P.E.R.C. NO. 88-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRICK TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-86-61-47

BRICK TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Brick Township Education Association against the Brick Township Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it terminated teacher aides represented by the Association in retaliation for their union activity and refused to negotiate in good faith with the Association. The Commission finds that the Board made an educational policy decision to reduce the number of aides and replace them with additional teachers and that its conduct during negotiations did not violate the Act.

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BRICK TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Anton & Sendzik, Esqs.
(Martin J. Anton, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, Le Vine & Brooks, Esqs. (Mark J. Blunda, of counsel)

DECISION AND ORDER

On August 30 and September 5, 1985, the Brick Township Education Association ("Association") filed an unfair practice charge and amended charge, respectively, against the Brick Township Board of Education ("Board"). The charge, as amended, alleges 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), (2), (3), (4) and (5),[1/] when it terminated teacher aides represented

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

by the Association and refused to negotiate in good faith with the Association.

On September 11, 1985, a Complaint and Notice of Hearing issued. On September 20, the Board filed its Answer. The Board admits that the parties did not reach a negotiated agreement and that certain teacher aides were advised that positions were not available for them in the 1985-1986 school year. It denies, however, that these actions were taken because of Association activity.

On September 23, 24, 26 and 30, 1985, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On May 12, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-64, 13 NJPER 438 (¶18168 1987).

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

He first found that the Association established a prima facie case that the teacher aides were illegally dismissed. Nevertheless, he recommended dismissal of this portion of the Complaint because the Board established that the dismissals would have taken place even absent Association activity. He specifically found that the "Board reduced the number of teachers' aides in the district in order to comply with State guidelines and improve the quality of its special education program as matters of educational policy." He also concluded that the Association failed to prove that the Board's negotiations conduct violated the Act. However, he found that the Board violated the Act when it assigned a non-unit employee to do unit work.

On June 19, 1987, after receiving an extension of time, the Board filed exceptions. It excepts to the recommended finding of a violation because there was no allegation in the unfair practice charge regarding unit work. It also excepts to the findings that most of the custodian's duties pertained to teacher aide "work" and Kenney would have been recalled next because of her seniority.

On June 21, 1987, also after receiving an extension of time, the Association filed exceptions. It contends that the Hearing Examiner's findings should be supplemented to include additional findings of protected activity, the Board's knowledge of that activity and the Board's hostility to that activity. It also asserts that the Board had sufficient monies budgeted to hire additional aides; did not have a business justification for not

rehiring the aides for the 1985-86 school year, and did not comply with State Board of Education regulations on the use of aides.

The Hearing Examiner's findings of fact (pp. 3-19) are accurate.[2/] We adopt and incorporate them here. There is one disputed fact which the Hearing Examiner should have resolved. John Martucci, Association president, testified that John Stutts, Board Business Administrator, implied that the aides would be fired because they joined the Association. Stutts denied such statements. In view of Martucci's equivocal testimony, we credit the denial.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other

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2/ However, on p. 5, the name Kennedy should be Kenney.

motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Board reduced the number of teacher aides. The issue is whether it did so in retaliation for Association activity. The timing would normally be suspect: a significant reduction in force occurred soon after difficult contract negotiations. Here, however, we believe that the Association did not establish that its protected activity motivated the reduction. The evidence shows that the Board, spurred by the State Department of Education, made an educational policy decision to reduce the number of aides and replace them with additional teachers. Class sizes were reduced and there was less need for teachers aides. In fact, the Department's Ocean County Superintendent specifically stated, in a letter to the Board, that "you could bring about improvement in your special education program by adding additional teachers and classes, thus reducing the number of aides which are required." The Board's Director of Special Services, who implemented this change, had no labor relations responsiblity. Under these circumstances, the

Association's reliance on the budget surplus as evidence of pretext is misplaced: the Board did not reduce the number of aides because of lack of funds.

We also do not believe that the Board violated our Act when one or two negotiation sessions were cancelled. Our examination of the totality of the Board's conduct does not establish that the Board refused to negotiate in good faith.

