P.E.R.C. NO. 88-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-261-15

TRENTON ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Trenton Administrators and Supervisors Association against the Trenton Board of Education. The charge alleges the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally increased unit member Harry Dearden's workload and refused to negotiate additional compensation for this increase. The Commission finds that the Board did not violate the Act because it had the unilateral right to increase Dearden's workload since it was the result of creating a position and the Association did not request to negotiate compensation.

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TRENTON ADMINISTRATORS AND
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Charging Party.

Appearances:

For the Respondent, Lemuel H. Blackburn, Jr., Esq.
(Hope R. Blackburn, of counsel)

For the Charging Party, Robert M. Schwartz, Esq.

DECISION AND ORDER

On March 19, 1986, the Trenton Administrators and Supervisor Association ("Association") filed an unfair practice charge. The charge alleges the Trenton Board of Education ("Board") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when it unilaterally increased unit member Harry Dearden's

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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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority

Footnote Continued on Next Page

workload and refused to negotiate additional compensation for this increase.

On May 6, 1986, the Board filed a statement of position. It argued that on its face the charge presented no proof of violations of subsections 5.4(a)(1) and (3) and therefore no Complaint should issue. Further, the Board maintained that it had no obligation to negotiate since any alleged workload increase resulted from its non-negotiable decision to abolish Dearden's position and assign him a new one.

On July 31, 1986, a Complaint and Notice of Hearing issued. The Board relied on its statement of position as its Answer.

On September 24, 1986, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally.

On March 2, 1987, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 87-51, 13 NJPER 203 (¶18086 1987). He reasoned that since any alleged workload increase stemmed from a reorganization, the Association had the obligation to request negotiations over compensation before filing its unfair practice charge. He found it did not do so. He recommended dismissal of the

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1/ Footnote Continued From Previous Page

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."

5.4(a)(1) and (3) allegations since he found that the Board had a legitimate business justification for directing Dearden to stop doing his former duties.

On March 23, 1987, after receiving an extension, the Association filed exceptions. It asserts that: (1) it demanded negotiations when it filed Dearden's grievance; and (2) the Hearing Examiner's reliance on Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15625 1984) was misplaced because the Board failed to relieve him of his old duties.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-9) are accurate. We adopt and incorporate them. We specifically accept his credibility determinations.

The principles governing this case are settled. The Board had the managerial prerogative to abolish Dearden's former position and to create the job title of Assistant Purchasing Agent/Stock and Inventory Control. Bergen Pines Cty. Hosp., P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986); Willingboro Bd. of Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984). Thus, the creation of this position did not obligate the Board to engage in negotiations. It is equally settled, however, that the question of the amount of compensation the occupant of the new position is entitled to receive is severable from the decision to create a position and is mandatorily negotiable. Ramapo-Indians Hills Reg. H.S. Dist. Bd. of Ed. v. Ramapo-Indian Hills Ed. Ass'n, Inc., 176 N.J. Super. 35 (App. Div. 1980); Fairview Bd. of Ed., P.E.R.C. No. 84-43, 9 NJPER 659 (¶14285).

We now apply these principles. The gravamen of the Association's claim is that the Board violated the Act when it unilaterally increased Dearden's workload. But since any increase was the result of creating a position, there was no obligation to negotiate over that increase. The Association had the burden to initiate negotiations on the severable question of compensation. Monroe. This it did not do. It instead filed a grievance[2/] claiming that the Board violated the contract when it assigned Dearden additional duties without compensation. The filing of a grievance alleging a contractual violation does not constitute a request to negotiate. See Monroe (an unfair practice charge is not a request to negotiate). This grievance was denied by the Board and was not pursued to binding arbitration as permitted by the contract. Had the Association believed that the Board's actions implicated statutory rights instead of a mere breach of contract, State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), it should have so informed the Board by a direct demand to negotiate rather than a contractual grievance. Ramapo-Indian Hills Ed. Ass'n.

2/ We disagree with the Hearing Examiner that Dearden's grievance was not on behalf of the Association. We believe it was. The Board's papers so labelled it, the Association's attorney represented Dearden, and the parties' contract gave Dearden the right to file a grievance in his own name.

In the absence of exceptions and under all the circumstances of this case, we also adopt the Hearing Examiner's recommendation that the 5.4(a)(1) and (3) allegations be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James M. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was opposed.

