P.E.R.C. NO. 88-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-87-66-39

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Respondent,

-and- Docket No. CE-87-5-44

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses cross-complaints based on unfair practice charges filed by the Matawan-Aberdeen Regional School District Board of Education and the Matawan Regional Teachers Association. The Association's charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it increased the workday. The Board's charge alleged the Association violated the Act when it refused to negotiate a successor agreement until the parties reached agreement concerning distribution of surplus aid monies. The Commission finds that both charges are moot because the Board has restored the prior workday and the Association has engaged in negotiations for a successor agreement.

The Commission further holds that Association grievances seeking compensation for the increased workday may be submitted to binding arbitration.

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DISTRICT BOARD OF EDUCATION,

Charging Party.

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-87-61

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Respondent.

Appearances:

For the Board, Kenney & Kenney, Esqs.
(Malachi J. Kenney, of counsel)

For the Association, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Mark J. Blunda, of counsel)

DECISION AND ORDER

On September 5, 1986, the Matawan Regional Teachers Association ("Association") filed an unfair practice charge against the Matawan-Aberdeen Regional School District 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., specifically subsections 5.4(a)(1),(3),(5) and (7),[1/] when, for high school teachers for the 1986-1987 school year, it unilaterally: increased the workday, pupil contact time, homeroom assignments and duty periods, and decreased professional and preparation time.

Simultaneously, the Association moved for interim relief restraining the Board from altering the workday, pupil contact time, homeroom periods, and professional and preparation time. The Board opposed the motion, contending that the workday increase, which amounted to 10 minutes per day, was not a mandatory subject of

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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 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; and (7) Violating any of the rules and regulations established by the commission."

negotiations under the particular circumstances of the case because it was made pursuant to a managerial prerogative to reorganize the district's facilities and a State Board of Education mandate concerning the duration of instructional periods.

On September 26, 1986, following a hearing, Commission Designee Charles A. Tadduni ordered the Board to rescind the 10 minute workday increase within the next three weeks. I.R. No. 87-7, 12 NJPER 779 (¶17297 1986). The Appellate Division then granted the Board's application for leave to appeal and summarily reversed this order, stating:

> Leave to appeal is granted and the interlocutory decision and order of September 26, 1986 of Commission Designee Tadduni is summarily reversed. We do not pass upon the relief which may be awarded by PERC, either of a monetary nature or otherwise, if it concludes that an unfair labor practice has been committed. [App. Div. Dkt. No. AM-216-86T5 (10/15/86)]

The Supreme Court denied leave to appeal.

On October 1, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 15, 1986, the Board filed its Answer. It admitted most of the factual allegations, including that it increased the workday and homeroom periods by 10 minutes, but denied violating the Act, asserting it made this change pursuant to a district-wide reorganization and a State Board of Education mandate and that it was willing to negotiate over compensation.

On August 25, 1986, the Board filed a charge against the Association. The charge alleges the Association violated the Act, specifically subsections 5.4(b)(3) and (5),[2/] when it refused to negotiate a successor agreement until the parties reached agreement concerning distribution of surplus minimum salary aid funds received from the State which were beyond the funds necessary to bring employees to the statutory minimum salary of $18,500.

On October 9, 1986, the Director of Unfair Practices issued a Complaint and consolidated the case with the Association's charge.

On April 7, 1987, the Board filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by the Association. The grievance alleged that the Board violated the parties' contract when it unilaterally increased the workday. The Board also sought an interim restraint because "the subject matter of that grievance is identical to the subject matter of currently pending unfair labor practice charge.... To allow the arbitration process to proceed would permit a duplicity of litigation."

On April 16, 1987, Commission Designee Edmund G. Gerber granted in part and denied in part the Board's request. He stated, "the decision to increase the length of the workday was

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2/ These subsections prohibit employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit and (5) Violating any of the rules and regulations established by the commission."

based on educational policies, the arbitration is restrained. However, to the extent that the issue of compensation for an increased workday is a severable issue, the application for restraint is denied...." I.R. No. 87-24, 13 NJPER ___ (¶_____ 1987).

On April 21, 1987, the Board amended its petition seeking to restrain arbitration of a grievance pertaining to an increase in homeroom duty assignments. On April 23, the Commission designee decided that, "to the extent the decision to increase homeroom duty assignments was based upon educational policy, the arbitration is restrained. However, to the extent of compensation for the increased homeroom duty is a severable issue, the application for restraint is denied...." I.R. No. 87-27, 13 NJPER ___ (¶_____ 1987). On April 24, the Appellate Division denied the Board's emergent application for leave to appeal and to enjoin arbitrations.

On May 13, 1987, the Board moved to consolidate the scope petition with the unfair practice charges. On June 18, Chairman Mastriani advised that "There is no need to formally consolidate these matters, although the Commission may ultimately reach a decision simultaneously on all outstanding petitions."

Awards have been issued on the two grievances which are the subject of the Board's scope of negotiations petitions.

On June 8, 1987, the arbitrator issued his award on the Association grievance concerning the school day increase. He found that the Board violated the collective negotiations agreement when

it extended the workday. As a remedy, he ordered that the affected teachers receive additional compensation.

On August 4, 1987, the arbitrator issued his award on the Association grievance concerning the homeroom duty period. He found that the Board violated the collective negotiations agreement when it increaed homeroom duty assignments of 48 teachers from six to sixteen minutes. As a remedy, he ordered that the affected teachers "shall receive straight-time compensation based on a proration of their annual contractual salaries provided this compensation does not duplicate the ten minutes they may have received in the extended workday compensation award."

On December 16 and 18, 1986, January 16 and 21, and February 5, 11 and 18, 1987, Hearing Examiner Alan R. Howe conducted hearings on the consolidated unfair practice Complaints. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On May 22, 1986, the Hearing Examiner issued his report recommending dismissal of both Complaints. H.E. No. 87-69, 13 NJPER 517 (¶18195 1987). He found that the Board did not violate the Act when it lengthened the workday of teachers and the homeroom duty of certain teachers by ten minutes because the increase "had its origin in a legitimate reorganization of the high school in order to accommodate a ninth grade and its students." He further found that the Board was obligated to negotiate over compensation, but that the Board had indicated its willingness to do so and that the pending

grievance arbitration could well resolve that issue. The Hearing Examiner also recommended dismissal of the Board's charge since he concluded that the Association's request that the distribution of surplus State aid money be resolved first was "hard bargaining" rather than a predetermined intention to avoid reaching a successor agreement. The Hearing Examiner did not address the scope of negotiations petition.

The Hearing Examiner's findings of fact (pp. 9-21) are uncontested except for the following Association exceptions:

> (1) they are incomplete because he does not find that the Board distributed a "bogus" document which withheld information referring to the planned workday and homeroom period increase.
>
> (2) finding of fact 19 that Deputy Superintendent Klaron and the Board's negotiating committee concluded, by January 1986, that the workday would have to be increased and that Principal Nesnay concluded, in June 1986, that a staggered schedule was virtually impossible. The Association contends these findings are "incorrect and incomplete." It asserts that the Board discussed, from January through June 1986, the length of the workday. Nesnay, as late as August 1986, intended to implement a staggered schedule.