The Hearing Examiner did find that the Board violated the Act when it assigned a custodial maid to do work, in addition to her other assignments, done before by teacher aides. However, we will only consider allegations of unfair practices that are specifically pled in an unfair practice charge or an amendment. State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 85-77, 11 NJPER 74, 79 (¶16036 1985), aff'd App. Div. Dkt. Nos. A-2920-84T7 and A-3124-84T7 (4/7/86). This was not. Nor was it fully and fairly litigated. Compare Commerical Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). We therefore dismiss it.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

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

H.E. NO. 87-64

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

In the Matter of

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-61

BRICK TOWNSHIP EDUCATION ASSOCIATION

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Brick Township Board of Education did not commit an unfair practice when it substantially reduced the number of teacher aides it hired for the 1985-86 school year. Although the parties were in negotiations, they were unable to reach an agreement. However, it was found that the reduction in the number of aides was made for educational policy reasons and not to discourage the exercise of protected activity. It was found, however, that the Board assigned teacher aide work to an employee who was not a teacher aide without first negotiating with the Association. It was recommended that the Commission find that this conduct constitutes an unfair practice.

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. 87-64

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BRICK TOWNSHIP BOARD OF EDUCATION,

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Appearances:

For the Respondent,
Anton and Sendzik, Esqs.
(Martin J. Anton, of counsel)

For the Charging Party,
Oxfeld, Cohen and Blunda, Esqs.
(Mark J. Blunda, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 30 and September 5, 1985, the Brick Township Education Association (Association) filed an original and an amended unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Bricktown Board of Education (Board or Respondent) 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 (the Act) in that during protracted negotiations for a new contract for teacher aides, wherein the parties were unable to reach an agreement as the new school year

approached, on August 28, 1985 each member of the aides negotiations unit received a letter from the Board of Education advising her that there were no positions available for teaching aides for September 1985. Fourteen of the unit members were advised to await a telephone call on September 3, 1985 as to any possible positions. The remaining aides were directed to advise the board if they were interested in taking positions as substitutes.

It was alleged that the Board's action's in terminating the aides as well as the Board's conduct in negotiations interfered with employees in the exercise of their protected rights[1/], all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (5) of the Act.[2/]

1/ The charge also alleges that the Board withheld the payment of increments for 1985-86. That portion of the charge was withdrawn.

2/ 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

The Board filed an answer admitting that the parties were not able to reach an agreement in negotiations but denying and/or leaving the Association to its proofs as to the other allegations of the Charge.

It appearing that the allegations of the amended unfair practice charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 11, 1985. Pursuant thereto, a hearing was held on September 23 and continued on September 24, 26 and 30, 1985 in Brick, New Jersey, at which time the parties were given an opportunity to examine witnesses, present evidence and argue orally. The parties filed post-hearing briefs by October 31, 1985.

An unfair practice charge having been filed with the Commission, a question concerning alleged violations of the Act exists and the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

In October of 1984, the Brick Township Teacher Aides, affiliated with the Brick Township Education Association, sought recognition as a negotiations unit. The Board of Education granted voluntary recognition to the Association on November 15, 1984. In December 1984, the Association commenced negotiations by forwarding a contract proposal to the Board. Subsequently, several negotiation sessions were held. On March 8, the Association filed an unfair practice charge with the Commission claiming that the Board refused to negotiate in good faith with the Association concerning the Teacher's Aide Unit.

The charge was then amended on July 10, 1985 to allege that, since the filing of the first charge, the Board had continued to refuse to negotiate for the 1984-85 school year.

The Complaint which issued, pursuant to the amended charge, was the subject of a settlement agreement between the parties and the Complaint was withdrawn before a Commission decision was issued. However, a Hearing Examiner's Report and Recommended Decision H.E. 86-17 (1985) was issued prior to the settlement agreement.

On August 28, 1985 every teachers' aide in the district received a letter advising her that there were "no available positions at this particular time". The letter went on to state that if the aide was interested in serving as a Substitute Teacher Aide she should notify the office of the Deputy Superintendent of Schools, Warren Wolf. Approximately fifteen aides were also told by letter that the Board would make a determination as their need for aides on September 4, 1985.

In fact the Board hired approximately twenty aides for the 1985-1986 school year, down from 32 aides employed the preceding June.

The Board also hired a woman custodian, Arlene Bartone, whose primary duties are to help physically disabled students. When she is otherwise available, she is assigned to custodial duties. The Board's contract for the custodians provides a starting salary of $10,692 while the starting salary for a teacher aide is $5,200.