DATED: Trenton, New Jersey
August 19, 1987
ISSUED: August 20, 1987

H.E. NO. 87-51

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-86-261-15

TRENTON ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Trenton Board of Education did not violate the New Jersey Employer-Employee Relations Act when it unilaterally implemented a new title and duties for employee Harry Dearden. The Hearing Examiner found that there was no change in Dearden's salary and no increase in his workload when the new title was implemented, thus no duty for the Board to negotiate at that time. The Hearing Examiner found that the Association had the burden to seek negotiations over a different salary for the new position, or over additional compensation for a perceived workload increase resulting from the employee performing additional, but unassigned, work. The Association did not seek negotiations, thus the Board was not obligated to negotiate.

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. 87-51

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

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Appearances:

For the Respondent
Lemuel H. Blackburn, Jr., Esq.
(Hope R. Blackburn, of Counsel)

For the Charging Party
Robert M. Schwartz, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 19, 1986 by the Trenton Administrators and Supervisors Association ("Association") alleging that the Trenton Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act").[1/] The Association alleged that the Board unilaterally increased the workload of employee Harry Dearden and then refused to negotiate over additional compensation for the increased duties.

A Complaint and Notice of Hearing (Exhibit C-1) was issued on July 31, 1986, and the Board relied upon its May 6, 1986 statement of position as its Answer (Exhibit C-2). The Board denied committing any violation of the Act. A hearing was held in this matter on September 24, 1986 at which time the parties presented evidence, examined witnesses, and argued orally. Both parties filed post-hearing briefs by November 14, 1986.

Based upon the entire record I make the following:

Findings of Fact

1. The Board is a public employer within the meaning of the Act, and the Association is a majority representative within the meaning of the Act.

2. The Board and Association were parties to a collective agreement (Exhibit J-1) effective from July 1, 1984--June 30, 1986

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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (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."

covering administrators and supervisors including the position of Assistant to Assistant Secretary which was held by Harry Dearden from January 1979 through August 1985 (T9, T14)[2/] Exhibit J-1 included a salary schedule for the Assistant to the Assistant Secretary. In September 1985 the Board abolished the position of Assistant to Assistant Secretary and offered Dearden employment in the newly created position of Assistant Purchasing Agent/Stock and Inventory Control (T14, T38, T49). There was no assertion, and no evidence, that Dearden's former position was abolished for any reason in violation of the Act. The new position was apparently placed in the Association's unit and Dearden was paid the same salary in his new position as provided in J-1 for his former position. There was no workload or workhours clause in the parties' collective agreement.

3. The job description for the Assistant to Assistant Secretary position (Exhibit J-2) primarily included assisting the Assistant Secretary of Purchases and Supplies; overseeing the operation of the storeroom; resolving supply, delivery and storeroom problems; maintaining composite book yearly operation for stock items; processing stock requisitions and controlling inventory; handling supply department functions; ordering fuel oil; and processing related paperwork. The job description for the Assistant

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2/ Transcript citations from the September 24, 1986 hearing are referred to as "T."

Purchasing Agent/Stock and Inventory Control position (Exhibit J-3) primarily includes assisting the Assistant Secretary/Purchasing Agent in purchasing operations; receiving of district acquisitions; maintaining equipment, furnishings and fixtures; disposing of physical assets; tagging equipment; preparing inventory records for computer input; maintaining maintenance and repair records; coordinating repairs; and preparing annual inventory reports.

Dearden testified that from September 1985 through February 1986 he functioned in both his former and new positions (T22). He further testified that in late 1985 he often worked through his lunch hour and took work home which he rarely did before (T27). But the record shows that he had not been directed to work through lunch or take work home (T51).

On January 28, 1986 Dearden prepared a list (Exhibit R-1) of the job duties he had been performing since September 1985. That list included certain duties from J-2 and J-3. Dearden's supervisor Douglas Palmer, the Assistant Secretary/Purchasing Agent, first saw R-1 at the hearing on September 23, 1986 (T52). He did not know that Dearden was performing all of those tasks.

In February 1986 Palmer directed Dearden to cease performing duties of the Assistant to the Assistant Secretary position and to start all the duties of his new position (T32-T33, T45, T50). At that point Dearden ceased performing composite book and stock item responsibilities, stock requisitions and inventory control, and department supply functions (T32-T33). Once he ceased

performing those duties from his former position, Dearden's workload in his new position was apparently equal to the workload in his former position. Thus, it was only between September 1985 and February 1986 that the Association alleges there was a workload increase.

