P.E.R.C. NO. 80-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CALDWELL-WEST CALDWELL BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-174-15

CALDWELL-WEST CALDWELL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice case the Commission dismisses most of the charges filed against the Board of Education by the Education Association. The Commission, contrary to the Hearing Examiner, concluded that the Board did not violate the Act when it extended class instructional time for core teachers by a half hour per day without first negotiating this increase in workload and when it reduced the summer schedule of the Cooperative Industrial Coordinator from four weeks to two weeks with a resulting loss of salary. The Commission adopted the Hearing Examiner's recommendation that the count of the charge relating to an alleged increase in the amount of time that all teachers, other than core teachers, were required to perform services for the Board of Education, should be dismissed. Additionally, the Commission agreed with the Hearing Examiner that the Board violated the Act when it unilaterally eliminated an extra preparation period and replaced it with an additional teaching period, thereby unilaterally increasing the workload of the Audio-Visual Coordinator. The Board was ordered to restore the extra preparation period and to negotiate in good faith concerning any future increase in workload for this position which is not a result of a reduction in force.

P.E.R.C. NO. 80-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CALDWELL-WEST CALDWELL BOARD OF EDUCATION,

Respondent,

-and-

CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,

Charging Party.

Docket No. CO-77-174-15

Appearances:
For the Respondent, Metzler Associates (Mr. Stanley H. Gerrard, Consultant)

For the Charging Party, Goldberg & Simon, Esqs. (Mr. Gerald M. Goldberg, Of Counsel)

DECISION AND ORDER

On December 27, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the Caldwell-West Caldwell Education Association (the "Association") which, as amended on October 25, 1977, alleges that the Caldwell-West Caldwell Board of Education (the "Board") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.. Specifically, it alleges that sections (a)(1) and (5) of the Act[1/] were violated in that the Board: (1) in September 1976, unilaterally increased the number of teaching mods during which the seventh

1/ These subsections provide that employers, their representatives or agents are prohibited 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."

grade core teachers were required to perform services, without prior negotiations over this increase in workload; (2) in September 1977, unilaterally increased the amount of time all teachers in the junior high school, other than core teachers, were required to perform services for the Board, again without prior negotiations over this increase in workload; (3) unilaterally, and without prior negotiations, increased the workload of the Audio-Visual Aids Coordinator by eliminating an extra free period provided to the Coordinator, in addition to the free periods normally enjoyed by teachers, for the purpose of performing audio-visual aid duties; (4) unilaterally reduced the summer school employment of the Cooperative Industrial Education Coordinator from four weeks to two weeks, thereby reducing the Coordinator's salary without prior negotiations.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 10, 1977. In accordance with the Complaint and Notice of Hearing, hearings were held on January 25, March 14, May 23, June 5, June 14, June 15, August 7, August 8 and September 29, 1978 before Robert T. Snyder, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Post-hearing briefs were filed by the Association and the Board on November 24, 1978 and

November 28, 1978, respectively. The Association filed a reply brief on December 21, 1978 and the Board failed to file a reply brief. On May 4, 1979, the Hearing Examiner issued his Recommended Report and Decision,[2/] which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Timely exceptions, cross-exceptions, and briefs in support thereof were filed by the Board and the Association on June 4, 1979 and June 12, 1979, respectively. The Commission granted the Association's request for oral argument before the Commission. Due to scheduling conflicts, this argument did not occur until October 31, 1979 at which time parties appeared.

The Hearing Examiner found that the Board violated the Act when, in 1976: (1) it unilaterally extended class instructional time for core teachers by a half hour per day without first negotiating over this increase in workload; (2) unilaterally eliminated, without prior negotiations, the extra preparation period provided to the Audio-Visual Aids Coordinator for the performance of audio-visual duties, thereby increasing the workload for this position; (3) without prior negotiations reduced the Cooperative Industrial Coordinator's normal four week summer schedule by two weeks, with a concomitant loss of salary. The Hearing Examiner further found that the Association failed to prove, by a preponderance of the evidence, that the Board, in September 1977, unilaterally increased the workload for all teachers in the junior high school, other than core teachers.

2/ H.E. No. 79-40, 5 NJPER 206 (¶10118 1979).

The Commission, after a careful review of the record, and in view of the recent court decisions in In re Maywood Board of Education, 168 N.J. Super 45 (1979), and In re Edison Twp. Bd. of Ed., ___ N.J. Super ___ (1979), App. Div. Docket No. A-51064-77, pet for cert pending Docket No. 16,485, declines to adopt the Hearing Examiner's first conclusion of law. Contrary to the Hearing Examiner's conclusion that the facts in this case are distinguishable from those in Maywood,[3/] it is apparent from the findings of fact[4/] that the increase in workload for seventh grade core teachers was a direct result of the decision not to reemploy the foreign language teacher for the 1976-77 school year, due to the elimination of foreign languate courses for the seventh grade. The core teachers were required to assume the additional responsibility of the instructional time previously covered by the seventh grade foreign language teacher who was eliminated as a reduction in force.[5/] Maywood clearly states that since the decision to reduce teacher personnel is a managerial prerogative, the impact - i.e., increased workload - on the remaining teachers is not negotiable. Accordingly, the Commission dismisses the first count of the Association's amended charge.[6/]

A cross-exception is taken by the Association to the Hearing Examiner's recommendation to dismiss the second count of the charge on the basis that the Association failed to meet its

3/ Hearing Examiner's report at page 11.
4/ Hearing Examiner's report at pages 5 and 6.
5/ Hearing Examiner's report at page 6.
6/ Due to the Commission's failure to adopt the Hearing Examiner's recommendation in regard to the first count of the Association's charge, it is not necessary to consider the Board's exception to his recommendation or the Association's cross-exception for a monetary award.

burden of proof, through statistical evidence, that the Board unilaterally increased the workload for non-core teachers. The Association contends that the Hearing Examiner failed to consider the decline from 1976-77 to 1977-78 in the percentage of teachers with schedules of 15 teaching mods or less and the increase during this same period in the percentage of teachers with schedules of 16 or more teaching mods.

The Commission does not agree with this exception, for it is clear that the Hearing Examiner extensively considered all the statistical data presented,[7/] and, in analyzing the various percentage increases and decreases in teacher instructional time, concluded that this data was inconclusive or, at best, evidenced a negligible increase in instructional time. Moreover, the Commission notes that the Association's exception misses the point. The Hearing Examiner found, and the Association does not dispute, that from the 1971-72 school year there was an established practice of assigning all teachers, other than core teachers, an instructional load that varied from 14 to 18 teaching mods per day. It is apparent from the upward and downward percentage variations in the yearly statistical data that an individual could, for example, be assigned 14 mods one year, 17 mods the second year, and 15 mods the third year. Since the Board remained within the established practice of assigning from 14 to 18 mods, there was no unilateral increase in workload, despite the fact that in the 1977-78 school year a non-core teacher may have taught more teaching mods than in the

7/ Hearing Examiner's report at pages 16 and 17.

previous year. Accordingly, the Commission adopts the Hearing Examiner's recommendation, substantially for the reasons discussed in his Recommended Report and Decision, and dismisses the second count of the Association's charge.

The Board takes exception to the Hearing Examiner's finding that it unilaterally increased the workload of the Audio-Visual Aid Coordinator by eliminating the extra preparation period for this position in 1976-77. Since extra-duty positions, such as this one, are awarded on a one-year basis under contracts separate and apart from regular teaching contracts, and teachers applying for this position have various teaching loads, the Board argues that subsequent applicants do not have to be afforded the same teaching schedule, including preparation periods, as their predecessors.

The Board misconstrues the point at which the unilateral change occurred and the effect caused by the establishment of a past practice. The Hearing Examiner found that from the 1971-72 school year through 1975-76 there was an established practice of providing the Audio-Visual Coordinator an additional free period to perform his audio-visual duties. In September 1977, the Board unilaterally assigned the Audio-Visual Coordinator an additional instructional period in place of the preparation period; thereby necessitating that he perform his audio-visual duties during his other previously free time.[8/] Accordingly, the Board committed

8/ The substitution of an instructional period for a preparation period is an increase in work load which must be negotiated. In re Newark Board of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979).

an unfair practice in September 1977, when, without prior negotiations, it increased the Audio-Visual Coordinator's workload.

By definition, an established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Moreover, terms and conditions of employment, whether expressed or implied, attach to positions, not individual employees. The Board having granted the Audio-Visual Coordinator an additional free period for five years, and the Association having acquiesced, this conduct raises an implied, mutual understanding that the extra free period is an established term and condition of employment which attaches to this position. It is immaterial that only one person held this position during the period when the Board established this practice. Any successor has a right to expect the continuation of the position's established terms and conditions of employment.

The Association takes cross exception to the Hearing Examiner's denial of a monetary award for the unilateral increase in the Audio-Visual Coordinator's workload. It suffices to say that had the Board negotiated over this issue, the outcome can only be speculated. Since there are any number of ways in which the Board and the Association could have resolved this problem, negotiations would not have necessarily resulted in a salary increase.[9/] By granting a monetary award the Commission, in effect, would be

9/ Even if it could reasonably be assumed that the Board and the Association would have agreed to a monetary settlement, the amount would also be mere speculation.

imposing a term and condition of employment on the Board and the Association for this title. Such a remedy is beyond the scope of the Commission's authority.[10/]

Accordingly, the Commission, substantially for the reasons stated in his Recommended Report and Decision, adopts the Hearing Examiner's conclusion that under the third count of the Association's charge, the Board violated the Act when, without prior negotiations, it unilaterally eliminated the extra free period for the Audio-Visual Coordinator, thereby increasing his workload. Further, in accordance with the Hearing Examiner's recommended order, the Commission declines to grant a monetary award.