Joyce Kennedy is the senior representative for the teachers' aide unit. She was first employed as a teachers' aide during the 1982-83 school year and worked the 1983-84 and 1984-85 school years as an aide. However, she was not recalled for the 1985-86 school year. She was first notified that she would not be recalled by one of the letters dated August 28, 1985.

The unit was recognized by the Board in November of 1984 after Kennedy presented a letter requesting recognition to the President of the Board of Education, Robert Robinski. Kennedy testified that Robinski stated he was a little "distressed" that the aides chose to be represented by the Brick Education Association, rather than the TWU, which represents a unit of non-professional employees of the Board. Kennedy further testified that she thought Robinski was glad that the aides were now represented.

Kennedy presented a proposal for a contract to the Board after Christmas 1984 and negotiations with the Board's business administrator, Mr. Stutts, commenced in January 1985. However, all during negotiations, the Board never indicated there might be a reduction in the number of teacher's aides. Subsequent to August 19, additional negotiation sessions were scheduled. However, no one appeared on behalf of the Board. Kennedy also asked Stutts if a seniority list could be compiled but Stutts didn't have such a list and he didn't know where to get it. Kennedy testified that a women with less seniority than her, Beverly McQuilken, was hired by the Board on September 4.

The State Commissioner of Education has promulgated guidelines setting forth the number of students which may be taught by a Special Education teacher. The exact number of students varies with the grade (or level) and classification of the special ed students. When the specified number is exceeded there is an obligation to place an aide in the classroom. The presence of such an aide means that the number of students in a classroom may be increased up to the level specified in the regulation.

The Association argues that there are not enough aides in the district to meet the state guidelines. The Association called a number of teachers and parents of special education pupils as witnesses in support of its position.

Anthony Schioppa is a teacher of the educable, mentally retarded (EMR) at the high school. He testified that he had 20 students in his classroom in 1985-86, but did not have an aide. In the prior year, 1984-85, with 19 students in his classroom he had an aide.

Stanley Reed and Robert Powers teach at the Brick Memorial High School. They each testified that each should have an aide in their respective classrooms, but they had only one aide between them. However, on the day of the hearing, they were informed an additional aide was assigned to one of their classroom so they each had an aide.

Four teachers from the Drum Point Elementary School testified as to their need for aides.

Bonnie Lavender had 6 trainable, mentally retarded students the year before and had an aide. In 1985-86, she did not have an aide in spite of having three children in her class who were not toilet trained. The IEPs for these three students all call for aides. On September 10, an aide reported to her classroom but then quit. Since then Lavender has had substitute aides. Lavender was told a full time aide would be assigned to her classroom.

Maryann Thran had a child in her class in 1985-86 who had cerebral palsey and was confined to a wheel chair. This child needed help getting out books and has additional dressing, feeding and bathroom needs. Thran testified that the custodial maid, Arlene Bartone, was assigned to her classroom for three hours a day; for the balance of the day, another three hours, there was no assistance available for the child. Thran maintains that the childs bathroom needs were not met and further the child had "specials" (i.e. art, music, library) which required extra assistance.

Florence Isen taught a special education class in 1985-86 for children classified as neurologically impaired, level three. She had nine children in her class and she testified that, pursuant to the regulations of the Department of Education, the maximum number of students allowed in her classroom without an aide is eight. On the day of the hearing a student was scheduled to be transferred out of her classroom. The student was to go from a level two classroom to a level three. (Children in special ed. classes are not grouped according to grades, rather there are much broader groupings or levels.)

Angela Moore taught a transitional kindergarten class in 1985-86 and had two children with IEPs that call for aides for one and one half hours a day. They each had physical disabilities and needed assistance for walking and for bathroom needs. In addition, there were eleven students in her classroom. The class was funded by a special grant which had a requirement of one teacher and one aide per ten students independent of any IEP needs. Moore asked Dr. Richardson for additional aides for her classroom. Although he was sympathetic, he never told her that more help was forthcoming.

Three teachers from the Veterans Middle School testified.

Sandra Possumato taught a perceptually impaired class in 1985-86. She testified that her classroom situation required an aide but she did not have one. On the day of the hearing an aide was placed in her class.