4. Palmer was Dearden's supervisor in both his former and new positions. Palmer testified that since new computer equipment was not ready in September 1985, and since Dearden needed that equipment to perform his new duties, he instructed Dearden to finish the job duties of his former position and not start any new tasks (T49-T50). In September 1985 Palmer knew that Dearden was overseeing the warehouse operation and receipt of stock; maintaining the composite book for stock items; reviewing whether vendors complied with affirmative action laws; receiving equipment; and ordering metal stickers for tagging equipment (T54-T55, R-1). Palmer also knew that between September 1985 and February 1986 Dearden was going to meet with computer people to plan his program (T51). But he did not know that Dearden was preparing records to be computerized, and preparing a computer program for inventory control (T55).

Dearden testified that Robert Lawrence, the Director of Computer Services, was pressuring him (Dearden) to provide computer data for the main computer system (T26-T28). Dearden testified that in order to provide that information he took work home. Lawrence testified, however, that it only took Dearden ten minutes to gather

the information that he (Lawrence) requested (T89-T90). In either case, Dearden did not contradict Palmer's testimony that he (Dearden) had been instructed not to perform his new duties. I credit Lawrence's testimony that the work he requested Dearden to perform took only minimal time to complete. I infer therefrom that any additional computer work that Dearden performed which necessitated his working through lunch and taking work home was assumed through his own initiative.

In January 1986 Palmer asked Dearden how much longer it would take for him to complete his former duties, and Palmer testified that Dearden said he would be finished in mid-February (T50). Thus, Palmer directed Dearden to start his new duties on February 18 (T50). Palmer further testified that he was not aware of an increase in Dearden's workload between September 1985 and February 1986, and that Dearden was neither required to miss lunch nor take work home (T51). In fact, Palmer testified that Dearden never told him (Palmer) that his (Dearden's) workload made it necessary for him to work through lunch and take work home (T51).

5. In October or November 1985 Dearden filed a grievance alleging that the Board unilaterally increased his duties without additional compensation in violation of Article 7, Paragraph B of J-1 (Exhibit J-4). Article 7, Paragraph B provides:

> Any anticipated policy which has an impact on the terms and conditions of employment of an administrator...shall be brought before the Association thirty (30) days prior to its adoption, except in case of unusual circumstances or emergency, but in no event shall any term or condition of

> employment be changed without proper negotiations consistent with Chapter 123, Public Laws of N.J., 1975.

The grievance sought additional compensation for additional duties.

A grievance hearing was held before the Superintendent of Schools on November 25, 1985 and the grievance was denied. The Superintendent explained that although duties were modified, there were no overall additional responsibilities, and no contract violation (J-4, attachment A). On January 24, 1986 a grievance hearing was held before a committee of the Board, and the grievance was again denied for the same reasons (J-1, attachment 1).

Exhibit J-1 provided for binding arbitration and gave the grievant the opportunity to proceed to arbitration with or without the Association. Dearden testified that the Board processed the grievance, and that he chose not to file for arbitration (T34-T35, T37, T43). The Association did not demonstrate that the Board failed or refused to notify the Association 30 days in advance of its adoption of the decision to abolish Dearden's former position, the creation of the new position, and Dearden's assignment to that position.

I credit Palmer's testimony. Neither Dearden nor anyone else on behalf of the Association contradicted Palmer's testimony that he was not aware of any workload increase for Dearden between September 1985 and February 1986. Palmer never even saw R-1 until the day of hearing. I observed Palmer's testimony and found him to be a believable witness. Thus, I credit his testimony and find that there was no intended, expected or known workload increase. That

finding is supported by the fact that in February 1986, when Dearden was ordered to perform only the duties of his new position, his workload was then apparently equal to the workload of his former position. When Palmer in September 1985 told Dearden to finish his former duties and not start new tasks, he expected Dearden's workload to remain the same.

Dearden, however, apparently through his own initiative, assumed some of the responsibilities of his new position which inevitably increased his workload and resulted in his working through lunch and taking work home. Since Dearden did not tell Palmer what he (Dearden) was doing, Palmer was unaware of any workload increase or its resulting impact. Similarly, since Dearden did not inform Palmer that he was performing some of his new duties and working through lunch, the mere filing of the grievance did not give Palmer notice of the additional duties Dearden had assumed. Thus, the grievance was denied because the Board did not believe or know that there was any change in Dearden's workload.