On June 8, 1987, the Association filed exceptions. It contends the Hearing Examiner erred in dismissing its Complaint because: (1) teacher workload, pupil contact time and professional and preparation time are mandatory subjects of negotiations. It cites Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978); Burlington Cty. College Fac. Ass'n. v. Bd. of Trustees, 64 N.J. 10 (1973); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super.

564 (App. Div. 1976) and Kingwood Tp. Bd. of Ed., P.E.R.C. No. 86-85, 12 NJPER 102 (¶17039 1985). It asserts that: (1) the Hearing Examiner's recommended decision would "emasculate" our Act and "destroy the bargaining process in the public sector of New Jersey;" (2) the Board's managerial prerogative to reorganize the school district and lengthen the student day and class periods does not give it the right to increase teachers' workday and workload, relying on Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980); (3) the Board did not have the right to increase workload because there was no reduction in force; (4) the Hearing Examiner's reliance on Pt. Pleasant Bd. of Ed., P.E.R.C. No. 81-145, 6 NJPER 299 (¶11142 1980); Passaic Cty., P.E.R.C. No. 87-40, 12 NJPER 803 (¶17036 1986); Tp. of Nutley, P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985); Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983) and Tenafly Bd. of Ed., P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983) is misplaced because those cases did not involve any unilateral changes in terms and conditions of employment; (5) he erroneously concluded that the availability of other options which might have obviated the need for a workday increase was irrelevant, and (6) there is no legal authority for the conclusion that "the Board was plainly entitled to have the simultaneous exchange of contract proposals."

The Board has responded to these exceptions claiming: (1) it is not obligated to negotiate the impact on terms and conditions of employment of a major educational policy decision, principally

relying on Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) and Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super. 43 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); (2) the Hearing Examiner's cited authority was properly relied on; (3) the Woodstown-Pilesgrove balancing test establishes that the length of the workday, under the circumstances of this case, is not mandatorily negotiable, and (4) the Hearing Examiner found there was a direct relationship between the reorganization and the workday extension and there were no feasible alternatives.

On June 9, 1987, the Board filed exceptions. It contends the Hearing Examiner erred in dismissing its Complaint because the Association refused to negotiate for a new agreement until agreement was reached on the surplus residual State aid distribution and the Association's reasons for refusing to do so were a "sham" and "served no legitimate substantive interest." It further contends the contractual hours of work clause is invalid given the Hearing Examiner's finding and grievance arbitration is not the appropriate mechanism to resolve a negotiations dispute over compensation for an extended workday because the arbitrator has effectively become an interest arbitrator with authority to impose a settlement contrary to the Commission's rules.

On July 14, 1987, the Commission heard oral argument.

As it now stands, the issue of the Board's unilateral decision to increase the workload of the high school teachers is moot. For the 1987-88 school year, the increases in both the work

schedule and the homeroom periods have been rescinded. This was made possible, according to the Board, because of declining student enrollment and an increased school budget. Arbitrators have issued awards compensating teachers for the increased work. Further, there is no indication that the Board is contemplating making any future changes in the teachers' work schedule. Under these circumstances, we will not issue an opinion resolving a mere academic issue. That has long been our State's judicial policy. See e.g., Oxfeld v. New Jersey State Bd. of Ed., 68 N.J. 301 (1975); Sente v. Clifton Mayor and Coun., 66 N.J. 204 (1974); Woodsum v. Pemberton Tp., 177 N.J. Super. 639 (App. Div. 1981); DeRose v. Byrne, 139 N.J. Super. 132 (App. Div. 1976). We believe such a policy is especially applicable where labor disputes are concerned. Continued litigation over this past dispute would only foment instability and hostility between the parties when labor stability and peace are most needed. See e.g., Rutgers University, P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), appeal pending App. Div. Dkt. No. A-174-87T7; State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987).

Likewise, we believe the Board's charge alleging that the Association refused to negotiate in good faith is also moot. The gravamen of that charge is that the Association's conduct in insisting that the parties negotiate and reach agreement on the distribution of the surplus State aid monies before negotiating any other issues constituted a refusal to negotiate in good faith. That claim is now moot because the parties are currently negotiating on other issues.

In sum, both parties have received what they have sought in this litigation and we will not decide these issues in the abstract. The Board has returned to the work schedule which existed before the charge. The Association has exchanged contract proposals with the Board and is engaged in successor contract negotiations.

The remaining issue to be decided is whether the grievances which are the subject of the arbitration awards are within the scope of negotiations. The Board has stated, in its motion to consolidate, that the issues raised by the scope petition were fully litigated during the unfair practice hearings and that the Board will rely on that testimony, documentary evidence and legal argument. Under these circumstances, we consolidate the petition with the unfair practice record and will decide whether the arbitration awards are within the appropriate scope of negotiations. First, however, we note our limited jurisdiction in making such determinations:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975)]

The Board's defenses appear to be that the arbitrator did not have the authority under the contract to render a monetary award for a violation of the contract. It also appears to argue that the contract was not violated because it had expired. But we do not have the authority to decide such questions in a scope of negotiations proceeding. Rather, our jurisdiction is limited to the abstract question whether compensation for the increased workday is mandatorily negotiable. We find that it is. While we need not decide whether the Board had the right to unilaterally increase the workday, our case law firmly establishes that the compensation claim was an appropriate subject for arbitration. E.g., Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986), aff'd App. Div. Dkt. No. A-4545-85T7 (3/23/87); Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶15312 1984). See also Woodstown-Pilesgrove. In Montville, the Association filed a grievance seeking compensation for a 12 minute increase in the length of the school day caused by the Board's reorganization of the structure of the school day. In affirming our determination that the compensation claim could be submitted to arbitration, the Appellate Division said:

> The Supreme Court and this court have held on numerous occasions that claims for additional compensation based on increases in the length of the work day during the term of a collective negotiating contract are mandatorily negotiable and hence may be subject to binding arbitration. See, e.g., Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Bd. of Ed. of City of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973);

> Ramapo-Indian Hills Ed. Ass'n v. Ramapo Indian Hills Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980); In re Galloway Tp. Bd. of Ed., 157 N.J. Super. 74 (App. Div. 1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976).
>
> Although the Court's opinion in Woodstown-Pilesgrove adopts a somewhat different approach than prior cases to determining scope of negotiation issues, nothing in that opinion indicates that a public employer can unilaterally increase the length of its employees' workday without their entitlement to additional compensation being subject to arbitration. On the contrary, Woodstown-Pilesgrove involved an issue very similar to the one in this case, the right of teachers to arbitrate a claim for additional compensation for two additional hours of school on the day before Thanksgiving. The Court stated that "...fixing the number of school days and the hours of instruction per school day fall within a fundamental management prerogative." 81 N.J. at 593. Nonetheless, the Court concluded that the teachers' claim for additional compensation for extra hours of work was subject to arbitration, stating: "There being no demonstration of a particularly significant educational purpose and the budgetary consideration being the dominant element, it cannot be said that negotiation and binding arbitration of that matter significantly or substantially trenched upon the managerial prerogative of the board of education." 81 N.J. at 594. We conclude that it was within the discretionary authority of PERC in dealing with negotiability issues to reach the same conclusion in the present case. [Sl. op. at 3-4]

Likewise, the related issue concerning compensation for lengthening the homeroom period may be submitted to binding arbitration.