The Board takes exception to the Hearing Examiner's conclusion that it violated the Act when it unilaterally reduced the summer work schedule of the Cooperative Industrial Education Coordinator from four weeks to two weeks. It is the Board's contention that the Hearing Examiner's reliance on In re Piscataway Twp. Bd. of Ed., 164 N.J. Super 98 (1978), is misplaced. The Commission agrees. Piscataway involved a situation where employees, whose regular employment was under a twelve month contract, had their employment unilaterally reduced to ten months. In the present case, it is clear, despite the Hearing Examiner's finding to the contrary, that the Board did not follow the Department of Education's recommendation to create an 11 or 12 month CIE Coordinator's

10/ H.K. Porter v. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970).

position.[11/] Rather, this was a regular 10 month position, with the employee being hired each June for the separate position of CIE Coordinator for the summer program, at a rate of pay which was one tenth of his regular contractual salary for the forthcoming year.[12/]

Based on these facts, the Commission concludes that this case is more closely analagous to the decision in In re Rutgers, The State University, P.E.R.C. No. 79-89, 5 NJPER 226 (¶10125 1979). The CIE Corrdinator, like the co-adjutant faculty in Rutgers, was hired anew each summer for the program. Decisions as to the extent of the program and determinations as to hiring are totally for management and non-negotiable. Accordingly, the Commission concludes, contrary to the Hearing Examiner's recommendation, that with regard to the two week reduction in the summer program, the arbitrator's award, though based on different grounds, is not repugnant to the Act. Therefore, the Board did not violate the Act and the fourth count of the Association's charge is also dismissed.

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Caldwell-West Caldwell Board of Education:

1. Cease and desist from interfering with, restraining

11/ See Joint Exhibit No. 4.

12/ The fact that the CIE Coordinator was paid on the basis of his salary for the next school further supports the conclusion that his regular employment year ended at the termination of the 10 month school year.

or coercing employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with the Caldwell-West Caldwell Education Association concerning the workload of the Audio-Visual Aid Coordinator and by unilaterally eliminating the extra free period for the Audio-Visual Coordinator by replacing it with an additional instructional period.

2. Taking the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Restore the extra preparation period to the Audio-Visual Coordinator; negotiate in good faith concerning the increased workload for the Coordinator's position from September 1976, when the Board unilaterally eliminated the extra preparation period and replaced it with an additional teaching period; and negotiate in the future concerning any increase in workload for the Audio-Visual Coordinator's position which is not a result of a reduction in force.

(b) Post at its central offices in the School District of Caldwell-West Caldwell, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by the Respondent's representative, be posted by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notice to its employees are customarily posted. Reasonable steps shall be taken by said Respondent to ensure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman, in writing, within twenty (20) days of receipt of the Order what steps said Respondent has taken to comply herewith.

3. IT IS FURTHER ORDERED that counts one, two, and four of the Complaint against the Caldwell-West Caldwell Board of Education be dismissed in their entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett and Parcells voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
December 4, 1979
ISSUED: December 5, 1979

"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 interfering with, restraining or coercing any employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act by refusing to negotiate in good faith with the Caldwell-West Caldwell Education Association concerning the workload of the Audio-Visual Aid Coordinator and by unilaterally eliminating the extra free period for the Audio-Visual Coordinator by replacing it with an additional instructional period.

WE WILL restore the extra preparation period to the Audio-Visual Coordinator; negotiate in good faith concerning the increased workload for the Coordinator's position from September 1976, when the Board unilaterally eliminated the extra preparation period and replaced it with an additional teaching period; and negotiate in the future concerning any increase in workload for the Audio-Visual Coordinator's position which is not a result of a reduction in force.

CALDWELL-WEST CALDWELL 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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 79-40

Sc-64

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

In the Matter of

CALDWELL-WEST CALDWELL BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-77-174-15

CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Public Employment Relations Commission Hearing Examiner, after lengthy hearing, sustains three charges filed by the Caldwell-West Caldwell Education Association claiming that the Caldwell-West Caldwell Board of Education had unilaterally, without negotiations, increased the workload of a group of seventh grade teachers, increased the workload of the Audio-Visual Aids ("A.V.") Coordinator and reduced the summer work schedule of the Cooperative Industrial Education ("C.I.E.") Coordinator, all employed at the Grover Cleveland Junior High School. The Examiner recommends dismissal of a fourth allegation that the Board of Education had also increased the workload of other junior high school teachers.

The group of seventh grade teachers, employed in a "core" program, teach combined english and social studies and combined science and math classes. The Examiner found that commencing September, 1976, when the Board of Education extended class instructional time for core teachers by a half hour per day to replace eliminated foreign language studies, it unilaterally changed a longstanding past practice as to class instructional time for these teachers without first negotiating with the Association, their exclusive representative, the impact upon them of the increased workload. The Board thus violated its negotiation obligation under the New Jersey Employer-Employee Relations Act. The Examiner further determined that for some years, the incumbent of the A.V. Coordinator position had been provided an extra preparation period to handle the duties of the position. When this period was eliminated in 1976 without negotiating the decision, the Board violated its negotiating duty under the Act. The Examiner also concluded that the Board's decision of shortening the C.I.E. Coordinator's normal four week summer work schedule by two weeks in 1976 in response to declining student enrollment, but without first negotiating this decision with the Association, further violated the Act. In so finding he declines to defer to an arbitration award issued under the parties' collective negotiations agreement which had dismissed the Association's claim of contract breach. The Examiner found that this award was contrary to clear Commission precedent sustained by the New Jersey Appellate Court, that an employer commits a violation of its negotiations obligation under the Act when it unilaterally reduces an employee's work year, even if the decision is motivated solely by economic considerations. Thus, the Examiner finds the award repugnant to the Act under applicable Commission standards. The Board also eliminated foreign language instruction

in the eighth grade for the school year 1977. The Examiner found that with respect to all teachers in the junior high school other than "core" teachers, the parameters of an existing past practice of assigning class instructional time per day was not changed when the students were assigned an extended class period to replace foreign language study.

To remedy the violations found the Examiner recommends to the Commission that within 60 days of the date of its final Decision it order the Board to restore the working hours of the seventh grade core teachers and A.V. Coordinator as they existed prior to the changes and negotiate in good faith with the Association as to those changes. The Examiner further recommends that the Board be required to restore the four week summer work schedule for the C.I.E. Coordinator and make the Coordinator whole for loss of earnings for the period during which the reduced work schedule has remained in effect.

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.

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

In the Matter of

CALDWELL-WEST CALDWELL BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-77-174-15

CALDWELL-WEST CALDWELL EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Metzler Associates (By Stanley C. Gerrard, Esq., Consultant)

For the Charging Party
Goldberg & Simon, Esqs.
(Gerald M. Goldberg, Esq., Of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On December 27, 1976, Caldwell-West Caldwell Education Association ("Association" or "Charging Party") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Caldwell-West Caldwell Board of Education ("Board" or "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 10, 1977. On October 25, 1977, an amended charge was filed which clarified and expanded upon the allegations contained in the original charge. 1/ Specifically, the Association now

1/ Although by the terms of the original Notice of Hearing, hearing was scheduled to commence on September 26, 1977, both the pre-hearing conference and hearing were adjourned on request of counsel for Charging Party without objection by Respondent. As a consequence of matters discussed at the re-scheduled pre-hearing conference held on October 3, 1977, the conference was continued on October 25, and November 22, 1977. The clarification of issues and of the parties' positions which resulted from these meetings led to the filing of the amended charge and an amended answer in response thereto.

charges in four separate counts that the Respondent, unilaterally and without prior negotiations, (1) increased the work hours and workload of a group of so-called core teachers who teach a combined english-social studies or science-math course of studies in the seventh grade, commencing September, 1976; (2) increased the work hours and workload of all junior high school teachers in the seventh, eighth and ninth grades other than the core seventh grade teachers, commencing September, 1977; (3) removed a free period from the position of audio-visual aids coordinator, commencing September, 1976; and (4) reduced the summer work schedule of the teacher assigned the duties of Cooperative Industrial Education ("C.I.E.") Coordinator for the summer of 1976, all in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). 2/ Respondent's amended answer to the amended charge 3/ denied the commission of any unfair practices and pleaded certain affirmative defenses which will be discussed, infra.

Hearings were held on January 25, March 14, May 23, June 5, June 14, June 15, August 7, August 8, and September 29, 1978. 4/ Both parties were given full opportunity to examine witnesses, present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on November 24, 1978, the Respondent on November 28, 1978, and the Charging Party filed a reply brief on December 21, 1978.

Upon the entire record in the case and from my observation of the witnesses and their demeanor I make the following:

FINDINGS OF FACT

1. The Parties

The Board operates a school district located in Essex County comprising

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" 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."

3/ At the opening of hearing leave was granted to the Charging Party and Respondent to amend the Complaint and Answer, respectively, to conform to the allegations set forth in the amended charge and the responses contained in the amended Answer, respectively, which each had previously filed.

4/ During the course of the proceeding, scheduled hearings were adjourned from time to time at the request of Charging Party's counsel, without objection by Respondent's representative, based mainly upon counsel's representation of active engagements which conflicted with hearing dates. As a consequence, the hearings stretched over more than half a year before completion.

primary, elementary and high school grades. Grades seven, eight and nine are housed in a separate junior high school, a/k/a Grover Cleveland Junior High School. For some years the teachers, other professionals and certificated personnel have been represented by the Association for purposes of collective negotiations with the Board concerning their terms and conditions of employment. A series of collective agreements covering their terms and conditions of employment have been entered by the Board and Association. I find and conclude that the Board and the Association are an employer, and employee organization and majority representative of employees in an appropriate unit, respectively, within the meaning of the Act.

II. The Unfair Practices

A. Unilateral Increase In Workload of Seventh Grade Core Teachers

The Evidence

A collective agreement between the parties for the school year 1975-76 contained a provision in Article XXII "Teaching Hours" which provides; "(a) As professionals, teachers are expected to devote to their assignments the time necessary to meet their responsibilities. The teacher will be in his classroom prior to the arrival of his students and shall be available to help students after student dismissal."

Traditionally, the school day has been broken down into units of time known as mods, each mod consisting of 15 minutes of time. Classes consist of either 2, 3 or 4 mods.