6. Dearden testified on cross-examination that he believed that he was eventually told not to continue performing the duties of his former position because he filed the instant grievance (T42). However, when pressed on that issue during cross-examination Dearden admitted that his testimony was based upon rumors, and he did not really know whether that action was taken because he filed a grievance (T42-T43). Thus, I do not credit any assertion that the Board took any action against Dearden because he filed a grievance.

7. Dearden testified that the Association did not ask the Board to negotiate over the increase in his duties from September 1985 through February 1986 (T44). Dearden indicated that through his grievance he sought to negotiate with the Board over his duties (T44). He also indicated that Association President Applegate had a meeting with the Superintendent where Dearden's workload was "mentioned" (T44-T45). However, Applegate did not testify at the hearing and there was no showing that he spoke to the Superintendent regarding Dearden's workload or asked to negotiate over the workload. Dearden actually was not even sure whether Applegate met with the Superintendent. Dearden only testified that "I think" Applegate had a meeting, and "I believe" Applegate "mentioned it." (T44-T45). Thus, I do not credit any assertion that Applegate or anyone else on behalf of the Association sought to negotiate over Dearden's workload. Rather, I credit Dearden's earlier testimony that the Association did not ask to negotiate over his workload. Not having been asked to negotiate over compensation for the new position, the Board never "refused" to negotiate as alleged by the Association.

Analysis

In its post-hearing brief the Association alleged that Dearden was required to perform the duties of both his former and new positions, that the Board had refused to negotiate, and that Palmer directed Dearden to cease performing his former duties because the grievance had been filed. The Board in its brief argued

that the complaint be dismissed because it did not refuse to negotiate and at least in part because the Association failed to pursue the grievance to arbitration. The Board also argued that Dearden accepted the new position at the stated salary.

The parties have approached this case from different legal perspectives. The Association apparently believes that this is a simple workload issue case and that the Board's alleged "refusal" to negotiate over additional compensation was a violation of the Act. The Board in large part argued that the complaint be dismissed because the Association failed to seek a resolution of this matter through the parties' arbitration procedure. Although it did not cite the relevant case law, the Board's argument invokes the policy established by the Commission in State of N.J. (Department of Human Services, P.E.R.C. No. 84-148, 19 NJPER 419 (¶15191 1984)("Human Services").

I find that neither the facts nor the law support the Association's position that the Board violated the Act. Contrary to the Association's position, I do not believe that the issue here is one of workload, or of the Association's right to negotiate over compensation. Rather, I believe that the issue here is when does the duty to negotiate affix and who had the burden to come forward? Since any change in Dearden's workload resulted from his assignment to a new position with different duties, and from his assumption of duties that had not been assigned, and since his salary was not altered, it was the Association's responsibility to come forward and

demand negotiations for additional compensation and/or to pursue a grievance through arbitration to resolve any contractual claim. The Association did neither, and the Board was not otherwise obligated to negotiate.

The Abolishment And Creation Of Positions - Workload And The Duty To Negotiate.

The Association neither alleged nor proved that the Board's decision to abolish Dearden's former position or to create his new position was unlawfully motivated. The Association also did not contest the Board's managerial right to determine the job duties and responsibilities of the new position.

It is well established in this State that public employers have the managerial prerogative to abolish and create positions, and transfer, assign and reassign employees to meet operational needs. Ridgefield Park Bd.Ed. v. Ridgefield Park Ed. Assn., 78 N.J. 144 (1978); Ramapo-Indian Hills Ed. Assn. v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. Ed., 176 N.J. Super. 35 (App. Div. 1980); Maywood Bd. Ed., 168 N.J. Super. 45, certif. den. 81 N.J. 292 (1974); Deptford Tp. Bd. Ed., P.E.R.C. No. 80-82, 6 NJPER 29 (¶11014 1980); Trenton Bd. Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982); Warren County, P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985).

It is equally well established that workload increases are generally mandatorily negotiable. Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Woodstown-Pilesgrove Bd. Ed. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582, 589 (1980); Byram Tp. Bd. Ed., 152 N.J. Super. 12 (App.

Div. 1977); Maywood, supra. Workload can be defined as the sum of the duties and responsibilities assigned to any one employee. Where a public employer assigns additional duties to an employee in his/her existing title, the public employer must offer to negotiate with the majority representative (not the employee) at least over additional compensation for the additional duties prior to implementation. For example, the Commission and the courts have held that the assignment of additional teaching periods to teachers is mandatorily negotiable. City of Bayonne Bd. Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Dkt. No. A-954-79 (1980), pet. for certif. den. 87 N.J. 310 (1981); Newark Bd. Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/20/80); Dover Bd. Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82); Kingwood Tp. Bd. Ed., App. Div. Dkt. No. A-1414-84T7 (11/25/85).

