P.E.R.C. NO. 84-156

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE CITY
OF NEWARK,

Respondent,

-and- Docket No. CO-83-118-81

CITY ASSOCIATION OF SUPERVISORS
AND ADMINISTRATORS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Board of Education of the City of Newark had a right to eliminate the eleventh month of its University High School program, but that it committed an unfair practice by the last minute manner in which it effectuated this right, thus depriving affected employees of any opportunity to secure other summer work. The Commission rejects its Hearing Examier's recommendation that the Board be ordered to pay the five affected employees full compensation for the month their services were no longer needed and instead orders the Board and the Association to negotiate over possible compensation for these employees.

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CITY ASSOCIATION OF SUPERVISORS
AND ADMINISTRATORS,

Charging Party.

Appearances:
For the Respondent, Dwayne Vaughn, Esquire

For the Charging Party, Barry A. Aisenstock, Esquire

DECISION AND ORDER

On November 5, 1982, the City Association of Supervisors and Administrators ("Association") filed an unfair practice charge against the Board of Education of the City of Newark ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when in July 1982, it unilaterally reduced the work year of employees at the University High School from 11 months to ten months.

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; and (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."

On March 29, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1.

On April 8, 1983, the Board filed its Answer. The Board, in part, denied that the work year at the University High School had been 11, rather than ten, months, and further asserted that it had no duty to negotiate over its decision to eliminate the eleventh month of University High School programs,

On June 7, 1983, Hearing Examiner Alan R. Howe conducted a hearing. At the outset the Board moved to dismiss the Complaint, asserting that a previous Commissioner of Education decision concerning the elimination of the eleventh month of programs at the University High School was res judicata. The Hearing Examiner denied this motion without prejudice. The parties then examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by July 7, 1983.

On July 13, 1983, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-3, 9 NJPER 445 (¶14193 1983) (copy attached). He found that the Board violated subsections 5.4(a)(1) and (5) when, without prior notice or negotiation, it shortened the 11-month work year for five University High School supervisors and administrators. He recommended an order requiring the Board to pay the five employees the wages (plus 12% interest) they would have earned if their work year had not been shortened and to post a notice of its violation and the remedial action taken.

The Board has filed exceptions. The Board maintains that a previous Commissioner of Education decision had a res judicata effect precluding relitigation or, alternatively, a collateral estoppel effect in respect to certain facts; that there was not an established 11-month work year at University High School; and that it had a managerial prerogative to eliminate the eleventh month of the school year without any negotiations.[2/]

The Association has filed a response relying upon the findings and determination of the Hearing Examiner.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-4) are accurate. We adopt and incorporate them here.

We first consider the Board's contention that a previous Commissioner of Education decision had a res judicata effect barring relitigation of the dispute or, alternatively, a collateral estoppel effect barring relitigation of certain facts. We disagree.

In July 1982, a group of University High School parents, teachers, students, and individuals filed a petition with the Commissioner of Education. The petition claimed that the Board's failure to fund and operate the high school during July 1982 was arbitrary and capricious under the education statutes. On January 17, 1983, an Administrative Law Judge granted summary

2/ The Board requested oral argument. We deny this request.

judgment for the Board. He specifically found that the Board did not act arbitrarily or capriciously under the education statutes when, as a result of fiscal restraints, it made the hard choice of sacrificing the eleventh month of the University High School program in order to provide other essential services. He dismissed the petition and specifically dismissed a teacher's claim that he had been deprived of his anticipated salary for the eleventh month of the program.[3/] No party filed exceptions to the Administrative Law Judge's decision. On March 2, 1983, the Commissioner of Education affirmed his findings and determinations.