Robin Doran taught an N.I. class in 1985-86 for children 12 and 13 years old. In 1984-85, she had nine students and one aide. In 1985-86, she had eight students but no aide, although she had a student who was confined to a motorized wheel chair and needed an aide. Bartone, the custodial maid, came to the school at nine o'clock and again at one o'clock and reported to the nurses office. At those times, the child is sent to the nurses office for bathroom needs. Due to the specialized needs of the child, that was the only time during the day the child has an opportunity to use the bathroom.

Cathy Bouford taught an N.I. class for children nine to eleven in 1985-86, with eleven children in her class. In 1984-85,

she had ten and then eleven students and had two aides, one for the classroom and one for a particular student. At the time of the hearing she had only one aide for the classroom although the student who required an aide was in her classroom again in 1985-86. Bouford brought this to the attention of both Mr. Wolf and Mr. Richardson. Wolf told Bouford she would not get an additional aide this year.

Lois Burns taught an N.I. class for students twelve and thirteen years of age at the Lane School in 1985-86. She had eleven students in her classroom and had an aide to help with the over-subscription but she was told by the child study team that she had a child in her class who had an IEP which requires an individual aide. She did not have an aide for this child. However she had not seen the IEP.

The Board does not dispute the testimony of these teachers as to the number of aides hired and the placement of aides in the classroom. However, it does dispute in a number of instances whether an aide was required in a given classroom and argues that its actions were not taken as a response to the Association's protected activity. Rather, it maintains its actions were based strictly on educational policy.

The Board points out that on July 30, 1985 the Department of Education, through its Ocean County Superintendent, Joseph Zach, wrote to Deputy Superintendent Wolf, stating that the number of aides used in Brick in the 1984-1985 school year was very large. "This results, of course, from the fact that your enrollments in all

of these [special education] classes exceed the recommended numbers, and therefore [the Board] had requested waivers and the addition of aides in order to increase the enrollments of each special education class....[I]t is my considered judgment that you could bring about improvements in [the Board's] special education program by adding additional teachers and classes thus reducing the number of aides which are required..." In fact the Board hired an additional eight special education teachers who began in September of 1985.

James Richardson is the Director of Special Services for the Brick Township Board of Education. He is in charge of Special Education for the Board. Richardson testified on behalf of the Board and was qualified as an expert in the field of special education. He served as Director of the Bureau of Special Education in the New Jersey Department of Education and helped draft the Department of Education regulations relative to class size maximums (as well as other requirements) for Special Education.

Richardson was hired by the Board in August of 1984. He testified that many of the aides employed in the district for the 1984-85 school year were needed because of over-subscriptions in special education classes and if classroom sizes were in accordance with state guidelines the number of aides would have been much smaller. Richardson was concerned about both the large number of aides in the district and the large number of children in the district who were classified as handicapped. He attempted to review the system of classification and see if a better system of

identification could be adopted to bring the number of classified children down to the national average.

During his first year, Richardson modified and expanded a program whereby, in line with Department of Education Rules and Regulations, handicapped children are mainstreamed. Specifically, classes with between 18 and 20 children were created with 5 handicapped children in each class. There is a regular classroom teacher along with a resource teacher who comes into the room for two hours every day. Also, basic skills teachers regularly come into the same classroom to work with these children as well. Richardson testified that this program is in line with the current trend to move the handicapped out of institutions; it is known that handicapped children learn best by being with regular children. The program also helps to identify children early on who might have problems and to provide academic assistance to keep them at grade level. Although three aides were hired to help with this program, overall the program has reduced the need for aides in the school district. Before Richardson came into the district there were seven modified classrooms in the district; this year there are 19. This program has the potential of mainstreaming 90 students and thus reducing the number of Special Ed classes.

Richardson also testified as to other reforms he made in the area of special education. The Board hired 42 Special Ed teachers, an increase of seven over the previous year, and the number of special ed classes went from 38 to 42. The other three

special ed teachers are resource room teachers who were hired to support the modified concept. When Richardson came into the District there were thirty-two aides employed in the District, twenty-one were for over-subscribed special education classes. This year there are twenty aides and ten are for over-subscribed classes.