But the right of the majority representative to negotiate over workload increases must not be confused with the public employer's right to create new positions and their corresponding job duties. In Ramapo-Indian Hills, supra, the court held that workload was not negotiable where it was significantly interrelated with the exercise of a management prerogative in creating the duties of a new position. 176 N.J. Super. at 45-46. But the court did find that compensation for the new position was negotiable. 176 N.J. Super. at 48. The holding in Ramapo is applicable here. The Board had the right to determine the duties for the new position without

negotiating the workload of the new position with the Association prior to implementing the new position. But absent any existing contractual waiver in J-1, the Association (but not Dearden) had the right to demand negotiations for a different salary for that position, or even to demand negotiations for additional compensation to cover the limited period of time between September 1985 through February 18, 1986. But Dearden admitted that the Association made no demand.

In Monroe Tp. Bd. Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984), affirming H.E. No. 84-66, 10 NJPER 400 (¶15186 1984), the Commission addressed the issue of which party, the employer or the union, has the burden to seek negotiations. In Monroe the Board subcontracted its cafeteria operation and did not offer to negotiate over the severable aspects of the decision such as procedural issues, notice, severance pay and recall rights. The union did not demand negotiations over those items; instead, it alleged that the Board had the duty to come forward and offer to negotiate prior to implementing its decision. The Commission, however, disagreed. It held that since the decision to subcontract was managerial, and since the Board was not repudiating the parties' contract or altering existing terms and conditions of employment, the union had the burden of demanding negotiations on the severable aspects of the managerial decision. The Commission held:

> The important point here, however, is that the Association had the obligation to request negotiations on severance pay and related matters, and the Board had the right to an opportunity to respond, before the

filing of an unfair practice charge. 10 NJPER at 570.3/

Monroe is applicable here. The Board exercised its managerial prerogative to abolish one position and create another, and to establish the duties of the new position. It did not repudiate the contract, and it did not alter existing terms and conditions of employment. Dearden's salary was not altered, and I have found that Palmer did not direct Dearden to assume a greater workload than he previously performed, and did not intend or expect Dearden's workload to increase. The facts show that the workload of the new position equated with the workload of the former position. Thus, in the beginning of September 1985 there was no change in Dearden's terms and conditions of employment and any desire to negotiate different compensation for the new position had to be expressed by the Association.

Sometime between September and November 1985 Dearden assumed some of his new computer data duties despite Palmer's directive not to begin those tasks. Those computer data duties apparently caused Dearden to work through lunch and take work home. If at that point the Association believed that Dearden was entitled to additional compensation because of the perceived workload

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3/ See also Town of Secaucus, H.E. No. 87-41, 13 NJPER ___ (¶_____ 1987) where a Hearing Examiner recently applied Monroe, supra, and held that the union had the burden of demanding negotiations over severable aspects of the managerial decision to implement a sick leave verification policy.

increase the Association had the duty to demand negotiations. However, it made no demand. As was the case in Monroe, the Board here was entitled to the opportunity to respond to a demand to negotiate before the Association filed a charge. Since no demand was made, the Board cannot be found to have refused to negotiate.

Neither Dearden's demand that the Board negotiate with him or that it negotiate with the Association, nor his filing the grievance, were sufficient to obligate the Board to negotiate here. The right to negotiate as provided for in subsection 5.4(a)(5) of the Act is available to majority representatives, not individual employees, and the right to negotiate must be exercised by the majority representative, not by an individual. Hoboken Bd. Ed., D.U.P. No. 80-1, 5 NJPER 313 (¶10169 1979), aff'd P.E.R.C. No. 80-36, 5 NJPER 410 (¶10213 1979); Bergen County Community Action Program, D.U.P. No. 78-9, 4 NJPER 136 (¶4063 1978).