The parties agree and the practice in the school district confirms, that the teachers' assigned work day has always consisted of 24 mods, including a 2 mod (or ½ hr.) duty free lunch period. Within that time the teachers are assigned daily classroom instruction, daily supervision of students (in homeroom, lunchroom or study hall) 5/ or daily non-supervisory duties (such as administering attendance records or school accounts), emergency assignments (primarily relieving

5/ The primary function of such duty is to supervise the behavior of students while they are in their homeroom, eating lunch or studying their class subjects. In contrast to class instructional duty, it involves no preparation time, no assessment of student comprehension or performance through evaluation of tests and class presentation and no course planning through developments of plan books and the like. (See, e.g. Tr. 191). Thus, while unquestionably involving a form of pupil contact, the contact is of a far different kind and nature than that involved in the classroom, instructional setting.

absent or indisposed teachers) [6] and free time (also known as preparation time) during which a teacher will normally prepare and grade assignments or confer with other teachers but may also engage in personal business. There is no question that the teachers' salary, as provided in the guide attached as a schedule to the agreements, including the 1975-76 contract, has been consistently determined by the length of service in the district as well as the number of graduate credits and degrees earned and has never been determined by the nature of the teachers professional assignments during the course of the work day.

For some years prior to school year 1975-76, since the 1960's, the Board had implemented an educational program for seventh grade students designed to ease their transition to departmentalized subject instruction followed in the eighth and succeeding grades. Under this "core" program, seventh grade students received combined social studies and english and combined science and math instruction daily from separate teachers who relate together as a team to provide greater integration of subject matter and instructional flexibility (Tr. 577-79).

From at least school year 1971-72 through school year 1975-76 the group of core teachers had remained substantially stable with very few, if any, transfers out of the program and with minimal turnover due to resignations or death. During the same years the daily classroom instruction duty for core teachers had uniformally comprised 14 mods, with 7 mods for each of two instructional classes, and additional daily assignments of at least 2 mods of supervisory duty and other mods of emergency coverage and preparation time.

Negotiations for a successor collective agreement to the one expiring June 30, 1976, commenced sometime in the fall of 1975. The Association sought through certain demands to limit the work day for special education teachers and all teachers on Fridays or days preceding holidays or vacations and for the purpose of attending faculty or other professional meetings involving total staff. The Association also sought the assignment of personnel other than teachers for non-teaching duties, the elimination of cafeteria supervision and the employment of aides for the performance of this duty but that if teacher assignment to non-teaching duties becomes necessary, distribution will be made on an equitable basis. The Association further sought no reduction in the number of teachers from the

---

6/ Inasmuch as such emergencies did not occur on a regular basis, the daily assigment of such a duty permitted teachers to engage in preparation or other non class work more often than not. Usually, those assigned morning emergency duty were more usually called upon to relieve teachers arriving late, than those assigned the duty in the afternoon.

previous year in positions covered in the agreement for the duration of the agreement, a limitation on class size not to exceed 25 students per class, with exception because of educational interests 7/ and a maintenance of standards clause, retaining existing terms and conditions of employment and benefits existing prior to its effective date. The Association also sought to extend the protections of N.J.S.A. 18A:28-9 *et seq.*, afforded to tenured and certificated teachers in the event of a reduction in force and, incorporated under Article XXVII, "Reduction in Force and Reemployment", to all certified personnel covered by the agreement, whether tenured or non-tenured.

None of these proposals were incorporated in the ultimate agreement between the parties for the school year 1976-77 which was adopted on June 14, 1976, except that in Article XXII "Teaching Hours" a new paragraph D. was added permitting teachers to leave on Friday 15 minutes after the close of school and also 15 minutes before the beginning of school calendar holidays. The 1976-77 agreement, like its predecessor, contains a short management rights clause, retaining in the Board all the authority vested in it by the New Jersey Education Law, Title 18A. Neither agreement contains a "zipper"clause, pursuant to which the parties' would be foreclosed from negotiating during the term on any subject matters which were raised in negotiations or covered in the agreement.

Negotiation sessions were held in 1975 on September 30, October 21 and 28, November 25, December 16 (in mediation), and in 1976 on March 22 and May 3 (both dates before a fact finder), May 18 and June 2.

After the defeat on March 9, 1976, of a proposed school budget, at a special meeting of the Board held on March 30, 1976, the Board adopted a lower, revised budget and a resolution revising curriculum. Foreign Language offerings in the seventh grade were eliminated effective September 1, 1976 and for the eighth grade, effective September 1, 1977. These classes met for 2 mods (½ hr.) each. The decision was based not only on the budget defeat but also on a review of the educational desirability of the programs. At no time did the Board or any of its representatives formally notify the Association of these course eliminations. However, on April 8, 1976, Jr. H.S. Principal Joseph Jacangelo held a meeting with the core teachers and informed them that among various alternative ways of absorbing the half hour block of time which had become available because of the foreign language elimina-

---

7/ This limitation was sought by the Association in an effort to legitimately restrict reductions in force.

tion, he had selected as the most advantageous educational alternative, the assignment of one mod (15 minutes) to reading and one mod to math as components of the existing english-social studies and science-math core classes. (Tr. 572-573). Thus, each core class was to be lengthened for the following year to two hours each from its present one hour and forty-five minute time frame. Because of the lengthening of their classes, 2 mods of lunchroom duty were eliminated from teachers' daily scheules. Also, by memorandum dated April 5, 1976, in accordance with Article XXVIII of the Agreement, Assistant Superintendent Edward McKeon informed Association President Herbert Yefsky that one tenured teacher, Betsy Rieder, who taught foreign language and 18 other non-tenured teachers, including one librarian and one guidance counsellor, would not be reemployed for the 1976-77 school year, Rieder because of a reduction in force, and the non-tenured teachers for that reason or because a tenured teacher was returning from a leave of absence. The letter concluded that at present 11 fewer teaching positions are planned in the district next year. By letter dated April 27, 1976 addressed to the Board, Yefsky requested a negotiating meeting to negotiate the effects that the reduction in force of 11 positions for the school year 1976-77 will have on the staff and the school system.

By response dated April 28, 1976, Shirley C. Coombs, President of the Board specifically noted that "The matter of the reduction in force, which was mentioned in your letter of April 27, can certainly be a topic of discussion, but not of negotiation" and sought Association agreement to a mutually convenient time to meet "concerning this matter."

A meeting in response to the Association demand was scheduled and held on May 10, 1976. The Board negotiating consultant, Mr. James Rigassio, who had acted as spokesman in negotiations for the Board at all other negotiating sessions, did not attend. However, McKeon and two Board members, Mrs. Poole and Mrs. Coombs, all members of the Board's negotiating team, did attend on behalf of the Board. Bernard Lelling, New Jersey Education Association UniServ Representative and main spokesman for the Association during the negotiations, Yefsky and other local officers attended on behalf of the Association. As noted earlier, the parties had completed fact finding presentations on May 3 and were to meet again in negotiations on May 18. While conceived of as an informal meeting outside the regular negotiations process concerned with matters affecting teachers which had arisen because of the budgetory emergency and the Board's response thereto, 8/ Mrs. Coombs

8/ The Board's expectation may explain why their regular negotiator, Mr. Riggasio, was not present.

testified that as a consequence of Lelling's participation the meeting took on the attributes of a negotiations session (Tr. 614).[9] Lelling and Yefsky for the Association, as well as Mrs. Coombs for the Board, testified as to the matters discussed at this meeting.

All participants agree that the main subject of the meeting was the reduction in force and its effect on the remaining teachers, in particular the extension of the teaching period for the core teachers which resulted from the dropping of Foreign Language instruction in the seventh grade (Tr. 613). Although Mrs. Coombs in her testimony avoided both on direct and cross-examination any reference to any response or characterization by her at the May 10 meeting of the Board's agreement to "discuss" rather than to "negotiate" the subject matter requested, at no time did Mrs. Coombs testify that she or any other Board representative present expressed any change from the Board's pre-existing position.[10] Thus, the ground rules established by the exchange of letters prevailed during the course of the meeting. All participants who testified agreed that the Board's position expressed by Mrs. Coombs was that there was no need to negotiate the reduction in force or its impact because there would be no change in the terms and conditions of teachers' employment. As Mrs. Coombs related, the reduction in force did not lengthen the school day and the teachers were expected to perform within the existing mod structure, which varied between 14 to 18 assigned mods per day (Tr. 613-614). The meeting terminated without any agreement on the Association's demands and without any understanding for any further meetings (See for example Tr. 108).[11]

9/ It is noteworthy that the Association Secretary Sharon Chiaet, who also attended the meeting, did not take minutes of this meeting although she attended every formal negotiating session and recorded in a notebook for the Association the substance of the matters discussed and the statements of the participants at each of them.

10/ However, consistent with the Board's position that they would only meet to discuss the matter at hand, Yefsky testified, without contradiction, that Mrs. Coombs had noted that since the parties were still in fact finding, the Board would not consider the meeting a negotiating session. This also appears to be consistent with testimony by Mr. Lelling that the past practice of the parties had been to refrain from introducing new negotiating subjects late in negotiations and certainly not after impasse procedures had been invoked.

11/ A few days earlier on May 5, 1976, the core teachers had also filed a grievance protesting the increase in their workload as constituting a change in their working conditions. As a remedy, they sought elimination of the additional time and negotiations of any changes of conditions of employment. Consistent
(continued next page)

I conclude from the foregoing that at the May 10 meeting the Board refused to negotiate on the impact on terms and conditions of employment of teachers within the bargaining unit of its decision to eliminate Foreign Language study in the seventh grade. I also conclude that the Board specifically refused to negotiate the subject matter of the extention of instructional time assigned certain teachers as a consequence of the Board's elimination of Foreign Language in the seventh grade. 12/

As noted earlier, a final agreement was reached on June 14, 1976.

At no time after the May 10 meeting did the Board notify the Association of the new schedules for core teachers although as previously discussed, the

11/ continued from previous page)

with Mrs. Coombs response at the May 10, 1976 meeting, Principal Jacangelo on May 17 in writing rejected the grievance on the ground that the rearrangement of the seventh grade schedule involved no deviation from the exercise of the Administration's managerial prerogative to assign schedules to teachers which reflect the parameter of an established 14 to 18 module range.