Accordingly, we dismiss the Complaints and decline the Board's request to find that the Association's grievances are not mandatory subjects of negotiations.

ORDER

The Complaints are dismissed. The Board's request to restrain arbitration over grievances which involve monetary issues is denied.

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
December 21, 1987
ISSUED: December 22, 1987

H.E. NO. 87-69

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

In the Matters of

MATAWAN-ABERDEEN REGIONAL
SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-87-66-39

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Respondent,

-and- Docket No. CE-87-5-44

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate §§5.4(a)(1), (3), (5) or (7) of the New Jersey Employer-Employee Relations Act when it unilaterally increased the length of the workday for high school teachers by ten minutes for the 1986-87 school year and also extended homeroom duty by ten minutes for 48 of the same high school teachers. The basis for this conclusion that the Board did not violate the Act by unilaterally extending the workday and homeroom duty was that this action had its origins in a legitimate reorganization of the structure of the high school in order to accommodate for the first time a ninth grade. There exists a legion of Commission decisions holding that the impact upon unit employees resulting from a reorganization is a non-negotiable managerial prerogative.

The Hearing Examiner also recommends that the Commission find that the Respondent Association did not violate §§5.4(b)(3) and (5) of the Act by its conduct in negotiations in 1986. The Association had taken the position at the outset of negotiations that it wished to resolve the distribution of some $25,000 of monies under the "$18,500" statute before it proceeded to negotiate the substantive terms and conditions of a successor agreement. The Hearing Examiner found that under the totality of circumstances in negotiations the Board had failed to prove by a preponderance of the evidence that the Association demonstrated bad faith under the test distinguishing "hard bargaining" from a pre-determined intention to avoid reaching an 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.

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DISTRICT BOARD OF EDUCATION,

Charging Party.

Appearances:

For the Board, Kenney & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For the Association, Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on

September 5, 1986 by the Matawan Regional Teachers Association (hereinafter the "Association") alleging that the Matawan-Aberdeen Regional School District Board of Education (hereinafter the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Association is, inter alia, the exclusive representative for a collective negotiations unit of teachers and other certified personnel; that on September 24, 1985, the Association advised the Board that it was ready to commence negotiations for a successor agreement to that expiring June 30, 1986; that between October 8, 1985 and May 13, 1986, the parties were engaged in communications back and forth with respect to setting a first negotiations meeting, which occurred on May 13th; that at the first negotiations meeting the parties discussed procedures for negotiations concerning distribution of residual monies from the $18,500 minimum teacher salary legislation; that at a second negotiations meeting on June 4, 1986, distribution of the "$18,500" money was discussed further; that on June 24, 1986, at a third meeting, the Board asked the Association if it had changed its position regarding distribution and, when the Association indicated that it had not, the Board's negotiator declared impasse; that on June 25, 1986, the Board unilaterally filed a declaration of impasse with the Commission, requesting a mediator for the "$18,500" issue and that of a successor agreement; that on July 17, 1986, the Association advised the Commission that

while it agreed that impasse existed as to the "$18,500" issue, contract negotiations had not even commenced for a successor agreement; that after a mediator was appointed by the Commission, one meeting was held with him but no agreement was reached and on August 22, 1986, the Association requested that a new mediator be assigned; that also, on August 22, 1986, the Board advised its teaching staff that, effective September 3, 1986, the workday for high school teachers was being increased by ten minutes per day; that on September 2, 1986, the Board issued staff schedules and advised teachers that the workday was being increased as stated heretofore, which unilaterally increased high school teacher pupil contact time, homeroom assignments and duty periods and unilaterally decreased teacher professional prep time; that at a public meeting of the Board on September 2, 1986, its Superintendent stated that he was aware that the previously expired agreement continued until a successor agreement was negotiated and that he was further aware that the administration was unilaterally altering terms and conditions of employment; and, as of the date of filing of the instant Unfair Practice Charge, impasse procedures have not been exhausted and a second mediator has been appointed. All of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) of the Act.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

On August 25, 1986, the Board filed its own Unfair Practice Charge with the Commission alleging that the Association had engaged in unfair practices within the meaning of the Act; in that the Association and the Board had entered into collective negotiations for a successor agreement, having first met on May 13, 1986; that at this meeting the Board representatives had anticipated receiving the Association's initial proposals in accordance with a longstanding custom of the parties in negotiations; that, however, the Association advised the Board that it would submit proposals only on the condition that there be a simultaneous exchange of proposals between the Association and the Board; that, additionally, the Association advised the Board that it was unwilling to initiate negotiations for a successor agreement until there was a resolution of the issue concerning distribution of minimum salary aid funds, i.e., the "$18,500" issue, supra; that the Board agreed to provide the Association with salary base data for purposes of expediting negotiations on the "$18,500" issue at a second meeting; that at

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1/ Footnote Continued From Previous Page

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; and (7) Violating any of the rules and regulations established by the commission."

this second meeting on June 4, 1986, agreement was "quickly reached" on the accuracy of the "$18,500" data; that the Board proposed a means of distribution on five steps of the teachers' salary guide but the Association rejected that proposal and countered that available funds be distributed equally among all negotiations unit members, which the Board rejected after caucus; that the Board then proposed that the distribution issue, regarding the $18,500" funds be set aside and that the parties exchange proposals for a successor agreement, which the Association rejected; that when the parties next met in negotiations on June 24, 1986, the Board declared impasse when the positions of the parties remained the same as at the prior meeting; that the Association again on July 21, 1986, advised the Board that it would not exchange proposals for a successor agreement until the "$18,500" issue had been resolved; and that at an August 18,1986 meeting with the mediator appointed by the Commission, several mechanisms for settlement were suggested by the mediator, all of which were rejected by the Association. All of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(3) and (5) of the Act.[2/]

2/ These subsections prohibit public employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the respective Unfair Practice Charges, supra, if true, may constitute unfair practices within the meaning of the Act, separate Complaints and Notices of Hearing were issued on October 1, 1986 and October 9, 1986 with an Order consolidating the two cases having issued on October 9, 1986. Pursuant to the Complaints and Notices of Hearing, hearings were held on December 16 & 18, 1986; January 16 & 21, 1987; and February 5, 11 & 18, 1987, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by April 7, 1987.

Following the filing by the Association of its Unfair Practice Charge on September 5, 1986, an application was made for interim relief. Following a hearing on September 17, 1986, Commission Designee Charles A. Tadduni granted the interim relief requested, namely, he ordered the Board to cease and desist from lengthening the workday and increasing student contact time for high school teachers during negotiations for a successor agreement and, further, ordered the restoration of the status quo ante (I.R. No. 87-7, 12 NJPER 779 [¶17297 1986]). On October 18, 1986, the Appellate Division granted the Board's Motion for Leave to Appeal and a Stay and further ordered that the Board's leave to appeal was granted and that the Order of Commission Designee Tadduni was summarily reversed. The Appellate Division then stated that it was not passing upon "...the relief which may be awarded by PERC, either

of a monetary nature or otherwise, if it concludes that an unfair labor practice has been committed..."