Thus, Dearden's demand that the Board negotiate with him over additional compensation did not obligate the Board to negotiate, and since there was no showing that Dearden was acting as an agent of the Association, any demand by him that the Board negotiate with the Association did not obligate the Board to negotiate. Similarly, there was no showing that the Association filed the grievance. Exhibit J-1 provides that individuals can file and process grievances on their own behalf even through arbitration, and it appears from the record that Dearden was processing his own grievance. Under those circumstances in particular, the filing of

the grievance by Dearden could not be considered as a demand by the Association to the Board to negotiate over compensation for Dearden. Thus, the subsection 5.4(a)(5) allegation should be dismissed.[4/]

The 5.4(a)(3) Allegation

In order to prove a 5.4(a)(3) violation the Association must show that the Board took action against Dearden because of his exercise of protected activity. Even if the Association could prove that element, the Board, as a defense, could show that it would have taken the same action in any event based upon legitimate business considerations. Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). The only evidence of protected activity was that Dearden filed a grievance. The Association alleged as the violation that in January or February 1986 Palmer had Dearden discontinue performing his former duties because he (Dearden) filed a grievance. Even assuming that the Board in part discontinued Dearden's former duties at that time because he filed a grievance, it was inevitable that those former duties would be discontinued as was understood in September 1985 when the new position was created which was prior to the filing of any grievance. Thus, Dearden's

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4/ In its post-hearing brief the Association relied upon certain workload cases to support its argument. Those cases, however, dealt with the assignment of additional duties to existing positions and were similar to the cases cited above: Bayonne, supra; Newark, supra; and Dover, supra; and are distinguishable from the instant facts.

former duties would have been discontinued in any event even if it was done in part because he filed the grievance. The Board, therefore, met its burden under Bridgewater. The 5.4(a)(3) allegation, therefore, should be dismissed.

The Failure To Proceed To Arbitration

In Human Services a dispute arose over the interpretation of a contract clause and the Commission refused to issue a complaint on an alleged 5.4(a)(5) charge. The Commission emphasized that the Act includes a legislative intent to resolve contractual disputes through the parties' grievance procedure. 10 NJPER at 421. Thus, the Commission held that it would not permit litigation of a breach of contract claim in the guise of an unfair practice charge. 10 NJPER at 422.

The Commission, however, indicated that some breach of contract claims may be evidence of an unfair practice such as where an employer has violated its obligation to negotiate in good faith. The Commission cited several examples in which it would issue complaint: A claim that the employer has repudiated a term and condition of employment; charges which indicate that the policies of the Act, rather than a mere breach of contract, may be at stake; and where specific indicia of bad faith over and above a mere breach of contract are alleged. 10 NJPER at 423.

The decision to issue a complaint is based upon the wording of an unfair practice charge. Based upon the instant charge the Director of Unfair Practices was correct in issuing the instant

complaint. The charge alleged a workload change which, standing alone, could be considered a repudiation of existing terms and conditions of employment. A hearing was necessary to determine the facts of the alleged change. Thus, Human Services did not apply in the initial processing of the charge.

Having considered the facts, however, I conclude that the Board did not repudiate existing terms and conditions of employment. To the extent that the Association believed that the Board violated Article 7, Section B of J-1, it should have pursued the grievance to arbitration. In the facts before me there was no showing that the Board failed to give the Association a thirty (30) day notice of the change in Dearden's position. In addition, since the Board did not authorize or require an increase in Dearden's workload there was no change in terms and conditions of employment in September 1985 which would have obligated the Board to negotiate. Similarly, since the Association made no demand to negotiate over compensation after Dearden voluntarily assumed additional duties, it could not be found that the Board "refused" to negotiate.

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

Recommendation

I recommend that the Commission ORDER that the Complaint be dismissed.[5/]

Arnold H. Zudick
Hearing Examiner

Dated: March 2, 1987
Trenton, New Jersey

5/ My recommendation that the Commission dismiss the Complaint is primarily based upon my discussion that the Association failed to demand negotiations over compensation. My decision is not at all based upon the Board's assertion that Dearden "accepted" the same salary for the new position. To the extent that the Board believes that Dearden's acceptance of the salary was a legitimate defense here, it is mistaken. As is stated above, the duty to negotiate runs to the majority representative, not the employee. Just as it was inappropriate for Dearden to demand to negotiate with the Board, it is equally inappropriate for the Board to rely on any acceptance of the salary by Dearden as fulfilling its duty to negotiate with the Association over compensation for positions covered by its unit. Absent a contractual waiver, had the Association demanded negotiations over compensation for Dearden's new position, the Board would have been obligated to negotiate. Whether such negotiations would have resulted in a different salary is academic. The point is, Dearden's alleged acceptance of the salary was irrelevant. Since no demand was made, then under the instant facts the Board was not obligated to negotiate.