The doctrine of res judicata is only applicable when the same parties have fairly litigated the same cause of action to a final judgment on the merits. See Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583 (3rd Cir. 1975); Lubliner v. Bd. of Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428, 435 (1960). The doctrine of res judicata is inapplicable here because the Commissioner of Education proceedings involved different parties (the Association did not

3/ In his findings of fact, the Administrative Law Judge found that University High School had previously operated on an eleven month basis. In his analysis, however, he stated:

> "...there has been some dispute as to whether or not the eleven month is, and always has been, treated as part of the overall program or, on the other hand, has been treated as the 'summer' portion of the program. The determination in this case does not turn on that question; however, I am convinced from the evidence that treatment of the eleventh month as a 'summer' month has been exactly that, and funding for it as part of the Board's operation during the summer, as opposed to the regular school year, was and would be quite appropriate."

participate) and a different cause of action (the validity of the Board's lack of funding under the education statutes) than are involved before us. The Commissioner of Education was not asked to decide, as we are, whether the Board's failure to negotiate with or notify the Association concerning the alleged reduction in work year violated the New Jersey Employer-Employee Relations Act. See In re Oakland Bd. of Ed., P.E.R.C. No. 82-125, 8 NJPER 378 (¶13173 1982), aff'd App. Div. Docket No. A-4975-81T3 (6/20/83) ("Oakland").

We also believe the doctrine of collateral estoppel is inapplicable to this dispute. Collateral estoppel applies when an issue of ultimate fact has been fairly and fully litigated in a prior action between, generally, the same two parties, regardless of whether the causes of action were identical. It bars relitigation of that particular question of fact. State v. Redinger, 64 N.J. 41 (1973); Harbor Land Development Corp., Inc. v. Mirne, Newels, Tumem, Magee & Kirschner, Esqs., 168 N.J. Super. 168 N.J. Super. 538 (App. Div. 1979); Oakland, supra. The Board contends that the finding of the Administrative Law Judge that the eleventh month was merely a "summer" portion of the program, rather than part of a continuous 11-month program, is binding upon the parties here. We disagree. Again, the Association was not a party to the previous litigation. Moreover, this finding, as the Administrative Law Judge recognized, was dictum and not an ultimate fact.

We now consider whether there was an established 11-month work year at the University High School. Under all circumstances of this case, we hold that there was. From 1970 through 1981, the University High School operated on an 11-month basis with all students, administrators, and teachers required to attend and work during the entire period. Employees did not have an option to decline to work the eleventh month, and employees who asked about taking July off were told they had a commitment to work.[4/] School administrators and principals credibly testified that at the time they were hired, they were told they would be expected to work 11 months every year and that the eleventh month was an integral part of the program. Employees were paid the same amount per month as they earned from September through June and a different amount than employees earned who worked in summer school programs separate from the ten month school year. While separate funding and staffing were approved each year for the July operations, the process of staffing the University High School was mechanical with the procedures (e.g., applications and employee action forms) for filling separate summer school programs

4/ An administrative supervisor assigned in June 1980 to the Department of Secondary Programs testified for the Board that the July curriculum was not a continuation of the regular 10 ten-month program and that some University High staff had not worked during July, even though they had not resigned or been transferred. The Hearing Examiner credited the contrary testimony of administrators and supervisors working at University High School and we accept his findings of fact and credibility determinations on this issue. We note that the testimony of the administrative supervisor was not specific or supported by documentation showing the names of staff who allegedly had not worked previous summers. Moreover, this supervisor conceded that he did not know whether University High School personnel had been hired with the expectation of working 11 months per year.

being ignored or treated pro forma. Viewing all the circumstances concerning the pre-1982 employment relationship, we conclude that an 11-month work year was an established past practice.[5/]

We next consider whether the Board had a managerial prerogative to eliminate the eleventh month of the work year. Length of work year has repeatedly and emphatically been held to be a mandatorily negotiable term and condition of employment. In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 77-37, 3 NJPER 72 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); In re Hacketts-town Ed. Ass'n, P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980), aff'd App. Div. Docket No. A-385-80T3 (January 18, 1982), pet. for certif. den., 89 N.J. 429 (1982); In re East Brunswick Bd. of Ed., P.E.R.C. No. 82-11, 8 NJPER 320 (¶13145 1982); In re Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).[6/] Under all the circumstances of this case, however, we believe that a limited exception to that general rule is warranted.