On the first day of hearing, December 16, 1986, during the course of opening statements by counsel for the parties, the Hearing Examiner elicited as a stipulation that beginning in September 1986 the 135 teachers in the high school[3/] had their workday lengthened by ten minutes, i.e., whereas it had been six hours and 30 minutes in duration it was as of September 1986 extended to six hours and 40 minutes in duration. Further it was stipulated that 48 high school teachers had the duration of their homeroom extended by ten minutes during the workday from what had been six minutes in duration to 16 minutes in duration, commencing September 1986. (1 Tr 20-22).

During the course of the second day of hearing, December 18, 1986, supra, the Hearing Examiner, after hearing considerable testimony by the Association's initial witness, decided sua sponte to defer a portion of the Association's Unfair Practice Charge, as set forth in ¶21,thereof,[4/] to arbitration, notwithstanding the lack of precedent for such action (2 Tr 28-70). The Association

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3/ This number was later corrected to 127 teachers.

4/ Paragraph 21 of the Association's Unfair Practice Charge alleges that: "On September 2, 1986, the administration of the Respondent Board of Education issued staff schedules and advised the teachers that it was unilaterally increasing the high school teacher workday; unilaterally increasing the high school teacher pupil contact time; unilaterally increasing homeroom assignments and duty periods and unilaterally decreasing teacher professional and prep time."

immediately moved for reconsideration, and after receiving briefs from both parties, the Hearing Examiner confirmed his December 18th decision on the record in a written decision issued on January 6, 1987 (H.E. No. 87-40, 13 NJPER 216 [¶18093 1987]). What the Hearing Examiner had deferred to arbitration under the parties' negotiated grievance procedure was all portions of the allegations in ¶21 of the Association's Unfair Practice Charge except (1) those dealing with the unilateral lengthening of the workday for high school teachers by ten minutes, effective September 2, 1986, and (2) the unilateral extending of homeroom duty from six minutes to 16 minutes per day.5/

Two Unfair Practice Charges having been filed with the Commission, questions concerned alleged violations of the Act, as amended, exist and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT6/

5/ Due to the fact that this sua sponte decision of the Hearing Examiner was interlocutory, the Association elected not to seek special leave to appeal to the Commission.

6/ No distinction will be made in the Findings of Fact as between the Unfair Practice Charge filed by the Association and that filed by the Board since there is substantial overlapping and it would be organizationally awkward to attempt to separate them.

1. The Matawan-Aberdeen Regional School District Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Matawan Regional Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions

3. Since 1968 the parties have entered into approximately seven collective negotiations agreements. Marie Panos has been the chairman of the Negotiations Committee since 1968.

4. The July 1, 1983 through June 30, 1986 collective negotiations agreement (J-1) contains a Memorandum of Understanding, dated May 23, 1984 (J-1, p. 51). This Memorandum provides, inter alia, that: (1) "For the duration of the 1984-86 academic years, the high school student day shall consist of eight (8) instructional periods of forty (40) minutes duration and one (1) lunch period"; and (2) "For the duration of the 1984-86 academic years, the high school teachers' day shall remain six and one-half (6 1/2) hours with 226 minutes of total pupil contact time"; and (3) "The high school teachers' day for the 1984-86 academic years shall consist of: five (5) instructional periods of forty (40) minutes duration...and a six (6) minute homeroom period duty..."

5. The Board embarked on a plan for reorganization of the high school, dating back to 1984, when it hired Dr. Frank Smith of Columbia University for that purpose.

6. On January 24, 1985, Robert Nesnay, the Principal of the high school, submitted a reorganization proposal for the high school for 1986-87 to the Superintendent, Kenneth D. Hall (J-2). Nesnay's proposal was based on the inclusion of a ninth grade in the high school where there had previously been only grades ten through twelve.

7. Bruce M. Quinn, the Board's Secretary-Business Administrator, prepared a report to the Board on reorganization, dated June 3, 1985 (B-3). This document, consisting of 48 pages plus additional pages of drawings, set forth a comprehensive proposal for reorganization of the school district, including the high school. One of the plans proposed came to be known as Plan "C."

8. At a special meeting of the Board on June 3, 1985 (see minutes thereof: J-3), the Board considered Quinn's Report (B-3, supra). The public and members of the Board made comments and no action of the Board was taken at that time.

9. On June 17, 1985, the Board met again where Quinn reported that the administration was reviewing the total implementation of the 1986-87 reorganization and that the matter would be considered further at a Board meeting on June 19, 1985 (J-4).

10. At a special meeting of the Board on June 19, 1985, the Board and the public again discussed the reorganization of the school district, based on the above report of Quinn, but no action was taken, based upon a consensus that a vote on reorganization at that time would be premature (J-5).

11. On July 31, 1985, Quinn prepared a Schedule Simulation for grades 9 through 12 for the 1986-87 school year (B-4). Quinn testified that this was submitted to the Board sometime in July or August 1985 at a Board meeting. Quinn also testified that a ninth grade would fit into the high school with no diminution of curriculum and only a slight modification in the rooms and was based on nine teaching periods per day.7/

12. On September 24, 1985, Panos sent a letter to Irving Hurwitz, the President of the Board, in which she stated that the Association was prepared to commence negotiations for successor agreements to the four 1983-86 collective negotiations agreements, adding that she would be communicating with him shortly regarding suggested dates (A-1).

13. On October 8, 1985, Superintendent Hall sent a letter to Panos, acknowledging the Association's request for data pertaining to contract negotiations and the $18,500 minimum salary for teachers legislation (A-2). Hall stated that Deputy Superintendent Michael K. Klavon was preparing the requested data and would forward it to Panos as soon as possible.

14. At a Board meeting on October 28, 1985 (see minutes thereof: B-2), the Board voted to adopt Plan "C" as the basis on

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7/ In the 1985-86 school there were eight and one-half teaching periods per day with a 20-minute lunch period. The 4th page of Exhibit B-4, supra, which was based on a nine-period day, indicated a lunch period of 40 minutes duration between periods 4-7.

which the school district would be reorganized for the 1986-87 school year.

15. Panos testified that at the October 28th Board meeting, supra, Superintendent Hall handled questions and that among the things he stated was that the teacher workday would not increase beyond the existing eight and one-half periods per day. This reassurance by Hall to the effect that the reorganization would have no impact on the workday was made not only at the Board meeting on October 28th but at subsequent meetings with the high school faculty in November and December 1985. John B. Shaw, a Vice-President of the Association corroborated the testimony of Panos that Hall stated at the October 28th Board meeting, supra, that the reorganization was "good" and would go "smoothly," adding that there would be no negative impact on the workday or on the collective negotiations agreement. Carl Kosmyna, a Vice-President of the Association, also corroborated the testimony of Panos, supra, as to what Superintendent Hall stated at the Board meeting on October 28th. Klavon did not dispute the testimony of Panos, Shaw and Kosmyna, supra.

