that

the previous contracts had a contrary application; that the legality of such application was upheld in Giammario; and that the parties in effect deferred the general issue of retroactivity to the opinion of Rottkamp, the Board's attorney in Giammario. If the thirty year teachers were to be treated differently from all other teachers, even in the event Rottkamp advised that the retroactivity language remained legal, express language in the Memorandum (or, at a minimum, a clear discussion of the issue by the parties at mediation) would be necessary to demonstrate a meeting of the minds consistent with the Association's position. Under the totality of the circumstances, I conclude that the Association did not prove by a preponderance of the evidence that the parties had a meeting of the minds on the disputed issue. Accordingly, I recommend that the Commission find that the Board did not violate subsection 5.4(a)(5) of the Act when it refused to implement the Association's position with respect to longevity payments to thirty year teachers in the 1986-88 collective agreement.5/

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5/ While the Association offered extensive testimony of its post-Memorandum of Understanding efforts to communicate its position regarding the thirty year teachers to the Board, ultimately such testimony is of no moment. This case must turn on whether or not the parties had a meeting of the minds when they signed the Memorandum of Understanding; subsequent communications between the parties could establish that the parties later modified the Memorandum, but are not probative as to the intention of the parties at the time they signed the Memorandum. Indeed, the unilateral creation of the Addendum to the Memorandum tends to confirm that the parties had not clearly addressed the disputed issue in the original Memorandum.

I do not, by this conclusion, suggest that the parties had a meeting of the minds to make longevity payments to thirty year teachers in a manner consistent with the Board's position. Association representatives testified credibly that they were seeking special treatment for thirty year people to remedy what they viewed as discriminatory treatment of those experienced teachers. However, I have found that this tacit intent was not expressly reflected in the Memorandum of Understanding, nor was it ever discussed by the parties. In view of these circumstances, I recommend the Commission find that, as in Long Branch Bd. of Ed., the failure of a meeting of the minds here does not "foreclose negotiations on the issue." 12 NJPER at 205.6/

The Association also alleges that Board representatives violated subsection 5.4(a)(5) of the Act when they failed to accurately present and advocate the Memorandum of Understanding to Board members at their October 22 meeting.7/ Having found that the parties did not reach a meeting of the minds upon the issue of longevity payments for thirty year teachers, I cannot conclude that

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6/ I note that the Board, on the record, expressed a willingness to "go back to the bargaining table on this limited issue." (T15). Negotiations on the limited issue appear appropriate; since disagreement between the parties is limited to this narrow issue, the parties should be bound to the rest of their agreement for 1986-88.

7/ This allegation, and those reviewed in the remainder of this Recommended Report and Decision, were not contained in the original charge but have been fully and fairly litigated by the parties. Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 250 (¶13253 1982), aff'd App.Div. Dkt. No. A-1642-8272 (12/8/83).

the Act was violated by the Board attorney's presentation of what he reasonably believed to be the parties' agreement. Nor can I conclude that the absence of Dileo and Plumeri at the Board meeting constituted an unfair practice; since Dileo was no longer a member of the Board by October 22, 1986 and Plumeri was ill (Finding of Fact No. 14), their failure to attend the meeting cannot, standing alone, constitute bad faith negotiations.

I also conclude that the Association has failed to prove by a preponderance of the evidence that the various conversations which Rowbotham had with Dileo, Plumeri or Medina, in the context of subsequent Board actions, indicate any improper conduct by the Board. I note that Dileo and Plumeri did not corroborate Rowbotham's testimony on those conversations, and that neither party called Medina to testify. Assuming, without deciding, that Rowbotham's testimony accurately recounts those conversations, I find that the Board did not violate its obligation to negotiate in good faith. While individual Board representatives may have been receptive to Association overtures after the Memorandum of Understanding was signed but prior to voting on either the Memorandum or the Addendum, this does not alter the fact that the parties did not have a meeting of the minds on a narrow issue when they signed the Memorandum. Nor does it change the essential fact that a majority of the Board has never voted to provide the Association with the benefit it seeks for all thirty year teachers.

The Association also alleges that the Board did not negotiate in good faith when it failed to "reconsider the retroactive application of the $200 increase in the thirty year longevity step..." in accordance with Graziano's letter of January 14, 1987 (Exh. J-10). While there was no formal reconsideration vote (Finding of Fact No. 17), the record is devoid of any non-hearsay evidence as to the events relevant to this allegation. I recommend that this allegation should also be dismissed.

## RECOMMENDED ORDER

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

Mark A. Rosenbaum
Hearing Examiner

Dated: August 14, 1987
Trenton, New Jersey