In an award rendered February 22, 1977, Arbitrator Max M. Doner determined that the grievance, which had been submitted to him by the parties, was not arbitrable because it did not pertain to a matter of specific terms and conditions of employment in the written agreement as required by the grievance Article III para. E, subpara. (e), in spite of the language contained in Article XXX of the 1976-77 agreement, but not the 1975-76 agreement, that required all proposed new rules and modifications of new rules governing working conditions to be negotiated with the Association before they are adopted except as the agreement may otherwise provide.

12/ I specifically reject the testimony by Mr. Rigassio that at a negotiating meeting which he attended sometime between January 1 and February 22, 1976, prior to invocation of fact finding, the subject of changes in assignment of core teachers and others due to the elimination of Foreign Language was discussed between the parties. This testimony is inconsistent with other persuasive evidence as to the timing of the Board's decision previously discussed, which establishes that the Foreign Language program was not finally eliminated until the Board meeting of March 30, 1976, and that revised teacher schedules for the succeeding year could not have possibly been proposed or agreed upon until sometime thereafter. Indeed, Principal Jacangelo places a meeting with core teachers to discuss the changes on April 8. Clearly the Association's request for a meeting to discuss the "effects" of the RIF and the new teaching schedules for the following year were triggered by the April 5 notice to it of the reduction in force and the April 8th Principal's meeting with core teachers. Finally, the Association's own minutes of all the negotiating meetings as previously noted, show no entry for any meeting between December 16, 1975 and the first fact finding meeting of March 22, 1976 and no entry for discussion of any subject at any meeting related to teacher scheduling and instructional time for the following year.

core teachers were advised of the change at an April 8 meeting. When teachers returned to school in September, the new schedules for the core teachers, which had aroused teacher concern and triggered the grievance and the Association's request for a meeting, were implemented.

In contrast with the practice previously discussed, core teachers commencing in September, 1976 and continuing to date have combined english and social studies and combined math and science courses for a total of 8 mods each (or 2 hrs.) rather then 7 mods (1 3/4 hr.) - an increase of class instructional time of 1 mod per class or 2 mods (or ½ hr.) per day. This increased instructional schedule for the core teachers has continued to the present time. Thus, since September, 1976 core teachers have been assigned 16 mods of instructional time. In addition, and in lieu of cafeteria duty, they are normally assigned 2 mods of emergency coverage and additional mods of preparation time to complete their work day.

Conclusion

Effective March 30, 1976, the Board made determinations within its managerial prerogative, to eliminate Foreign Language instruction over a two year period, first in the seventh grade, and the following year in the eighth grade. Such a decision "...is a basic educational policy decision not subject to the mandatory duty to negotiate." North Plainfield Education Association and North Plainfield Board of Education, P.E.R.C. No. 76-16, at page 4 of the Commission's Decision and Order. Furthermore, directly as a consequence of the Board's decision, Junior High School Principal Jacangelo made another decision as to how to absorb the half hour per day Foreign Language instruction for students which had now been eliminated. Among various options, he determined to expand existing core classes of one hour and forty-five minutes by an additional 15 minutes each. This was essentially an educational judgment directed at resolving the question of how best to allocate the students' time during the existing school day. Contrary to one element of the Association's charge, no core teachers were thereby subjected to an increase in the total number of hours of work. [13] However, Principal Jacangelo's decision as to

13/ While the evidence has established that teachers spend their time in a variety of ways during the course of a given work day, the Association does not, and, indeed, could not reasonably advance a claim, that any one of these tasks, including preparation periods, are not part of the duties required of them as professional employees of the Board. See, e.g. Newark Board of Education and Newark Teachers' Union, Local 481, AFT, AFL-CIO, P.E.R.C. No. 79-38 and Article XXII of the parties' 1975-76 agreement, supra, at page 3. In any event, the
(continued next page)

allocation of student time, as implemented commencing in September, 1976, did in fact result in an increase in the time that core teachers had previously devoted to classroom instruction by one half hour per day. This effect on members of the teaching staff was the natural and inevitable consequence of increasing the length of each of the two daily core classes by 15 minutes each. The core teachers class instructional time, and thus their workload, was increased as a result. 14/

The Respondent argues in its brief that the Board's assignment of this additional class time was in accord with the collective agreement and past practice. In addition to previously quoted Article XXII(a), it cites Article XXIV "Teacher Assignment and Transfer" providing that "Assignment shall be made at the discretion of the administration and shall normally be within the teacher's area of competency, teaching certificate or major field of study." Neither of these provisions, or any other, deals with the specific subject of teacher time devoted to class instruction. Neither does its authority under Title 18A, specifically preserved in Article XVIII of the 1975-76 agreement, provide the Board with the license to unilaterally change teacher instructional time. Such authority, part of which is quoted by the Board in its brief, is of a general nature, resulting from legislative implementation of the New Jersey Constitution, Article 8, Section 4, paragraph 1 to "...provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children of the State...", quoted at page 8 of its brief. In the absence of a specific legislative mandate authorizing the

13/ (continued from previous page)

assignment of additional classroom instruction time resulted in the elimination for the core teachers of a half hour per day period of cafeteria supervision and not a preparation period.

14/ Respondent, at pages 14 to 17 of its brief cites <u>Dunellen Board of Education</u> v. <u>Dunellen Education Association</u>, 64 <u>N.J.</u> 17 (1973), <u>Bd of Ed</u>. v. <u>Great Neck Teachers' Assn</u>., 92 LRRM 3486, and <u>Ridgefield Park Education Association v. Ridgefield Park Board of Education</u>, 78 <u>N.J.</u> 144, in support of the view that the restructuring of the instructional program by the Board was an exercise of its managerial responsibility and a specific educational policy decision which may not be determined in the forum of collective negotiations. Respondent's argument is sound, but misses the distinction, not disputed in these decisions, which has been drawn by the Commission and the Courts, as noted, between an educational decision to plan the students' school day, which is the Board's prerogative, and the effect that decision may have (and in the case, <u>sub judice</u>, did have) upon the teachers' terms and conditions of employment, and which is mandatorily negotiable.

(continued next page)

Board to fix the time which a teacher must devote to classroom instruction, 15/ the Board's decision to increase core teachers instructional time is subject to the Act's negotiation obligation as directly involving workload, as an intimate aspect of their conditions of employment. 16/ Accordingly, while the decision to

14/ (continued from previous page)

Recently, in Maywood Board of Education v. Maywood Ed. Ass'n., App. Div. Docket No. A-1648-77 (decided 4/3/79), notice of pet. for cert. filed, rev'g in part, aff'g in part and remand'g in part, Maywood Board of Education, P.E.R.C. No. 78-23 (1977), the Court determined that the impact of a non-negotiable reduction in force upon the terms and conditions of employment is not negotiable. The Court reasoned that since the theory behind the notion that impact is negotiable is based on the premise that it is a "permissive" subject of negotiations and since the Supreme Court has now determined in Ridgefield Park Ed. Assn. v. Ridgef. Pk.Bd. of Ed., supra, that there is no permissive category of negotiable subjects under existing law, to allow the impacts of a managerial decision to be negotiated would indirectly contravene the Dunellen analysis now strongly affirmed in Ridgefield Park. The Court ignores consistent judicial recognition and approval of the Commission's so-called "decision/impact dichotomy." In Byram Twp. Bd. of Ed., 153 N.J. Super. 12 (App. Div. 1978), another panel found "too restrictive" an argument advanced by the New Jersey School Board's Association, amicus curiae, that there is no basis for finding negotiable the impact of an exercise of management educational responsibilities. The School Board's rationale appears to have been adopted by the panel in Maywood. Similarly, in Burlington County College Fac. Assn. v. Bd. of Trustees, 64 N.J. 10 (1973) the Supreme Court, and recently, in Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Assn., 164 N.J. Super. 106 (App. Div. 1978), pet. for certif. granted, another panel concluded that the affects of exclusively managerial decisions relating to the fixing of the school calender upon the working hours and workloads of teachers were mandatorily negotiable. Furthermore, the modification of class instructional time in the case sub judice, while related to an earlier decision to reduce the work force, was made independently of the RIF, was not dictated by the RIF, and on that ground may be distinguished from the facts in Maywood in which the change in teacher workload resulted directly from the RIF of a music teacher and librarian. The Maywood panel recognized the distinction when it remanded to the Commission for the development of a further record of relevant contractual provisions and past practice but did not reject the Commission's holding that the employer had unilaterally increased the workload of two physical education teachers by a unilateral decision not caused by the RIF. It should also be noted that as of this writing, the Supreme Court may yet accept Maywood for review.

15/ State v. State Supervisory Employees Association, 78 N.J. 54 (1978).

16/ Byram Board of Education and Byram Twp. Education Assn., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd as modified, 152 N.J. Super. 12 (App. Div. 1977); see also Englewood Board of Education v. Englewood Teachers' Association, 64 N.J. 1 (1973); Burlington County College Faculty Association v. Bd. of Trustees, 64 N.J. 10 (1973); Red Bank Board of Education v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); In re Middlesex County College Board of Trustees, P.E.R.C.

(continued next page)

extend core classes was not negotiable as a basic educational policy decision, "...the impact of that decision of teachers' terms and conditions of employment including the number of teacher periods of pupil contact and the amount of pupil contact time and other workload factors are within the required scope of collective negotiations and are mandatorily negotiable." Lincoln Park Education Association and Board of Education of Lincoln Park, P.E.R.C. No. 78-88, at page 5 of the Commission's Decision and Order.