16. On November 13, 1985, Superintendent Hall, Klavon and Nesnay conducted a meeting at the junior high school for high school faculty where the sole topic was the reorganization plan and its impact. According to the uncontradicted testimony of Kosmyna, Hall spoke initially for about 30 to 45 minutes, and he was followed by Klavon for 15 to 20 minutes with about 30 minutes for questions

thereafter. The length of the high school day came up in the question period with the discussion centering on a nine-period day for teachers and the sufficiency of space for a ninth grade. Klavon acknowledged on cross-examination that he made the following statements: "Next year we're talking about going to a nine period day which means the student day will increased by 20 minutes, the teacher day will not be. The teachers have a contract and the contract calls for a six and one half hour workday...so the teacher schedule will be staggered by one period. You'll have some teachers (that) will come in for homeroom, other teachers will come in perhaps after first period because we cannot extend the length of the teachers' day. That's set by contract." (4 Tr 74).8/

17. On November 22, 1985, Klavon sent a letter to Panos, in which he responded both to her letter to Hurwitz, requesting negotiations dates, and her letter requesting data for negotiations (A-3). In this letter of November 22nd, Klavon provided the requested data.

18. Notwithstanding that Quinn had in July 1985, developed a schedule simulation for the high school which included, inter alia, a 40-minute lunch period (see B-4, supra), he had reached a conclusion by December 1985 that the 40-minute lunch period was not desirable, based largely on comments by Nesnay, the high school

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8/ It is also undisputed that a similar meeting took place two days later on November 15, 1985, also at the junior high school.

Principal, that there was less conflict in the cafeteria with 20-minute lunch periods. This change by Quinn is reflected in the document that he prepared for Superintendent Hall in December 1985, entitled "District Reorganization Statistics and Timelines" (B-5).[9/] This document was prepared for the Board's Reorganization Committee.

19. Klavon testified without contradiction that by the end of January 1986, he had concluded that there would have to be an increase in the length of the workday and that this had resulted from meetings with counsel for the Board, Quinn, and the Board's Negotiating Committee between January 4 and January 30, 1986. In fact, on January 28, 1986, the Board's Negotiating Committee had decided to increase the length of the high school teacher workday by 30 minutes. Klavon testified credibly that the administration had concluded by the end of January 1986, that the workday could not be staggered on the basis of the first and ninth periods.[10/] This fact was confirmed between March and June 1986, by the tallies of course selections made by the students. In addition, Nesnay testified credibly that, notwithstanding a request by Quinn in March

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9/ Page 13 of B-5 indicates that the student day would be 390 minutes including 15 minutes of homeroom, which is longer than that provided in J-1, p. 51, supra.

10/ Quinn corroborated Klavon's testimony in this regard, having participated in meetings with counsel for the Board and its Negotiating Committee in the latter part of January 1986.

1986, to stagger teachers' schedules between the first and the ninth periods, Nesnay concluded by early June 1986, that a staggered schedule was virtually impossible because of too many constraints.11/

20. On February 18, 1986, Panos sent a letter to Hurwitz, reiterating the desire of the Association to commence negotiations and requesting dates (A-4). Klavon testified that he suggested a date in the week of March 15th and that although the Board was agreeable to meet on March 18th it appeared that the only possibilities were dates in April as set forth in Klavon's letter to Panos dated March 10, 1986 (A-5). Although Panos accepted the date of April 23, 1986 (A-6), this date was adjourned because of the Jewish holidays. The parties finally mutually agreed on a first negotiations date of May 13, 1986 (A-7) and a meeting was held on that date.

21. The parties' first negotiations meeting on May 13th lasted about one and one-half hours. Counsel for the Board and John Molloy of the NJEA were introduced as the respective spokesmen for the Board and the Association. Klavon testified that the Board was anticipating a simultaneous exchange of proposals, which did not

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11/ Nesnay acknowledged that in June 1986, his bulletin board indicated that there would be a nine-period day, staggered between the first and ninth periods as testified to by several Association witnesses. While this may have been misleading to teachers and the Association it did not estop the Board from abandoning a staggered workday on and after June 1986.

occur. Panos testified that the Association wished to take up the "$18,500" issue[12/] first and refrain from negotiations for a successor agreement until this issue was resolved. The Association's reasoning was that it had to know the final 1985-86 salary guides, which would be affected by the "$18,500" distribution, in order to negotiate the salary guides in the 1986-87 agreement. This position was confirmed in the testimony of Klavon. The result was that a further meeting was scheduled in order for the Board to provide the Association with data on the "$18,500" issue. Counsel for the Board stated before the meeting ended that he was still looking for the simultaneous exchange of contract proposals.

22. Following the cancelling of a second meeting scheduled for May 27th, a second meeting took place on June 4, 1986 (A-8). This meeting lasted approximately two hours and began with a discussion of the distribution of the $25,000. The Association's position was that this fund should be distributed equally among the 363 staff members in the district, while the Board's position was that it should be distributed across the first five steps of the salary guide. Equality of distribution of the $25,000 for all 363 staff members meant distribution across all steps of the salary guide, which would amount to approximately $70 per staff member. After a Board caucus it offered to distribute the monies across the

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12/ This involved the distribution of approximately $25,000, this being the sum calculated as due to comply with the Teacher Quality Employment Act of 1985.

first six steps of the salary guide. Klavon testified that the Board wanted to front load the salary guide and move on to negotiations for a successor agreement. Also, Klavon testified without contradiction that the Board was prepared to exchange contract proposals at this meeting[13/] but that the Association refused to do so. Panos acknowledged on cross-examination that as of June 1986 the wage cost to the Board for its teaching staff was $11,000,000 but she insisted that the distribution of the $25,000, supra, seriously impacted on the $11,000,000. Her stated reason was that giving $350 to a few teachers seriously skewed the 19% raises that some staff members had received.

23. A third negotiations meeting between the parties occurred on June 24, 1986, and, according to Panos, lasted approximately seven minutes. Panos testified that the Association stated that even if the Board modified its position on the "$18,500" issue the Association would not change its position. Klavon's testimony regarding this meeting confirmed that of Panos, namely, that there was no change in the position of the parties on the "$18,500" issue, adding that the Board caucused once and again asked the Association to set aside the "$18,500" issue and move on to the exchange of contract proposals. This the Association refused to do until the "$18,500" issue was settled. Klavon testified finally

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13/ Exhibit A-20, the Board's contract proposals, are dated June 4, 1986 but were not proffered to the Association until September 5, 1986.

that the Board concluded that it was at "impasse" over the entire negotiations process while the Association's position was that the parties were at "impasse" only over the "$18,500" issue.

24. The next day, June 25th, counsel for the Board filed a Notice of Impasse with the Commission and set forth in a cover letter the Board's version of the history of negotiations through June 24th (A-9). The Association set forth its position on impasse, supra, in a letter to the Commission dated July 17, 1986 (A-10).

25. On August 18, 1986, the parties met with the Commission-assigned mediator, Lawrence Hammer, for approximately two hours, during which he met separately with the parties. The Association's position throughout the August 18th meeting was unchanged. The Board told Hammer of its need to exchange contract proposals. Hammer said he did not have the power to order the Association to do so. The Association also refused to proceed to Fact-Finding. When, in the presence of both parties, Hammer stated that if the Board were to move to the Association's position, it would be total capitulation on the Board's part, Panos took strenuous objection and the mediation session concluded.