At the outset of the litigation, the Board asked whether

5/ The Administrative Law Judge concentrated on the academic aspects of the University High School program and specifically found that it had an 11-month program, even though the July month could be considered as a "summer month" different from the other ten months. The evidence before us suggests a close educational tie between academic affairs in July and the other ten months. For example, students were required to attend University High School or its external programs for all 11 months starting in July, and July commenced the start of a ten-week grading cycle during which teachers discharged their normal duties including teaching classes in the core curriculum. We need not, however, secondguess the Administrative Law Judge's finding in order to find that the employment relationship was definitely conducted on an 11-month basis.

6/ Contrast cases in which a summer school program has been conducted separately from the regular school year. In re Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1978), aff'd in part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981).

the Association was contesting the Board's claimed managerial prerogative to abolish the eleventh month of the program. The Board specifically requested clarification of this issue because it wanted to know whether it would have to introduce the same evidence introduced before the Commissioner of Education concerning the reasons for the elimination of funding.[7/] The Association conceded that it was not contesting the Board's managerial prerogative to eliminate the program, but was merely litigating a claimed right to negotiate the impact of that decision. The litigation proceeded based on that understanding. The Hearing Examiner ultimately concluded that the Board had a managerial prerogative to eliminate the summer program and no exception has been filed to this determination. Given this posture of the litigation, we must assume that the Board had a managerial prerogative to eliminate the eleventh month of the high school program, thus eliminating the need for employees to work during that month. It follows, as necessary consequences of that decision, that the Board had the right to reduce the work year of the high school employees and that the Board was not obligated to compensate the employees for the full month as the Hearing Examiner ordered.

Nevertheless, even assuming that the Board had a managerial prerogative to eliminate the eleventh month of the program without negotiations over that decision, we hold that the Board violated the Act by the last minute manner in which it implemented its

7/ In the Commissioner of Education proceedings, evidence was introduced showing that the Board incurred a 4 1/2 million dollar shortfall in anticipated revenues for school year 1982-83, leading to a decision to reassess its priorities for the greatest good for the greatest number of students in the district.

decision. We have recognized that sometimes an employer's non-negotiable managerial prerogative to make a decision must be reasonably accommodated with the interests of employees adversely affected by that decision. See, In re County of Morris, P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd App. Div. Docket No. A-795-82T2 (1/2/84), pet. for certif. pending Supreme Court Docket No. 22,347 ("Morris County"). Under all the circumstances presented in this case, we do not believe the employer should be permitted to ignore totally the legitimate interests and expectations of its employees. Here, the Board did not decide to eliminate the funding for the eleventh month of the University High School year until a special meeting on June 30, 1982; employees did not receive notice of that decision until between July 2 and July 5. Thus, the Board's last minute action not only shortened the established 11-month work year, thus eliminating the need for work during July, it also deprived employees of the opportunity to procure other summer employment and compensation. Given the established 11-month work year, employees had a justifiable expectation that there would be work providing them with compensation during July 1982. One employee justifiably relied upon this practice in turning down a job offer in June 1982; the other employees implicitly relied upon it in not seeking other summer work prior to July 1982. Without warning or prior notice to the Association, the Board shattered this expectation. None of the affected employees was able to secure other employment for that month. Under all these circumstances, we believe the Board violated subsection 5.4(a)(5) and, derivatively,

(a)(1) when it failed to give the Association earlier notice of the elimination of the eleventh month of the program and an opportunity to negotiate the consequences of the Board's decision.