Respondent also argues from the fact that the increased teaching period replaced a pre-existing cafeteria supervision duty that the core teachers' workload was not thereby increased. As noted at page 3, f.n. 5, teaching requires additional work to be performed - work which entails a significantly higher professional responsibility and application of pedogagical skills than that involved in the basically custodial function of supervising students during their lunch time. What the Commission said with respect to the analogous relationship between preparation and class instruction time, in Newark Board of Education, P.E.R.C. No. 79-38 at page 3 of its Decision and Order is equally applicable here:

> "It was clearly established in Burlington County College Faculty Assn. v. Board of Trustees, 64 N.J. 10 (1973) that workload is mandatorily negotiable. We do not perceive how removal of a preparation period to be replaced by teaching is not a change in workload falling precisely under Burlington, Byram and Red Bank, supra. Even though preparation periods may have been required to be used for educational purposes, there is still additional work to be performed, and we doubt that the Board would seriously contest that teachers must still do as much - or, given the extra class to be taught, more - preparational work as before the shift." 17/

16/ (continued from previous page)

No. 78-13, 4 NJPER 47 (4023, 1977); In re State of New Jersey(Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62. But see In re Maywood Board of Education, P.E.R.C. No. 78-23, 3 NJPER 344 (1977), and In re Maywood Board of Education, P.E.R.C. No. 78-37, 4 NJPER 63 (1978), affm'd in part, rev'd in part, App. Div. Docket No. A-1648-77, notice of petition for certification filed.

17/ Even a change in the nature of a teaching assignment, may well impact upon terms and conditions of employment, such as the effect it may have upon workload, North Plainfield Education Association, supra.

Surely, a change from a supervisory to a teaching mod involves at least as much additional work, if not more, than that involved in a change from a preparation period to a teaching period. 18/

Respondent further argues that the Board's assignment of the additional 2 mods of class instruction per day was made within an established framework and practice of 18 mods for teaching and non-teaching duties for all teachers. Yet, Respondent does not dispute that core teachers had a non-varying schedule over a course of years which limited their classroom instruction to 14 teaching mods.

The fact that a special group of teachers who were assigned responsibility for implementing the core program of instruction had a consistent history of fixed class instructional periods is sufficient to establish a past practice for this group, whatever the variable practice may have been for other teachers within the system. In decisions involving seventh and eighth grade teachers in a middle school, 19/ English teachers, 20/ an Industrial Arts teacher, 21/ Physical Education teachers 22/ and certain certified personnel employed under 11-month contracts, 23/ the Commission has concluded that each constituted a readily definable group of employees within an existing negotiating unit whose working hours or workloads were unlawfully changed as a consequence of an employer's unilateral decision. In each case, a consistent practice had been established which was changed by the employer's unilateral decision.

That the terms and conditions of employment - here 14 teaching mods for core teachers - is not found by reference to the parties' collective negotiations agreement, which, as noted, does not delineate teaching mods as either an implied or expressed term of the agreement, is immaterial. Since a practice governing working conditions has been established, the Board was compelled to first negotiate

18/ See Board of Education of The Borough of Fair Lawn, P.E.R.C. No. 79-44 involving an increase in workload resulting from a change in a duty free period to a supervisory period.

19/ Lincoln Park Educational Association, supra.

20/ North Plainfield Education Association, supra.

21/ Board of Education of The Borough of Verona, P.E.R.C. No. 77-42, rev'd in Maywood Board of Education, P.E.R.C. No. 78-23, f.n. 9 at page 9 of the Commission's Decision and Order.

22/ Maywood Board of Education, supra, In re Maywood Board of Education, App. Div. Docket No. A-1648-77, notice of pet. for cert. filed, remanded to determine terms and conditions of the contract and past practices on this issue.

23/ New Brunswick Board of Education, P.E.R.C. No. 78-47, motion for reconsideration denied P.E.R.C. No. 78-56, affm'd App. Div. Docket No. A-2450-77 (4/2/79).

the assignment of additional teaching mods to the core teachers with the Association "...prior to its implementation." 24/ Its failure to do so, constitutes a violation of N.J.S.A. 34:13A-5.4(a)(5) and (1). 25/

Respondent argues, finally, however, that the Association negotiated for and failed to achieve a restriction on the Board's right to assign teachers. This argument fails for lack of proof. Clearly, the 1975-76 contract, as noted, did not deal with the subject matter of pupil contact time. Neither did the agreement contain any waiver of the Association's right to negotiate the subject matter, 26/ nor had the Association sought to negotiate the subject matter prior to the Board's decision to eliminate seventh grade foreign language on March 30, 1976. As a consequence, when the Association demanded negotiations by its letter of April 27, 1976, the Board was under an obligation to negotiate the impact of its decision to restructure core classes. Its posture, made known in Mrs. Coombs' April 28 letter and later confirmed at the May 10 meeting, that it would not negotiate, but only discuss, 27/ and that there were no impacts on terms and conditions of employment to negotiate, was an unlawful evasion of its negotiating obligation under the law.

B. Unilateral Increase in Workload of All Other Junior High School Teachers, Particularly Eighth Grade Teachers

The Evidence

As earlier noted, on March 30, 1976 the Board adopted a resolution eliminating the teaching of Foreign Language in the eighth grade, effective September 1, 1977. Just as with the seventh grade core students the year before, a ½ hour (or 2 mods) daily block of time previously devoted to eighth grade student Foreign Language instruction was now freed. A meeting similar to the one held

24/ New Brunswick Board of Education, supra at pages 8 and 9, of the Commission's Decision and Order. See also Hudson County Bd. of Chosen Freeholders and Hudson County P.B.A., Local 51, P.E.R.C. No. 78-48, affm'd App. Div. Docket No. A-2444-77 (4/9/77).

25/ Piscataway Township Board of Education, 1 NJPER 49, appeal dism. as moot, No. A-8-75 (App. Div., 1976), certif. denied, No. C-267 (9/8/76).

26/ To be effective, such a waiver must be "clearly and unequivocally established", North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 79-14.

27/ State of New Jersey, E.D. No. 79, aff'd 141 N.J. Super. 470 (App. Div. 1976).

for core teachers in the spring of 1976 was held with the remainder of the junior high school teaching staff in the spring of 1977 to discuss the administration's proposal for allocation of this available time. (Tr. 210; 586). Again, no formal notification was provided to the Association of changes made and later implemented in the teachers' work schedules. As explained by Junior High School Principal Joseph Jacangelo, after receiving teacher concurrence at the faculty meeting,one mod of the available 2 mods was allocated to reading improvement to correct a deficiency of the eighth grade students in this area (Tr. 584). A block of 1 hour 15 minutes (5 mods) previously devoted to a combination of english and reading was now broken up into separate 45 minute (3 mods) periods of english and reading, each. The other mod was used to extend an existing 45 minute (3 mod) major subject class held prior to lunch into a 1 hour (4 mod) block of time (Tr. 586). This particular segment could be treated by the teacher as a class extention or as a study period. Since it immediately followed a teaching period in the same room and with basically the same students, the teacher's responsibility in assisting the students was greater than that of the usual study supervision period, even if the time was devoted solely to study. The class extension prior to lunch was also consistent with an attempt to resolve what Jacangelo and others perceived as a long-standing problem of a 45 minute lunch period for ninth grade students - 15 minutes longer than the seventh and eighth grade lunch periods - which caused disciplinary problems during the warm weather. Thus, at the same time as the class extension (or study) was made effective for eighth graders, a 1 mod study period was created for ninth grade students to bring their lunch period in line with other students. The revised schedules for eighth and ninth grade students were made effective September 1, 1977. What effect, if any, these changes had on the assigned teaching time of the teachers remains to be considered.

There is no question but that the teachers' work day was not affected by these changes. As to workload, since the previous combined english-reading course had now been severed and the segments were now separated in time and were no longer commonly related by subject material, they could and, presumably, were now being taught by different teachers. Indeed, the record evidence fails to show that the english teachers who had previously taught the combined $1\frac{1}{4}$ hour english-reading class were now, by virtue of the change, being assigned an additional $\frac{1}{4}$ hour of instructional time in their speciality. Furthermore, since most, if not all, eighth grade teachers also instructed ninth grade students in their academic specialities, it is unclear how the class extension affected any

particular group of teachers. With respect to the ninth grade teachers affected by the 1 mod study period, a change of one form of supervision for another does not appear to be a change of any significance in terms of workload which would warrant the Commission's attention. Thus, the class extention and the reading class extension for eighth grade students did not necessarily impose an additional block of instructional time for the eighth grade teachers and the ninth grade study period surely did not for ninth grade teachers.

The Charging Party submitted in evidence a statistical chart containing a summary of percentages of the assigned instructional time by number of mods per day for all teachers other than seventh grade core teachers over a four year period from school year 1974-75 to 1977-78. (Charging Party's Exhibit No. 9). The chart was derived from the basic records of daily work day assignments maintained by the Board, some of which the Association had already introduced into evidence in connection with its claim relating to the core teachers. (See Charging Party's Exhibits 6A to 6I, 7A to 7I and 8A to 8H). In contrast to these detailed daily work assignment exhibits submitted in support of that claim, the Charging Party has relied exclusively upon the percentages portrayed in the statistical chart in support of its claim of unilaterally imposed additional teaching mods for teachers affected by the elimination of eighth grade Foreign Language. 28/

The most striking feature of the exhibit is its variation and lack of regularity. Over the four years covered by the chart, teachers were assigned anywhere from fewer than 15 to as many as 18 mods of instructional time without any pattern emerging. For example, during the four year period, teachers carrying fewer than 15 teaching mods varied between a high of 28.8% in 1975-76 and a low of 5.4% in 1977-78. Teachers with 15 teaching mods varied between a high of 34.5% in 1976-77 and a low of 26.0% in 1977-78; teachers with 16 such mods varied between a high of 42.5% in 1977-78 and a low of 13.5% in 1975-76; teachers carrying 17 teaching mods varied between a high of 13.0% in 1974-75 and a low of 3.6% in 1977-78, and teachers with 18 such mods varied between a high of 25.9% in 1976-77 and a low of 20.3% in 1975-76.

28/ Significantly, the Association did not offer any breakdown of teaching mods for either eighth grade english teachers or teachers of other major eighth grade subjects before or after the institution of the reading and class extension. It thus may reasonably be assumed that in submitting the chart the Association sought to present its most favorable case and that the statistical data it contains supports its claim to the fullest extent possible.