26. On August 22, 1986, Panos wrote to the Chairman of the Commission, reciting the events at the mediation session of August 18th and requested the assignment of a new mediator (A-11). The Commission ultimately assigned Jeffrey B. Tener as mediator, who entered the negotiations process in September 1986.

27. Also, on August 22, 1986, counsel for the Board wrote jointly to Panos and Molloy, advising them formally for the first time of the necessity of a longer workday for high school teachers in order to accommodate the assignment of ninth grade students to the high school (A-12). Counsel for the Board then went on to state that due to the Association's continuing refusal to exchange proposals "...it has been impossible to begin...negotiations on this issue prior to the start of the new school year..." Further, counsel stated that State instructional requirements made the change necessary and that the scheduling change would become effective with the new school year in September. Finally, counsel for the Board stated that it recognized "...a continuing duty to negotiate on the issue of compensation...in the context of general negotiations for a new Agreement..." (A-12, p. 2).14/

28. Also on August 22, 1986, Klavon sent a memo to the Board's teaching staff, which stated, in part, that high school teachers should take note of the fact that the regular workday will start at 7:40 a.m. and conclude at 2:20 p.m. "...an increase of ten minutes..." (A-13). For reason never adequately explained at the hearing, Nesnay sent a memo on the same date, August 22, 1986, to the high school faculty, which stated that the school hours in September 1986 would be 7:45 a.m. to 2:15 p.m. and that there would

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14/ It is undisputed that the Board had never previously advised the Association in writing ot its decision to lengthen the workday for teachers in the high school.

be no staggered day as previously mentioned (A-18). Nesnay testified credibly that his first knowledge of the lengthening of the high school day by ten minutes was when he received Klavon's memo of the same date (A-13, supra).15/

29. On August 29, 1986, Panos wrote to Hurwitz, in which she referred to the August 22, 1986 letter from counsel for the Board (A-12, supra) and protested the Board's proposed lengthening of the high school workday in the absence of a formal proposal from the Board in the course of negotiations (A-15).

30. Panos testified without contradiction that on September 2, 1986, the administration implemented the 10-minute increase in the length of the workday at the high school in contravention of the Memorandum of Understanding in J-1, dated

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15/ Quinn testified credibly that prior to August 1986, he had concluded that a nine-period day was required in the high school and that its teachers would have to work an additional ten minutes per day. Since the teachers' schedule could not coincide with that of the students the requirement that teachers report five minutes prior to the beginning of the student day and remain five minutes after the conclusion of the student day had to be continued. Quinn also testified that whereas the student day had been 380 minutes during the 1985-86 school year with the teachers' day having been 390 minutes, based on eight teaching periods per day, the contemplated nine-period day for the 1986-87 school year required a student day of 390 minutes and a 400-minute day for teachers in the high school, i.e. an increase of ten minutes per day. While the increase affected all high school teachers only 48 teachers were to be affected by the necessary increase in the length of homeroom from six minutes to 16 minutes for the 1986-87 school year.

May 23, 1984, supra, and, also, Article VI of J-1 (pp. 10-12).16/ Panos testified further that the Association requested negotiations on additional compensation for the affected teachers by the filing of eleven grievances.

31. Extensive testimony was provided by the parties as to the efforts each made to offer and consider "options" which might obviate the need to increase the high school workday by ten minutes and extend the homeroom duty. As productive as this testimony might be to the parties in their negotiations in attempting to resolve the workload and compensation problems implicated by the changes implemented by the Board, the Hearing Examiner concludes that the evidence on these "options" is not probative vis-a-vis alleged violations by the parties of either §5.4(a)(5) or §5.4(b)(3) of the Act.

32. On February 9, 1987, during the pendency of the instant hearings, the Board adopted a budget, which included reducing the number of teaching periods per day from nine to eight for the 1987-88 school year for high school teachers. Quinn testified that the Board could not have produced a schedule for eight teaching periods per day in 1986-87 because at that time there were 1250 students in the high school whereas the number of students is projected to be 1160 for the 1987-88 school year.

16/ Panos also testified that she learned of the 10-minute increase in the homeroom duty at a meeting early in September 1986.

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate §§5.4(a)(1) And (5) Of The Act When It Unilaterally Lengthened The Workday For High School Teachers By Ten Minutes And Increased The Homeroom Duty Of 48 High School Teachers By Ten Minutes For The 1986-87 School Year Since The Action Of The Board Originated With A Legitimate Reorganization Of The High School And It Offered To Negotiate Additional Compensation For Any Increases In Workload.

The Hearing Examiner first dismisses the allegations by the Association that the Board violated §§5.4(a)(3) and (7) of the Act since there was no evidence adduced of hostility or anti-union animus toward the Association by the Board's representatives nor was any violation of the Commission's rules and regulations established.

Proceeding to the heart of the matter as to whether the Board violated §§5.4(a)(1) and (5) of the Act, it is patently evident to the Hearing Examiner that the September 1986 increase of ten minutes in the length of the workday for all of the teachers in the high school and the increase in homeroom duty of ten minutes for 48 high school teachers had its origin in a legitimate reorganization of the high school in order to accommodate a ninth grade and its students, dating back to 1984. On January 24, 1985, Nesnay, as the principal of the high school, submitted a reorganization proposal to Superintendent Hall, and Quinn prepared a report to the Board on reorganization on June 3, 1985 (see Findings of Fact Nos. 6 & 7, supra). Quinn's report of June 3, 1985, was considered by the Board at meetings on June 3 and June 19, 1985. After further work by Quinn on the reorganization in the summer of 1985, the Board on October 28, 1985, voted to adopt what had become

known as Plan "C." (See Findings of Fact Nos. 11 & 14, supra.)

Both at the October 28th Board meeting and in subsequent meetings with the high school teaching staff in November, various explanations and statements were given by the administration through Superintendent Hall, Klavon and Nesnay (see Findings of Fact Nos. 15 & 16, supra). Admittedly, there may have been some misleading of the high school teaching staff regarding the changes contemplated by the administration as it ultimately impacted on the length of the high school workday. For example, on October 28th, Hall stated that the teacher workday would not increase beyond the 8-1/2 periods per day and this was reiterated by him at subsequent meetings in November and December 1985 (see Finding of Fact No. 15, supra). Klavon contributed to the problem by stating on November 13, 1985, that the high school was going to a nine-period day and that although the student day would be increased by 20 minutes the teacher workday would not be increased, adding that the teachers' contract called for a 6-1/2 hour workday (see Finding of Fact No. 16, supra).

However, in the months subsequent to November and December 1985, Quinn, who had the primary responsibility for developing schedules, reached the conclusion in late January 1986, based upon a simulation, that there could be no staggering of teaching periods between the first period and the ninth period and this was confirmed by Klavon. The tallies of courses selected by students between March and June 1986 further confirmed that a staggered schedule over nine periods would not work, and that a nine-period day was

necessary. No weight is given to the fact that Nesnay obviously permitted the posting of documentation on the bulletin board in June 1986, indicating that a staggered workday would be in place for the 1986-87 school year since Nesnay was obviously not privy to significant administrative decisions on the subject, i.e., even as of August 22, 1986, he was not aware that the administration had decided to lengthen the high school workday by ten minutes [compare A-13 (Klavon) with A-18 (Nesnay)].