As a remedy, the Hearing Examiner recommended that the Board be ordered to pay five administrators and supervisors the money (plus interest) they would have earned if they had worked during July 1982. Given the Board's conceded managerial prerogative to eliminate the eleventh month of the program and the absence of any explicit contractual notice provisions protecting an employee's compensation against last minute personnel actions, In re Old Bridge Bd. of Ed., P.E.R.C. No. 83-60, 9 NJPER 12 (¶14004 1982), aff'd 193 N.J. Super. 182 (App. Div. 1984), appeal pending Supreme Court Dkt. No. 22,353, this remedy is inappropriate. Instead, we order the Board to negotiate with the Association over possible compensation for the five supervisors and administrators who did not work during July 1982.

ORDER

The Board of Education of the City of Newark is ordered to

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate over compensation for those administrators and supervisors who were unable to secure other employment for July 1982.

2. Refusing to negotiate over compensation for those administrators and supervisors who were unable to secure other employment for July 1982.

B. Take the following action:

1. Negotiate with the City Association of Supervisors and Administrators over compensation for those employees who were unable to secure other employment for July 1982.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Graves and Newbaker abstained. Commissioner Butch was not present.

DATED: TRENTON, NEW JERSEY
June 25, 1984
ISSUED: June 26, 1984

H. E. No. 84-3

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

In the Matter of

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-83-118-81

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsection 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, without notice to or negotiations with the Charging Party, it unilaterally discontinued the July Summer program in 1982 at the University High School and failed to employ five staff members represented by the Charging Party for that month. There had been a long-standing practice, dating back to 1969, of employing staff members for the month of July and paying said staff members 1-10th of the annual salary for the month of July. The Hearing Examiner relied on a long line of Commission and court decisions, which hold that the length of employment during a school year is a term and condition of employment, which is mandatorily negotiable and may not be altered without negotiations with public employee representatives.

By way of affirmative action, the Hearing Examiner recommends that the five affected employees be paid their salary for the month of July 1982 together with interest at the rate of 12% per annum from that month.

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 of modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 84-3

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

In the Matter of

BOARD OF EDUCATION OF THE CITY OF NEWARK,

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Docket No. CO-83-118-81

CITY ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS,

Charging Party.

Appearances:

For the Respondent
Dwayne Vaughn, Esq.

For the Charging Party
Barry A. Aisenstock, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 5, 1982 by the City Association of Supervisors and Administrators (hereinafter the "Charging Party" or the "Association") alleging that the Board of Education of the City of Newark (hereinafter the "Respondent" or 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 Respondent unilaterally eliminated the eleventh month of employment for employees represented by the Charging Party at University High School as of July 1982 without notice to or negotiations with the Charging Party, and without compensation for the affected employees for the month of July, notwithstanding a contrary practice of some 12 or 13 years, all of which is alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 29, 1983. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 7, 1983 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 July 7, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists 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 FACT

1. The Board of Education of the City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The City Association of Supervisors and Administrators is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association represents, for purposes of collective negotiations, certain supervisors and administrators at the University High School.

4. Since the 1970-71 school year the University High School has been operated on an eleven-month basis. The administrative staff, as well as the teaching staff, has since 1970 been expected to perform services for 11 months of the school year commencing in September. Except for resignations, transfers or retirements it has

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1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

been the practice for the staff at the University High School to work the 11 months as indicated above.

5. Each year since 1970 the Board has approved for employment in July those teachers, supervisors and administrators, whose names were submitted to the Board by the Principal of University High School. The compensation for those staff members who were approved for employment in July has always been calculated and paid on the basis of one-tenth (1/10) of the annual salary of the staff member.

6. Beginning in April 1981 the Board's Instruction Committee raised questions about whether or not the Summer program in July, the eleventh month, should be continued since it was being utilized to offer enrichment to students who had no academic deficiencies (R-1, p. 7). However, no action was taken by the Board and thus the Summer program for July 1981 continued as in the past.

7. In the Spring of 1982 the Principal of the University High School, Willie J. Young, prepared his budget for the 1982-83 school year, including the Summer program for July 1982 (R-3).