Richardson testified that he was responsible for each decision to place an aide in a classroom but he took no part in hiring specific aides. There were two exceptions and one of those exceptions was Beverly McQuilken. In January of the 1984-85 school year Richardson received word that he would not be able to place a blind student in a neighboring school district as he had in the past and the child would be returning to the Brick schools. Richardson made a decision in January to place the child in Melissa Mack's classroom when she entered the Brick system in September. The child would also need an aide for educational purposes and McQuilken was chosen as the aide. This decision was made so early so McQuilken and Mack could, and did, visit the sending district, meet with the child's teacher and become acquainted with the student to help facilitate her adjustment in September. Richardson was not aware that McQuilken was not a member of the Association.[3/] All other hiring decisions were made by the Assistant Superintendent of Schools Warren Wolf. Richardson would inform Wolf of what the programs needs were and Wolf would do the hiring.

3/ A second aide, Mrs. Christianson, was also picked by Richardson for a specific class but she went on leave.

Richardson testified in response to the Association witnesses as to placement of aides in the classrooms.

Although Schioppa indicated that there were twenty students in his room and the maximum number was fifteen, Richardson testified that, at the secondary level, pursuant to Department of Education regulations, the maximum number of students that can be enrolled in a class is one and one half times the maximum class size. The maximum class size for the students in Schioppa's classroom is 14 so, at the secondary level, the maximum class size would be 22.4/ Accordingly, there is no over-subscription in Mr. Schioppa's classroom.

Richardson did admit that there was an over-subscription in the gym class at the high school when Mr. Schioppa's children attend. This problem was brought to Richardson's attention by the gym teacher a week before the hearing. This over-subscription was for a 20 minute period when some 24 children were enrolled in one gym class. Twenty minutes after the period began, 12 of those children left to take early buses. Richardson directed that the principal determine the best way to alleviate this problem and place the students in another gym class, bring in another gym teacher or send the students to a different program during the 20 minute period.

4/ N.J.A.C. 6:28-4.2AV provides that the maximum size of an EMR (mentally retarded educable) class is 15 pupils. However, "enrollment in secondary special class programs may be increased by one half the maximum class size..."

Richardson acknowledged that the two trainable classes at the high school taught by Reed and Powers, each required aides but the classes had to share an aide. There was a delay in placing an aide because Richardson sought approval from the County Office to hire an additional special education teacher to create a new class. The approval was granted and an additional teacher was hired. Richardson knew that when his plan was approved two teachers aides would be freed up; one of those teacher aides went to Mr. Reed's classroom. Richardson was also going to apply to have a child kept in Reed's class on the basis of ability, rather than age; the age difference is out of compliance with State regulations. Richardson was expecting that the request would be denied and that the child would have to be moved which would place the child in a different class and would relieve the over-subscription in Reed's classroom. Mr. Richardson was simply waiting for a disposition of the application from the Commissioner of Education.

There is a child in Brick Memorial High School in a wheelchair in a departmentalized special program whose IEP calls for a full-time aide. Richardson admits that there is no aide but maintains that services required under the IEP were provided. The child has mobility needs that are being met and in addition the student is presently being fitted for an electric wheelchair which will eliminate the need for assistance.

As to Angela Moore's transitional pre-school program at Drum Point School, Richardson wrote a special grant for the

Department of Education to fund. In June the grant was revised at the request of the State Department of Education. Richardson had asked for two aides in the class; the Department of Education said that the class could not have aides. Richardson then negotiated with the Department and ultimately received one aide. That class had 11 children with one aide. It was not an over-subscribed classroom for it was not covered by State regulation and the grant provided for 12 youngsters in the class with one aide.

Richardson visited Lavender's classroom at Drum Point and saw that there were two students that needed individualized bathroom assistance on the basis of their IEP's and an aide was placed in the classroom to help with these two students.

Mrs. Isen had one child above the maximum at the start of school. She was told that one of the children would be transferred out of her class to bring her into compliance and that was done.

Richardson testified that Bartone, the custodial aide in Thrans classroom, assisted the child who has cerebal palsy. The child is working at or above grade level and does not need an aide for educational purposes.

Richardson testified that the child at Veterans Memorial Middle School in Dorans class whose IEP called for full-time individual aide had an electric wheelchair and did not need services for mobility or in the classroom for academic work. Assistance is presently necessary for the student only in regard to bathroom needs and that has been provided by the custodial maid Bartone.