The statistical feature upon which the Charging Party places greatest reliance is a percentage change for those teachers teaching 16 mods in school year 1977-78 after the elimination of eighth grade Foreign Language instruction. The percentage of such teachers increased from 26% the prior year to 42.5% in 1977-78, an increase of 16.5%. That change must be viewed in context. Over the same period of time, between the 1976-77 and 1977-78 school years, the percentage of teachers who carried more than 16 teaching mods per school day dropped from 32.9% to 25.8%, a decrease of 7.1%. During the same period, the percentage of teachers who carried fewer than 16 teaching mods per day dropped from 41.3% to 31.4%, a difference of 9.9%. The combined percentage of these changes are within one half of a percent (.5%) of the 16.5% increase of those teachers teaching 16 mods for the 1977-78 school year and account for the increase in 16 mod teaching schedules in 1977-78. Thus, among non-core teachers, between 1976-77 and 1977-78, practically as many had their teaching mods reduced as those who had their teaching mods increased. 29/

The inconclusive, or, at best negligible, impact upon instructional time derived from this statistical material is consistent with the teaching schedules of those individual eighth and ninth grade teachers who testified for the Charging Party and whose assignment schedules were read into the record (compare Tr. 232-234 with Tr. 310-312, Tr. 322-324 and Tr. 344-345) 30/ and the daily mod assignments of all junior high school teachers without any breakdown by teaching speciality which was received in evidence from Respondent as its Exhibit No. 12. 31/

Conclusion

The conclusion is warranted by the foregoing facts that the practice with regard to all teachers other than core teachers from 1971-72 through at least 1977-78 has been that they have had a teaching load that has varied between 14 to

---

29/ This analysis assumes the accuracy of the summaries the Association made from the original records and the percentage calculations it made from the summary figures thus derived.

30/ While the Charging Party did not offer these records to support this aspect of its claim, it is nonetheless bound by them.

31/ At the time of its receipt, Charging Party counsel agreed that this exhibit showed the variance over the course of the years in mix of teaching and non-teaching duties for the faculty for the periods 1971-72 to 1977-78 (Tr. 624 to 626), with the reservation that by so stipulating the Charging Party was not thereby agreeing that every individual entry was in fact correct (Tr. 625, lines 19 to 23). At no time thereafter during the balance of the hearing and before the close of the record did the Charging Party offer any evidence disputing the accuracy of any entries in Respondent's Exhibit No. 12.

18 mods per day and that the manner in which Principal Jacangelo revised and modified instructional assignments for the school year 1977-78 in response to the elimination of instruction of eighth grade Foreign Language did not result in a deviation from this past practice for eighth grade teachers.

In Shell Oil Co., 166 NLRB No. 128, 65 LRRM 1713 (1967) the General Counsel sought to establish that the employer had failed to consult with the union when it engaged in expanded subcontracting in the months preceding a strike. To support the claim of a substantial departure from its prior established subcontracting practice the General Counsel presented statistics culled from the Respondent's business records of employee layoffs and man hours of contracting work performed in the plants. The NLRB refused to give this statistical material sufficient weight to establish the factual claim of expanded contracting out. It reached its conclusions in the following language:

> "...Even if we were to assume that these statistical tabulations constituted, without more, competent evidence of Respondent's contract work, both as to type and amount, we could not say that the comparative figures, showing fewer layoffs and fewer man hours of contract work during the critical prestrike complaint periods, lend themselves to any finding of expanded contracting or significant detriment.
>
> While the General Counsel apparently argues that the figures are not conclusive on whether there has been expanded subcontracting, our attention is not called to any other supporting evidence of sufficient explicitness that would establish the point.
>
> ...We thus find no merit to the General Counsel's claims of subcontracting occuring during the prestrike complaint periods differing in kind and extent from that which existed as an established practice." Id at 1715 /Emphasis Supplied/.

The Charging Party in the case, sub judice, relying similarly upon statistical evidence derived from the Respondent's original records, and without otherwise buttressing its claim, has in like fashion failed to adduce sufficient evidence that the Board has unilaterally modified an existing practice regarding instructional time for non-core junior high teachers. The Association having failed in its burden of proof as to a claimed impact upon non-core teachers resulting from the reading and other subject class extensions, and the creation of a one mod study period for ninth grade teachers having not imposed any additional instructional time or workload upon them, I will recommend dismissal of this allegation.

C. Unilateral Increase in Workload For
Position of Audio-Visual Aids Coordinator

The Evidence

Alan Davenport was employed as a teacher by the Caldwell-West Caldwell Board of Education from September 1951 (Tr. 412) through September 1976 (Tr. 450). In April, 1971 he was offered the extra duty position of Audio-Visual Aids Coordinator ("A.V. Coordinator") by Mr. Kannes, then principal of the Junior High School. The A.V. Coordinator's position is an extra duty job for which an extra stipend is provided. This is listed, along with all other extra duty jobs, in Schedule C of the collective bargaining agreements (Tr. 590).

When offered this position, Mr. Davenport was told by the principal that he would have no homeroom, no cafeteria duty and would have one free period besides his preparation period. The use of these two free periods was left to his discretion, although there is the implication, not disputed by the Board, that the extra free period was to be used to perform his A.V. duties (Tr. 418).

In essence, Mr. Davenport's classroom load was reduced from 15 mods to 12 mods when he accepted the A.V. Coordinator's position. Mr. Davenport testified that the position of A.V. Coordinator included the following duties: inventory and storage of all A.V. equipment, delivery of equipment, set-up of permanent equipment, handled requisition of softwear (tapes, replacement lamps, etc.), consulted by principal on the ordering of major items, aided teachers in requisition of films from the Essex County Film Library, handled incoming films and ensured that films were returned, handled minor repairs, sent out equipment that needed major work, evaluated literature available from free film distributers and informed teachers of free film availability (Tr. 415; Respondent's Exhibit No. 9).

There were certain changes in his duties over the years. The first change was that in his last year the A.V. Coordinator at the high school was consulted before equipment was sent out for major repairs. The second change was that there was an increase in the amount of equipment (Tr. 416). The last change was the addition of video-tape equipment in 1971-72 or 1972-73. Besides having charge of the handling of this machine, Mr. Davenport began using the machine in his own classes. This eventually led to the setting up of a special ninth grade class. This class was in lieu of another teaching assignment. Even with this class Mr. Davenport retained a 12 mod teaching schedule.

This reduced 12 mod class schedule began in 1971-72 and continued through the 1975-76 school year during all of which time Davenport functioned in

the position (Tr. 418). In May, 1976 he was notified that an extra class had been added to his teaching schedule for 1976-77. He now had a 15 mod teaching schedule.

A grievance was filed in the Spring of 1976 which ultimately went to arbitration. The arbitrator held that the grievance was not arbitrable in the same award he issued on February 22, 1977 on the claims of the core teachers. Mr. Davenport began the 1976-77 school year, retaining the position of A.V. Coordinator and teaching the 15 mod schedule, but resigned soon after the school year began. The principal reasons, as articulated by the witness himself, were discipline problems with the students combined with increasing health problems (Tr. 426, 451). The increased workload was cited as a factor in his decision to resign, but was not a major factor.

After Mr. Davenport resigned, a young man, Jim Horvath, was hired as a replacement. Mr. Horvath took over Mr. Davenport's class schedule, as well as the position of A.V. Coordinator. Mr. Horvath resigned in January, as he had not been offered a contract for the following year (Tr. 460). A Mr. Anderson or Alexander (see Tr. 598) was hired as replacement. He stayed only a short time (resigned March 3). After he left, "everything went to pot." Mr. Davenport's classes were disassembled and scattered among the other teachers. No one took over the A.V. Coordinator position immediately. During the month of March, 1977 Robert Adams, a Special Education Teacher with an 18 mod teaching schedule took over the position of A.V. Coordinator without receiving an additional 3 mod free period. He took this position with the understanding that he was not waiving the the Association's rights on the grievance (Tr. 473). [32/] He held this position until November or December, 1977 at which point he resigned due to an inability to handle the workload in addition to all his other responsibilities (Tr. 474, 477).

During the negotiations for the 1976-77 contract, no mention was made of the A.V. Coordinator's workload, nor did the Association make a request for any increase in pay for the position beyond the straight percentage increase proposed for all salaries (Tr. 487, 538).

Prior to Alan Davenport, a Mr. Ross held the position of A.V. Coordinator. For the years 1967-68 and 1968-69 he had a 16 mod teaching schedule and for the years 1969-70 and 1970-71 he had a 15 mod teaching schedule.

32/ Although the grievance by this time had been determined by the arbitrator to be excluded from arbitration under the Agreement, the Association had then pending its original unfair practice charge, filed December 27, 1976.

Conclusion

It is clear that a unilateral change in workload took place during Alan Davenport's tenure of the position of A.V. Coordinator which resulted in a violation of the Act. It is well established that workload and teacher pupil contact time is a mandatory subject of negotiations, In re Byram Township Board of Education, 152 N.J. Super. 12 (App. Div. 1977). A school board may not unilaterally change or increase either without negotiating with the unit employees' majority or exclusive representative. Thus, when the Board substituted three mods of teaching time for what was previously understood to be either free time or A.V. duty time, there was a unilateral increase in Mr. Davenport's workload.

The Board, however, argues that the issue is, in essence, moot, as Mr. Davenport is no longer with the school system and any private agreement that the Board had with him as to his workload does not apply to any successor in the position of A.V. Coordinator.

In making this argument, the Board ignores the fact that the N.J. Supreme Court has held that unions represent job titles and classifications, not just the individual in the job title. Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed. Sec., 78 N.J. 1 (1978). In Galloway the N.J. Supreme Court affirmed a Commission negotiating order notwithstanding the fact that six of the seven unit employees had resigned and been replaced during the pendency of the litigation. This turnover did not automatically dissolve the union's presumption of majority support. The important factor was that the unit positions still existed.