It will be recalled that the Board's Negotiating Committee, and later the Board itself in or around March 1986, had decided to increase the workday by 30 minutes. Although this did not come to pass, it is a clear indication that the Board and the administration had concluded that an increase in the length of the workday was necessary. The Hearing Examiner here notes that whether Panos learned of the proposed increase in the length of the workday in or around mid-March 1986, as testified to by Klavon, is of mere historical interest since, even if true, the instant decision is based upon the Board's managerial prerogative to adjust the length of the workday, based upon a legitimate reorganization of the high school.

It is true that the Board never formally communicated its proposal to increase the length of the high school workday to the Association between the commencement of negotiations on May 13, 1986 and August 22, 1986, when counsel for the Board wrote to the Association and Klavon issued his memo to staff on that date. The Board's stated defense, in not having made this proposal available

to the Association, was the failure of the Association to have agreed to the mutual exchange of contract proposals in the three negotiations meetings between May 13 and June 24, 1986. It is noted that the contract proposals of the Board, which are dated June 4, 1986, and which were given to the Association on September 5, 1986, contain an Attachment A, this being the Board's proposal regarding the lengthening of the workday (A-20).

Given the position of the Board that it was prepared to exchange contract proposals with the Association at the second meeting on June 4, 1986, the Hearing Examiner can in no way impute bad faith to the Board in having retained these proposals until they were ultimately mutually exchanged on September 5, 1986. The Board was plainly entitled to have the benefit of a simultaneous exchange of contract proposals, notwithstanding the Association's position throughout the negotiations that it wished to resolve the "$18,500" issue before undertaking negotiations for a successor agreement. Apparently, the Association was of the view that no purpose would be served by a mutual exchange of contract proposals on a successor agreement until the "$18,500" issue was resolved. Given this position of the Association, it appears reasonable to the Hearing Examiner that the Board, although prepared to do so on June 4, 1986, was justified in refraining from disclosing the Board's contract proposals of the Association until the mutual exchange on September 5, 1986, supra.

Now, proceeding to the decisional basis, upon which the Hearing Examiner predicates his findings and conclusions above that the Board exercised a legitimate managerial prerogative when it unilaterally increased the length of the high school workday as a result of a legitimate reorganization, consider the following:

In Tenafly Bd.Ed., P.E.R.C. No, 83-123, 9 NJPER 211 (¶14099 1983) the Board, as the result of an independent study of the staffing of it custodial and maintenance department, decided to eliminate certain custodial positions and alter the shift hours of two of the remaining custodians. The Commission, in concurrence with this Hearing Examiner, held that the Association in that case had failed to prove by a preponderance of the evidence that the Board had a duty to negotiate the changes in the hours of the two custodians. The Commission then stated:

> The hours an employee works are a fundamental term and condition of employment and are mandatorily negotiable. We have, however, recognized a limited exception to this rule when, as a result of a department reorganization, a change of hours is necessary in order to effectuate a managerial prerogative. See In re Freehold Reg. H.S. Bd.Ed., P.E.R.C. No. 78-29, 4 NJPER 19 (¶4010 1977) and the cases cited by the Hearing Examiner. (9 NJPER at 213).

The undersigned Hearing Examiner in Tenafly, supra, cited earlier Commission decisions in the cases of Cherry Hill Tp. Bd.Ed., P.E.R.C. No. 81-90, 7 NJPER 98 (¶12040 1981), Pt. Pleasant Boro Bd.Ed., P.E.R.C. No. 81-145, 6 NJPER 299 (¶11142 1980) and Delaware Valley Reg. H.S. Bd.Ed., P.E.R.C. No. 79-65, 5 NJPER 183 (¶10100 1979).

In Pt. Pleasant, supra, the board transferred supervision of compensatory education teachers from department chairpersons to the school principal, thereby relieving these chairpersons of their supervisory authority. In restraining arbitration of a grievance involving this subject matter, the Commission stated:

> It is well established that decisions concerning (1) reorganizing the departmental structure; (2) restructuring particular programs; and (3) reassigning supervisory duties from one group of employees to another are all major educational policy matters beyond the scope of negotiations (citing cases)... (6 NJPER at 300).

In Tp. of Nutley, P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985) the Commission affirmed the undersigned Hearing Examiner in his conclusion that the township had lawfully assigned non-unit civilian school crossing guards to perform duties in its traffic safety department, which were previously performed by police patrolmen, where the evidence established that the township acted pursuant to a lawful managerial prerogative to reorganize the traffic safety department. See H.E. NO. 85-38, 11 NJPER 325 (¶16116 1985).

In Cty. of Passaic, P.E.R.C. No. 87-40, 12 NJPER 803 (¶17306 1986) the Commission affirmed the undersigned Hearing Examiner in his conclusion that, in the absence of anti-union motivation, the county did not violate the Act by implementing the reorganization of its public works department, notwithstanding that it impacted upon certain employees through a one-day layoff and the reclassification of the affected employees to new positions upon

their return although without changes in job duties or reductions in wages. See H.E. No. 87-3, 12 NJPER 588 (¶17220 1986).

Finally, in Toms River Bd.Ed., P.E.R.C. No, 84-4, 9 NJPER 483 (¶14200 1983) the Commission restrained arbitration of a grievance, which alleged that the Board violated the agreement by eliminating one of two cafeteria manager positions in the collective negotiations unit with the result that non-unit cafeteria employees were performing the manager's supervisory functions in his absence. The Commission stated that, distinct from cases where an employer unilaterally removes work from a negotiations unit and assigns it to non-unit employees, which violates the Act, an employer that changes the level of services delivered and implements corresponding personnel changes does not violate the Act since this restructuring is in the context of a managerial prerogative. The Commission cited Ramapo Indian-Hills Ed. Assn. v. Ramapo Indian-Hills Reg. H.S. District, P.E.R.C. No. 80-9, 5 NJPER 302 (¶10163 1979), aff'd 176 N.J. Super. 35 (App. Div. 1980) where the employer abolished a full-time teaching position and a part-time extracurricular position, creating in their stead one full-time position, which encompassed the responsibilities of the two abolished positions. Also, the Commission in Toms River cited the New Jersey Supreme Court decision in Dunellen Bd.Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973) where the public employer had consolidated two department chairmanships into one, which action did not violate the Act.

Based on the foregoing authorities on reorganization, vis-a-vis the managerial prerogative of the instant Board to increase unilaterally the workday for the high school teaching staff in September 1986, the Hearing Examiner concludes that the Board did not violate §§5.4(a)(1) and (5) of the Act. This conclusion applies both to the increase in the workday by ten minutes for all high school teachers and the increase in homeroom duty by ten minutes for 48 high school teachers.

Having concluded that the Board exercised a legitimate prerogative, supra, there is the secondary question as to the Board's obligation to negotiate additional compensation for any increase in the workload which may have resulted from its unilateral action. Recalling that in Ramapo-Indian Hills, supra, the Commission held that appointments to extracurricular assignments were managerial policy decisions and were not mandatorily negotiable. However, the Commission then went on to state that there was no interference with the exercise of this managerial policy decision in requiring the public employer to negotiate compensation for the extracurricular duties as well as the concomitant workload to the extent that it was severable from hours (5 NJPER at 302).