Mr. Bouford's class at Veterans School was over-subscribed and also had a student who has an individual IEP that calls for a teacher aide. There was only one teacher aide assigned to the room but Richardson had no plans to increase the number of aides. This, Richardson claimed, is an administrative decision which relates to both classroom management and the teacher's willingness to teach handicapped children. Richardson testified that he visited the classroom during 1984-85 and felt that the teacher had the potential to become a competent teacher for the handicapped. However, she was spending too much time behind her desk ordering the aides to do the work. Richardson feels that the teacher should become more active in the classroom and his preliminary visits to the classroom support his decision. He also maintained that the individual needs of the child in the IEP were being cared for by the teacher aide assigned to the room.

In Possumato's class at Veteran Middle School there was a perceptionally impaired child. On the eighth day of school, an aide was provided for her. Again, this aide was the other aide that became available after the new special education teacher (Robin Doran) was hired. Richardson was not aware if the aide was in place at the time he testified.

Lois Burns, a teacher at the Lane Middle School, had 11 children in her class in 1985-86, including a child who had an IEP that was not completed and tentatively needed an aide. Richardson testified that he was working with someone at Rutgers University who

was developing the educational or instructional component for the IEP; that had not been done to date and Richardson was waiting for Rutgers to complete the work-up to provide an aide in compliance with the IEP.

Richardson maintained that the Board was in full compliance with the law except with the administrative decision on the part of Bouford's classroom and the incomplete IEP from Rutgers (Mrs. Burns' class). Richardson was of the opinion that three weeks into the school year with only one classroom out of compliance and with one student whose IEP was incomplete (because of an outside evaluation) the Board's situation was, on the basis of his own past experience, not unreasonable. If additional aides were needed, Richardson would make a recommendation to Wolf to hire them.

Wolf's testimony was in accord with Richardson. He testified that he hired Bartone as a custodial maid to assist the handicapped students in Doran's class at Veterans Memorial Middle School and in Thran's class at Drum Point school. He testified that the Board hired a custodial maid because, in the past, some aides objected to lifting the students. It was decided "it was better for us to get someone who was basically a lifter," that is, someone who was strong. TB-181. Bartone had previously applied for a position as a custodial maid. She was hired with Wolf's understanding that she would be in Thran's classroom as long as Thran needed her (except when she visited Veteran Middle School twice a day to take care of the bathroom needs of the student in Doran's class).

Bartone's hours extended beyond the school day. She began work at 8 a.m. and finished at 4 p.m. TB 182-183. Accordingly, at the beginning and close of the school day she performed custodial duties.

In May of 1985, Sy Kagan was retained by the Board of Education to be its labor negotiator for all its outstanding contracts. They were due to expire June 30, 1985. Kagan testified that he was told that the teacher aide unit negotiations had already begun in house and the teachers aides had filed a Notice of Impasse with P.E.R.C. He wrote to the Commission's offices and suggested that the mediator assigned should contact Mr. Kagan directly. Kagan sent a letter to Ron Villano, the Association's representative, on May 17 stating that he would be negotiating for the Board and inviting Villano's response to him. The next letter that Kagan has was dated July 31 from Villano confirming the August 5 negotiation. Kagan considered this session as preliminary to any formal mediation with the hope of resolving and clarifying as much as possible prior to mediation. The letter from the Commission appointing a mediator was dated May 30. Kagan admitted that there was not much progress at this first session. Kagan prepared a comprehensive agreement which was submitted at the August 19 session. He told the Association that this proposal was to be effective September 1, and if an agreement was not reached until sometime later in the year it could not be guaranteed that what was being offered now would also be made retroactive later in the year.

Following this August 19 meeting another meeting was scheduled for September 3 at 4 o'clock on Monday. Kagan testified that on Friday, August 30, he received word that there was an emergency application being made in Superior Court, Appellate Division, in Trenton concerning another client. The scheduled time for the application was 11 a.m. Kagan believed that he would be able to make the court appearance and still be back in time for the 4 p.m. negotiations session. The Court appearance concluded at 3 p.m. whereupon Kagan called up his secretary and asked her to inform everyone he would be late getting to the negotiations session. By time he arrived at the meeting at twenty to five the aides negotiators had already left. Kagan could not say why there were no negotiations between March and August 5 for Kagan was not hired until the end of May.