8. The agenda for the special Board meeting of June 30, 1982 included the University High School Summer program for 1982 (R-5). Excerpts of the minutes of the executive session of the Board on that date indicate that the University High School Summer program was "pulled" from the agenda and that the School would now go to a regular school year instead of being an eleven-month program (R-6, p. 2).

9. The affected employees represented by the Association were informed of the Board's action of June 30, 1982 by telephone or other means. As a result none of the affected employees worked during the month of July 1982 as they had in the past. The Charging Party's witnesses testified credibly that they were unable to find alternative employment in July 1982 due to the abrupt notice from the Board that they would not be employed for that month.

10. The affected employees have continued to work at the University High School on a ten-month basis since September 1982.

11. The witnesses for the Charging Party testified credibly that at the time of their employment at the University High School each was informed by representatives of the Respondent that they were expected to work eleven months commencing in September of the school year.

12. Gerald A. Samuels, a member of the Association's Grievance Committee and Executive Board, testified credibly that the Board never gave notice to the Association nor offered to negotiate with it regarding the Board's decision to terminate the July Summer program in 1982.

13. The only provision in the parties' collective negotiations agreement, effective during the term July 1, 1980 to June 30, 1982, which pertains to the length of the school year or the work year is Article X, Section D, which provides as follows:

> "For schedule purposes, the Personnel with the exception of Directors and Central Office Coordinators, shall work ten (10) months and ten (10) days which period shall be the regular (10) months teachers' schedule. They shall report on August 18, 1980 for the opening of the 1980-81 school year and on August 24, 1981 for the opening of the 1981-82 school year."

14. It was stipulated that there are five staff members in the University High School, who were not employed during the month of July 1982. These individuals and the salary that they would have received are as follows:

Malanga	$3,528.00
Pinckney	$3,275.00
White	$3,495.50
Young	$3,911.90
Zois	$3,040.00

THE ISSUE

Did the Respondent violate Subsections(a)(1) and (5) of the Act when, without notice to or negotiations with the Association, it failed to employ certain staff members represented by the Association at the University High School for the month of July 1982?

DISCUSSION AND ANALYSIS

The Respondent Violated Subsections (a)(1) And (5) Of The Act When Without Notice To Or Negotiations With The Association It Failed To Employ Certain Staff Members Represented By The Association At The University High School For The Month Of July 1982

The Charging Party correctly observes that, in view of the collective negotiations history of the parties, and the practice at the University High School since 1969, certain of the staff represented by the Association have worked, and have been expected to work, an eleventh month in July of each year. The testimony was uncontradicted that employees hired to work at University High School were told by the Respondent's representatives that they were expected to work the eleventh month. Certain employees of the High School worked the eleventh month each and every year from 1969 through 1981. The Respondent unilaterally discontinued this practice without notice to or negotiations with the Association in 1982.

It is noted that the Respondent recognizes that past practice may alter the contractual relationship between the parties but contends that it is not herein involved since "...it must first be shown that the express provisions of the contract are somewhat unclear, ambiguous or that such express terms do not exist..." Thus, we must examine the collective negotiations agreement where the only pertinent provision is found in Article X, Section D. This Article provides that, for schedule purposes, the staff shall work ten months and ten days, which shall be the regular ten months teachers' schedules. There are no other provisions in the agreement which in anyway bear upon the work schedule of the staff members represented by the Association. Given Article X above, and its provision for a school year of ten months and ten days, there clearly is an ambiguity or silence in the agreement vis-a-vis the 13-year practice of work during the eleventh month in July of each year.

The Commission and the courts of this State have recognized past practice and custom in the collective negotiations relationship between public employers and

public employee representatives. Thus, did the Commission state in New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84, 85 (1978), aff'd. App. Div. Docket No. A-2450-77 (1979) that:

> "...Where, during the term of an agreement, a public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement... the employer must first negotiate such proposed change with the employees' representative prior to its implementation...
>
> "...under N.J.S.A. 34:13A-5.3 the obligation is on the public employer to negotiate, prior to implementation, a proposed change in an established practice governing working conditions which is not explicitly or impliedly included under the terms of the parties' agreement..." (Emphasis supplied).