This proposition is further illustrated by New Brunswick Board of Education, P.E.R.C. No. 79-14, (1978) in which the Commission, citing Galloway, supra, stated in dictum that the Association's responsibility relates to the job classification, not just to the particular incumbent holding the job. The Commission illustrated this proposition with the following hypothetical: A unit employee's hours are unilaterally changed. The employee resigns during the pendency of the unfair practice proceedings. A violation of the Act is found. An order ordering the restoration of the old hours would be appropriate pending negotiations notwithstanding the willingness of the new employee to work the altered hours.

This is almost the exact situation presented here.

There was a unilateral change in the terms and conditions of employment of the A.V. Coordinator, Alan Davenport. A grievance was filed, initiating the grievance arbitration procedure. Mr. Davenport resigned his position in September, 1976, during the pendency of the procedure. The unfair practice charge was filed

December 27, 1976. There is no significance to the fact that the charge was filed after Mr. Davenport resigned. The Association represents the A.V. Coordinator position whoever holds that position. Mr. Davenport's resignation has no bearing on the ability of the Association to prosecute this charge, or the Commission's ability to make a decision on this issue. The question is, was there a past practice of providing an extra free period for the A.V. Coordinator, not was there a past practice of providing an extra free period for Mr. Davenport.

It is well established that a unilateral change in an established past practice concerning terms and conditions of employment can constitute a violation of the Act. An established past practice is considered as binding as if there were a contractual provision on the subject. Hudson County Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, affm'd App. Div. Docket No. A-2444-77 (4/9/79); New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (1978), affm'd App. Div. Docket No. A-2450-77 (4/2/79).

The past practice of providing the encumbent of the job classification of A.V. Coordinator with an extra free period was established in 1971 when Mr. Davenport was assigned the job and was provided with a reduced 12 mod class schedule. During the succeeding five years, as noted, the function of A.V. Coordinator was enlarged as responsibilities for consulting on major repairs and in administering additional items, including video-tape equipment, were added. Thus, the evidence that Mr. Davenport's predecessor in the position of A.V. Coordinator had a 15 mod teaching schedule is irrelevant to the question of what has been the past practice since 1971. It is the last consistent past practice that is at issue here, not the prior past practices.

A practice need not stretch back into infinity for it to be considered an established past practice. Practices begin at some point. What happened before the past practice began has no more relevance to the current past practice than a contract clause that has been replaced or revised in subsequent contract negotiations.

Also irrelevant to the issue are the teaching loads of those who have subsequently held the position. The fact that there have been and currently are teachers working the new schedule not including an extra free period pending the outcome of the grievance and unfair practice proceedings does not make the unilateral change legal.

The Board, nonetheless, argues that by not raising the question of a reduced teaching schedule for the A.V. Coordinator during the contract negotia-

tions for 1976-77 the Association has in essence waived its right to make any such demand now. This argument is rejected. As earlier noted, it is well-established that "any waiver must be clearly and unequivocally established..." North Brunswick Township, P.E.R.C. No. 79-14, (1978). The Board has not established that the Association clearly and unequivocally waived its right to negotiate this unilateral change in terms and conditions of employment. A grievance was filed by the Association immediately upon learning of the change. Thus, it's opposition to the change was known immediately. Also other testimony in the record show that by May, 1976 the parties were in the final stages of negotiations and it would have been improper to introduce new subjects of bargaining at that point. There was no waiver by inaction. Thus, it is concluded that there was no waiver of the Association's right to negotiate the change in workload for the A.V. Coordinator.

A preponderance of the record evidence establishes that the practice since 1971 has been for the Board to provide the A.V. Coordinator with a teaching schedule reduced by a 3 mod free period for use in connection with the Coordinator's duties in addition to the other preparation mods normally assigned faculty members.

There was a unilateral change in this practice without prior negotiations in May, 1976. I will recommend to the Commission that it find this change violated the Act.

D. Unilateral Reduction in Summer Work Schedule of Cooperative Industrial Education Coordinator

The Evidence

The parties stipulated to the facts regarding this claim contained in an Arbitration Award received in evidence as Joint Exhibit No. 4. The salient facts follow: John Antolick has been employed in the position of Cooperative Industrial Education ("CIE") teacher-coordinator by the Caldwell-West Caldwell School District since 1968. For each of the summers between 1968 and 1975, Antolick was employed for four weeks to conduct that program in accord with state guidelines recommending eleven or twelve month contracts for teacher-coordinators to provide continuity of the program during summer months. For this employment he was paid at a rate of one tenth of his contractual salary for the ensuing year. Mr. Antolick's summer duties included visiting students on the job, directing these students, counseling new students and visiting current and prospective employers. For each of these summers, there were 10-12 students enrolled in the

Cooperative Industrial Education program.

Only three students enrolled in the program for the summer of 1976. Dr. Eugene Bradford, Superintendent, was advised by John A. Wanat, Director of the Office of Cooperative Vocational-Technical Education, State Department of Education, that two weeks employment for John Antolick would comply with the state guidelines. Upon receiving this information, Bradford had Edward McKeon, Assistant Superintendent, by letter of June 3, 1976, tender Antolick a two week contract for the summer of 1976.

A grievance was filed and an arbitration hearing was held on December 13, 1976 before Arbitrator Irvine L. H. Kerrison. The Arbitration Award was issued on January 31, 1977. After holding that the grievance was arbitrable as it involved a claimed change in the terms and conditions of Antolick's summer employment, Arbitrator Kerrison went on to deny the grievance on the merits. The arbitrator considered the reduction in summer employment from four weeks to two weeks to be analogous to a layoff for lack of work in the private sector. Thus, it was within the board's management prerogative to reduce Mr. Antolick's summer work given the drastically reduced student enrollment (Joint Exhibit No. 4, pages 5 and 6).

Conclusion

The first thing that must be considered is the effect that is to be given to the Arbitrator's decision. The instant award, unlike the awards of Arbitrator Doner, previously discussed, was made on the merits of the grievance. National labor policy has long recognized the principle that if arbitration is to be a respected tool of labor management relations, an arbitrator's decision should not be readily overturned by either the courts or the NLRB. Such a policy gives effect to the parties' own agreement that they are to be bound by the arbitrator's determination. In Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955), the NLRB set out the very limited conditions under which they would review an arbitrator's award.

The Commission has adopted this principle. The Spielberg standards were adopted, almost verbatim, in State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977). In this case, the Commission stated that they would reassert jurisdiction over an unfair labor practice charge that arose out of the same facts that had previously been deferred to arbitration only if:

> "a) the dispute has not, with reasonable promptness after the issuance of the determination to defer, either been resolved by amicable settlement or submitted to arbitration, or

b) the grievance or arbitration procedures have not been fair or regular, or
c) the result reached is repugnant to this Act."
Stockton, 3 NJPER at 64

These last two standards are applicable in this case when an arbitrator's decision has already issued.

No assertion has been made that the arbitration proceedings were in any way unfair or irregular. Rather, the Charging Party asserts that the decision is repugnant to the Act as the arbitrator did not apply the decision-impact dichotomy. The arbitrator simply held that the decision to reduce the summer work schedule of the CIE instructor was the exercise of a valid management prerogative. He appears not to have weighed the Association's argument that the change in work schedule violated Article XXX of the parties' 1976-77 agreement 33/ mandating, inter alia, that all proposed new rules governing working conditions shall be negotiated before adopted. Neither did he order the Board to negotiate the impact of this decision on terms and conditions of employment.

There is no fixed and simple definition for the terms "repugnant to the Act." Guidance, however, can be found in NLRB decisions 34/

In Spielberg, the NLRB specifically stated that the fact that it would not have made the same decision does not make the arbitrator's decision repugnant to the Act. This statement, though, has been limited by the NLRB. In Raytheon Mfg. Co., 140 NLRB 883, 52 LRRM 1129 (1963), enf. denied on other grounds 326 F.2d 471 (C.A. 1, 1964), it added another criteria to the Spielberg list. In that case, the NLRB stated that it will not defer to an arbitrator's decision where the arbitrator just decided the contract issue and did not purport to consider the unfair practice issue which the Board is now called on to decide. Recent NLRB decisions have refined this latter statement. In Alfred M. Lewis, Inc., 229 NLRB No. 116, 95 LRRM 1216 (1978), affirmed 99 LRRM 2841 (C.A. 9, 1978), the NLRB stated that, "where the arbitrator does not address himself to the unfair labor practice issue

33/ The arbitrator appears to have applied the 1976-77 agreement, inasmuch as he concluded that the matter was arbitrable in the face of the Board's contention, made in reliance on Art. III (E.), that only grievances relating to specific terms and conditions of employment written into the agreement may be taken to arbitration (see Joint Exhibit No. 4, pp. 3-4).

34/ Guidance derived from the "Experience and adjudications" under the federal act is particularly appropriate with respect to the interpretation of the unfair practice provisions of N.J.S.A. 34:13A-5.4. Galloway Twp Bd. of Ed. v. Galloway Twp Assn. of Ed. Sec., supra.

and his decision is contrary to unfair practice decisions under the Act, binding effect will not be given to the arbitrator's award." [citation omitted], 95 LRRM at 1217.

Lewis involved two separate arbitration awards. In each case the arbitrator concluded that the employer had a right to unilaterally change production quotas as the contract did not specifically limit such activities. In refusing to defer to these decisions the Board cited well-established Board precedent to the contrary; that in the absence of a specific contract provision it is a refusal to bargain in violation of Section 8(a)(5) to unilaterally institute work standards.

The case sub judice involves facts very similar to those in Alfred M. Lewis. An allegation has been made that the Board violated N.J.S.A. 34:13A-5.4(a)(5) (and derivatively (a)(1)) by unilaterally reducing Antolick's summer employment. The dispute was submitted to arbitration. However, it is unclear whether the arbitrator addressed himself to the unfair practice issue. The Association, in presenting the case to the arbitrator, did argue that the Board's action "violated the law, the collective bargaining agreement and past practice,..." (JT-4, p. 5, emphasis added). In making his decision, though, the Arbitrator simply stated: "The arbitrator considers the instant matter as analagous to a layoff for lack of work in the private sector rather than as a change in the terms and conditions of the grievant's (Antolick's) summer employment". Thus, it was within the employer's prerogative to make the unilateral change (JT-4, p. 5). 35/ The Arbitrator does not state whether this principle is a matter of law or comes from the language of the collective bargaining agreement.