ANALYSIS

In re Bridgewater Tp., 95 N.J. 235 (1984) sets forth the standard's for determining whether an employer has illegally discriminated against employees in retaliation against union activity:

> the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action.

> Transportation Management, supra, 462 U.S. 401, 103 S.Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. [Id. at 244]

I am satisfied that the Association has made out a prima facie case under Bridgewater. Its officers engaged in protected activity and the employer knew of this activity. The Association had been recognized by the Board as the exclusive representative of the aides but the Board and Association were unable to come to terms for a contract. In March of 1985, the Association filed an unfair practice charge with the Commission claiming the Board refused to negotiate in good faith. Again in July, the Association filed an amendment to its charge alleging that the Board refused to negotiate with the Association. Then, as a new school year was about to begin, and without prior notice, the Board sent letters to each member of the unit stating that they would not be hired for 1985-86. Under such circumstances, employer hostility or anti-union animus may be inferred.

However, the Board has demonstrated that there would have been the same reduction in the number of employees hired by the Board even in the absence of the protected activity.

I found Richardson to be a credible witness. The Board was unquestionably out of compliance with the Department of Education special education requirements and he was hired to correct this problem. Richardson was not involved in negotiations with the

Association. His stated reasons for the actions he took ring true and I credit and adopt his entire testimony as a finding of fact and find that the Board reduced the number of teachers' aides in the district in order to comply with State guidelines and improve the quality of its special education program as matters of educational policy.

Accordingly, I find the Association has failed to prove protected activity was a substantial motivating factor in the reduction in the number aides and the employer has met its burden under Bridgewater.

The issue of good faith negotiations before me is rather fragmented. As noted above, the parties entered into a settlement agreement which withdrew the amended charge that was a subject of H.E. 86-17 concerning bad faith negotiations. That charge dealt with the conduct of negotiations through the end of July 1985. The question of bad faith bargaining here could only deal with events subsequent to July 1985. The Act does require, at §5.3, that the parties will meet at reasonable times to negotiate. The Association did not initially object to the scheduling of meetings as proposed by Mr. Kagan and the totality of conduct here, including Kagan's failure to appear at the September negotiation session, does not demonstrate that the Board refused to negotiate in good faith.

The third component of the charge concerns the use of a non-unit employee, Bartone, the custodial maid, to do unit work. I find this conduct violated the Act. As pointed out, the chief

spokesperson and founder of the unit, Kennedy, was denied employment although she had the most seniority of the aides who were not recalled yet the Board hired a custodian to do aides work at a salary which was approximately double that of an aide.

It was clear from the testimony that most of Bartone's time was taken up with aide duties and the uncontroverted testimony of Kennedy was she was next in line in terms of seniority to be recalled. The Commission has long held that it is an unfair practice for an employer to assign work of a recognized unit to employees in another unit of the same employer. See Rutgers The State University v. American Federation of State, County & Municipal Employees, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981) aff'd App. Div. Dkt. No.-A-468-81T1 (May 18, 1983)

The work Bartone was doing was traditionally performed by aides'. It was an unfair practice to assign such work to someone outside the unit without first negotiating good faith with the Board.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Township cease and desist from:

1. Refusing to negotiate in good faith over the assigment of teacher's aide unit work to employees of another unit.

B. That the Township take the following affirmative action:

1. Negotiate in good faith concerning proposed assignments of unit work to employees outside the unit.

2. Reimburse Joyce Kennedy the salary she would have earned had she been offered a position as a teacher's aide during the 1985-86 and 1986-87 school year, less any monies actually earned by Kennedy during the same school years.

3. Offer Joyce Kennedy employment as a teacher's aide for the 1987-88 school year.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Edmund G. Gerber
Hearing Examiner

Dated: May 12, 1987
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from refusing to negotiate in good faith over the assigment of teachers' aide unit work to employees of another unit.

WE WILL negotiate in good faith concerning proposed assignments of unit work to employees outside the unit.

WE WILL reimburse Joyce Kennedy the salary she would have earned had she been offered a position as a teacher's aide during the same school years.

WE WILL offer Joyce Kennedy employment as a teacher's aide for the 1986-87 school year.

Docket No. CO-86-61 Brick Township Board of Education
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.