See also, Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 221 (1979); Sayreville Education Association v. Sayreville Board of Education, App. Div. Docket No. A-373-80T4 (1981); and Sayreville Board of Education, P.E.R.C. No. 83-105, 9 NJPER 138, 140 (1983).

There are several other pertinent court and Commission decisions on the issue of the unilateral reduction in the duration of employment during the school year for public school employees. See Piscataway Township Board of Education v. Piscataway Principals Association, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); Hackettstown Education Association v. Hackettstown Board of Education, App. Div. Docket No. A-385-80T3 (1982); and East Brunswick Bd of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (1982). In Piscataway the Court made clear that "...the matter of length of the work year and its inseparable concomitant - compensation - are terms and conditions of employment within the intent of ..." the Act. (164 N.J. Super. at 100, 101).

The instant Hearing Examiner decided a similar issue in Board of Education of Essex County Vocational Schools, H.E. No. 81-24, 7 NJPER 112 (1981), which was affirmed by the Commission in the absence of exceptions: P.E.R.C. No. 81-102, 7 NJPER 144 (1981). Except for the presence of a RIF issue in that case the facts there bear a striking resemblance to the instant case and the Hearing Examiner cites Essex as additional authority for his conclusion herein.

Finally, the Hearing Examiner finds inapposite the many Commissioner of Education

decisions cited by the Respondent. They clearly are not pertinent to the issue involved herein, namely, the unilateral change of an established practice governing working conditions without negotiations with the Association. No one is here raising the issue of whether or not the Respondent has the managerial prerogative to eliminate the Summer program during the month of any school year. This the Respondent can do without negotiations. What the Respondent cannot do is fail to negotiate before implementation a reduction in the work year of affected staff members represented by the Association from eleven months to ten months where there has been a practice to the contrary covering some 13 years.

The Hearing Examiner having concluded that the respondent has violated Subsections (a)(1) and (5) of the Act, an appropriate remedy will be recommended hereinafter.

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

CONCLUSION OF LAW

The Respondent violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, without notice to or negotiations with the Association, it failed to employ certain staff members represented by the Association at the University High School for the month of July 1982.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the City Association of Supervisors and Administrators regarding the five staff employees who were not employed in July 1982 in the Summer program at the University High School.

2. Refusing to negotiate in good faith with the said Association regarding the five staff employees who were not employed in the Summer program at the University

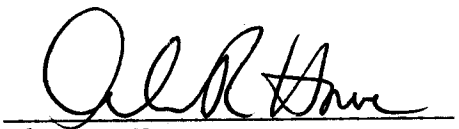
High School in July 1982.

B. That the Respondent take the following affirmative action:

1. Forthwith make the five staff employees at the Universtiy High School, who were not employed in July 1982, and who are identified by name and amount of salary in Finding of Fact No. 14, supra, whole for the wage loss suffered for the month of July 1982 with interest at the rate of 12% per annum from the month of July 1982.

2. 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 a period of a least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure 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.



Alan R. Howe
Hearing Examiner

Dated: July 13, 1983
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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the City Association of Supervisors and Administrators regarding the five staff employees who were not employed in July 1982 in the Summer program at the University High School

WE WILL NOT refuse to negotiate in good faith with the said Association regarding the five staff employees who were not employed in the Summer program at the University High School in July 1982.

WE WILL forthwith make the five staff employees at the University High School who were not employed in July 1982, whole for wage loss suffered for the month of July 1982 with interest at the rate of 12% per annum from the month of July 1982, as follows:

Joseph Malanga	$3,528.00
Theodore Pinckney	$3,275.00
James White	$3,495.50
Willie Young	$3,911.90
Joelle Zois	$3,040.00

NEWARK 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 James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780