The Commission and the courts have in many cases since Ramapo held that workload is a mandatory subject of negotiations and that unilateral increases in workload without negotiations for additional compensation violate §§5.4(a)(1) and (5) of the Act. See

Burlington Cty. College Faculty Ass'n v. Board of Trustees, 64 N.J. 10 (1973); In re Maywood Bd. of Ed., 168 N.J. Super. 45, 59 (App. Div. 1979); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Kingwood Tp. Bd. of Ed., P.E.R.C. No. 86-85, 12 NJPER 102 (¶17039 1985); Ramsey Bd. of Ed., P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), aff'd App. Div. Dkt. No. A-4836-84T1 (2/6/86); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1975), aff'd App. Div. Dkt. No. A-2060-78 (2/26/80).

Given the above Commission and court precedent on the obligation of a public employer to negotiate compensation for increases in workload, the Hearing Examiner directs the Board to negotiate compensation for any additional workload between and among high school teachers in the district, a demand to do so having been previously made by the Association. The Hearing Examiner notes that the Board adduced evidence of its willingness to negotiate compensation in the course of the hearings in this case. Thus, there would appear to be no obstacle to the negotiation of additional compensation, especially under the circumstances of the Hearing Examiner taking administrative notice that a plenary arbitration proceeding on this issue is pending before Carl Kurtzman, an arbitrator mutually designated by the parties to hear and determine the compensation issue pursuant to the provisions of

the most recent collective negotiations agreement of the parties (J-1).[17/]

Accordingly, the Hearing Examiner will recommend dismissal of the allegations by the Association that the Board violated §§5.4(a)(1), (3), (5) and (7) of the Act, it appearing that the Board is willing to negotiate on additional compensation for any increase or increases in the workload, which may have resulted from its decision to extend the high school workday and homeroom duty.[18/] It appears that the Board has agreed to do so in accordance with a demand by the Association so to do.

Based on the foregoing authorities and the above analysis, the Hearing Examiner concludes that the Association's Unfair Practice Charge, alleging that the Board violated §§5.4(a)(1), (3), (5) and (7) of the Act, must be dismissed.

The Respondent Association Did Not Violate §§5.4(b)(3) And (5) Of The Act By The Conduct Of Its Representatives In Collective Negotiations On The "$18,5000" Issue And The Successor Agreement.

The Hearing Examiner first dismisses the allegation that

17/ See, also, I.R. Nos. 24 & 27, wherein Commission designee Edmund G. Gerber refused to restrain the Association's attempt to arbitrate the question of additional compensation for the alleged workload increases that occurred in September 1986.

18/ The Hearing Examiner perceives nothing probative as to the Board's alleged violation of the Act in its decision on February 9, 1987, to return to an 8-period teaching day in the 1987-88 school year. A legitimate reason was advanced for the Board's action, namely, a projected reduction in the number of pupils in the high school from 1250 in the 1986-87 school year to 1160 in the 1987-88 school year.

the Association violated §5.4(b)(5) of the Act since no evidence was adduced that it violated the Commission's rules and regulations.

Admittedly, the allegation that the Association violated §5.4(b)(3) of the Act, and the evidence adduced at the hearing, presents a close question. The Hearing Examiner has considerable difficulty with the Association's position that the "$18,500" issue had to be resolved before negotiations could proceed on the terms of a successor agreement. The Hearing Examiner's concern in this regard arises from the fact that there was only $25,000 in dispute over the "$18,500" distribution of monies on the salary guide as against the total wage expenditure of the Board of some $11,000,000 at that point in time, namely, May and June 1986. It tends to strain credulity that the necessity of reaching agreement on the distribution of the sum of $25,000 could have any substantial impact on the salary guide to be negotiated for the years beginning 1986-87.

In the experience of this Hearing Examiner and, as urged by the Board, the subject of salaries and salary guides is typically reserved for resolution at the conclusion of negotiations, not at the beginning. While the Board contends that the Association's position in urging the resolution of the "$18,500" issue first was pretextual, and did not constitute "hard bargaining," the Hearing Examiner is persuaded that the appropriate decision in this case is to dismiss the Board's Unfair Practice Charge.

In support of this conclusion, the Hearing Examiner refers to the decision of the Commission in Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984) where the Association there urged that, under the totality of circumstances, the college had not negotiated with an intent to reach an agreement. The Commission, in dismissing the complaint, cited the leading case on the subject of totality conduct in negotiations: State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd. 141 N.J. Super. 470 (App. Div. 1976). In that case the appropriate standard for determining whether a party has refused to negotiate in good faith was stated as follows:

> It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred... A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object...is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid rather than reach an agreement... "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement..." (10 NJPER at 172).

The Commission in Ocean County College also cited Mt. Olive Bd.Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983), concluding that the conduct of the respondent college "...did not transgress over the line separating hard bargaining from a pre-determined intention to avoid reaching an agreement..." (10 NJPER at 173). In so concluding, the Commission noted that the respondent college in that case met frequently with the Association at agreed upon times and places such as the Association has done in the instant case.

In concluding that the Board's Unfair Practice Charge herein against the Association must be dismissed, the Hearing Examiner elects to characterize the position of the Association in negotiations prior to August 25, 1986, when the Board filed its Unfair Practice Charge, as "hard bargaining" rather than a pre-determined intention to avoid reaching a negotiated successor agreement. Although the Hearing Examiner has questioned the tactic of the Association in seeking to resolve the matter of $25,000 before proceeding with substantive negotiations on a successor agreement, he is not prepared to conclude that this was other than a "hard bargaining" tactic, which the Association deemed necessary in pursuing its overall strategy for the ultimate conclusion of negotiations for a successor agreement. In assessing the testimony adduced by the parties as to how the Association proceeded in the negotiations prior to August 1986,[19/] the Board has failed to prove by a preponderance of the evidence that the Association transgressed over the line separating hard bargaining from a pre-determined intention on the part of the Association to avoid reaching an agreement: Ocean County College, supra.

19/ The Hearing Examiner is aware that Molloy testified that "...if we wanted to have good faith negotiations, if we wanted to reach a settlement on outstanding issues, it was necessary for the Board of Education to withdraw its proposed schedule change..." (7 Tr 17) and that Panos testified that the Association's position was that the Board should understand that the high school schedule change was not a fait accompli and that the Association was prepared to negotiate both the scheduling change and additional compensation.

Accordingly, based on the foregoing discussion and analysis of the Board's Unfair Practice Charge against the Association, the Hearing Examiner will recommend dismissal.

* * * *

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

CONCLUSIONS OF LAW

1. The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) when it unilaterally and without negotiations with the Association increased the workday for all high school teachers by ten minutes for the 1986-87 school year and extended the homeroom duty by ten minutes for 48 high school teachers.

2. The Association did not violate N.J.S.A. 34:13A-5.4(b)(3) and (5) by its conduct in collective negotiations, commencing in May 1986.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaints of the Board and the Association be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: May 22, 1986
Trenton, New Jersey