Although this uncertainty exists, one thing is clear - whatever the basis for the Arbitrator's decision, it is contrary to clear PERC precedent which has recently been affirmed in the Appellate Division of the N.J. Superior Court and thus, deferral is inappropriate. In In re Piscataway Township Board of Education, 164 N.J. Super. 98 (App. Div. 1978), aff'g P.E.R.C. No. 77-37 and P.E.R.C. No. 77-65, the Appellate Division specifically rejected a school board's argument that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where economy reasons lie behind the decision. In holding that the Board did not have the right to reduce

35/ Contrast the result in Stockton State College, supra, where the arbitrator concluded that the State had the obligation to negotiate with the union about the impact of its decision to increase the number of minutes of the faculty's contact time, and, if warranted by the amount of that impact, about a remedy for the extra load, and the Commission deferred to that award.

12 month employees to 10 months with a corresponding reduction of salary the Court stated that: "We have no doubt 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 Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and consequently the subject of mandatory negotiation before being put into effect by the public employer", 164 N.J. Super. at 100. The court rejected the board's contention that the reduction in work year is analogous to a layoff. (See also New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (para. 4040 1978), affirmed ___ N.J. Super ___, App. Div. Docket No. A-2450-77(4/2/79) in which the Commission reaffirmed that a unilateral reduction in the school year from 11 to 10 months is now an unfair labor practice and specifically overruled previous decisions to the contrary).

This is the exact situation presented here. John Antolick suffered a reduction in work year and salary when the board unilaterally reduced his summer employment from four weeks to two weeks. The length of the work year is clearly a mandatory subject of bargaining. The basis for the Arbitrator's decision - that the reduction in work year is analogous to a layoff for lack of work - has been specifically rejected by the Appellate Division.

Therefore, the Arbitrator's decision is repugnant to the Act and it would not be appropriate to defer to it.

In making a recommendation for a decision on the merits, reliance is again placed on In re Piscataway, supra. The Caldwell-West Caldwell School Board cannot unilaterally reduce the school year of John Antolick without prior negotiation. Not only the impact of this decision (for example on salary), but the decision itself is a mandatory subject of bargaining.

Accordingly, the Hearing Examiner recommends that the Commission not defer to the Arbitrator's Award and concludes, instead, that the Caldwell-West Caldwell Board of Education has violated subd. 5.4(a)(1) and (5) by unilaterally reducing the summer work of John Antolick from four to two weeks in the summer of 1976.

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

CONCLUSIONS OF LAW

1. By its conduct in unilaterally extending core instructional classes, without first negotiating with the Association the impacts of that decision upon the core teachers' terms and conditions of employment, including the length of

teaching periods and the amount of pupil contact time and other workload factors, the Respondent has thereby engaged in and is engaging in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(5), and derivatively, (a)(1).

2. By its conduct in unilaterally, without prior negotiations with the Association, removing a free period from the work schedule of the Audio-Visual Aids Coordinator, and reducing the summer work schedule of the Cooperative Industrial Education Coordinator, the Respondent has thereby engaged in and is engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1).

3. By its conduct in unilaterally separating the eighth grade combined english-reading class into two separate components, extending the reading class by ¼ hour, extending the major subject classes which immediately precede the lunch period by ¼ hour, and changing a ¼ hour portion of the ninth grade lunch period into a study time, the Respondent did not make changes which impacted upon the affected teachers' terms and conditions of employment, and accordingly, has not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and (1).

THE REMEDY

Having found that the Respondent has engaged in, and is engaging in, unfair practices within the meaning of Section 5.4(a)(1) and (5) of the Act, I will recommend that the Commission, in accordance with the mandates of the Act, order the Respondent to cease and desist therefrom and to take certain affirmative action.

Having found that the Respondent has refused to negotiate collectively with the Association as the exclusive negotiating representative of its employees in an appropriate unit, and in order to effectuate the policies of the Act, I will recommend, for affirmative relief, that the Commission direct the Respondent to restore the status quo ante with respect to the class instructional time of core teachers, the free time of the Audio-Visual Aids Coordinator, and the summer work schedule of the Cooperative Industrial Education ("C.I.E.") Coordinator, as they each existed prior to the unilateral change made as to each, and negotiate in good faith the impact upon the core teachers for the period during which they had a greater workload and class instruction time, and the decision and impact upon each of the Coordinators for the period of time during which they lost, or have continued to lose, the extra free time and two week's summer work, respectively.

In order to avoid any unnecessary disruption of the school day and, in particular, student class schedules, I will further recommend that the Board shall be given 60 days from the Commission's order to restore the status quo ante with respect to the core teachers and Audio-Visual Aids Coordinator, 36/ but that the summer work schedule of the Cooperative Industrial Education Coordinator be restored immediately upon issuance of a final order herein. Since only summer hours are affected, it would be inappropriate to defer the effective date of compliance which, in all likelihood, will cause little or no disruption of the summer program.

In addition, I will also recommend that the Respondent also make John Antolick whole for the summer of 1976, and make Antolick whole, or any successor in the position of C.I.E. Coordinator for any summer thereafter during which the Respondent continued its unilateral reduction of the summer work schedule, by paying him (and/or any such successor) what he would have earned had the Respondent not unilaterally reduced his work schedule, less any amounts earned by Antolick or any such successor during the period such summer work would have been performed. 37/

The Association in its main brief, urges that, with respect, in particular, to the core teachers 38/ whose class instructional time was unilaterally extended in violation of an existing past practice, a make whole remedy is required. In reliance on Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed. Secs., 78 N.J. 1, 16, which, inter alia, specifically affirmed the Commission's authority to award back pay, the Association argues that only by awarding compensation for the increased work performed by employees as a result of the Board's action can the

36/ See North Brunswick Township Board of Education and North Brunswick Educational Secretaries Association, P.E.R.C. No. 79-14 at pages 10 and 17 of the Commission's Decision and Order. See also Maywood Board of Education and Maywood Education Association, P.E.R.C. No. 78-23 at page 11 of the Commission's Decision and Order, aff'd in this respect as to the kindergarten teachers and remanded to determine certain additional facts with respect to the physical education teachers in Maywood Board of Education, ___ N.J. Super. ___, App. Div. Docket No. A-1648-77 (4/3/79).

37/ Piscataway Twp. Bd. of Ed. and Piscataway Twp. Principals Assn., P.E.R.C. No. 77-65, aff'd In re Piscataway Twp. Bd. of Ed., 164 N.J. Super. 98, 101-102 (App. Div. 1978).

38/ The remedial claim made by the Association for the other junior high school teachers affected by the reading and class extension is not reached because of the finding that their allegation lacks merit.

Act's remedial objective of deterring future unlawful conduct be achieved. The Association then proposes several alternative means by which the value of the loss suffered by each teacher may be fixed.

The Charging Party's request for a make whole remedy for core teachers is denied. It is abundantly clear from the record, and previously noted, that the compensation of the teachers herein is not related in any way to the nature of the professional duty assigned to them. Unlike the employees in such a case as In re Piscataway Twp. Bd. of Ed., 164 N.J. Super. 98, whose work year was unilaterally reduced by two months (or Antolick, the Coordinator in the instant proceeding, whose summer work schedule was cut back), any attempt to fix an amount would involve the Commission in a matter of speculation which would be inappropriate under the exercise of its authority to take reasonable affirmative action necessary to the effectuation of the Act's policies. While, as noted, such authority includes the power to award back pay, it may be exercised only "...to compensate an employee for wages lost by reason of the commission of an unfair practice." Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed. Secs., supra, at page 10 of the Court's opinion. Even the Association has not offered to show by means of any formula how the extra teaching which the core teachers have been assigned can be converted into a back pay figure. In Galloway Twp. Bd. of Ed., 157 N.J. Super. 74 (App. Div. 1978) the Court specifically rejected a monetary award for teachers whose split work day was extended by 15 minutes but who received the same salary as all other teachers who worked a longer single session work day. The Court noted that all teachers in the district received the same salary commensurate with their experience without regard to the length of their work day, or whether they worked a single or split shift. The Court concluded that the Commission's award of an amount equivalent to 1/200th of annual salary did not make them whole but rather gave the affected teachers more than they were actually entitled to. This principle enunciated in Galloway has since been followed in Maywood Board of Education, ___ N.J. Super. ___, App. Div. A-1648-77 (4/3/79), where the Court, in reliance on Galloway, rejected a claim by the Maywood Education Association that the kindergarten teachers whose work day was extended (and not intensified, as in the case, sub judice) were entitled to an award of back pay because they did not actually lose money thereby.

RECOMMENDED ORDER

Upon the basis of the foregoing recommended Findings of Fact, Conclusions of Law, and Remedy it is recommended that Respondent, Caldwell-West Caldwell Board of Education, shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act by refusing to negotiate in good faith with the Caldwell-West Caldwell Education Association concerning terms and conditions of employment of unit employees and more specifically by making unilateral changes in the length of the work year and the workloads of unit employees.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Within 60 days of the date of this Decision and Order, restore the _status quo ante_ as to the working hours of the seventh grade core teachers prior to the change in workload and negotiate in good faith concerning the impact on these teachers for the period during which the workload of these teachers was unilaterally increased.

b. Within 60 days of the date of this Decision and Order, restore the _status quo ante_ as to the working hours of the Audio-Visual Aids Coordinator prior to the removal of the extra free period and negotiate in good faith concerning the decision and the impact on the Coordinator and any successor for the period during which the workload of the Coordinator or any successor was increased.

c. Restore the four week summer work schedule for the Cooperative Industrial Education Coordinator as it existed prior to the summer of 1976.

d. Reimburse John Antolick, C.I.E. Coordinator, for the summer of 1976, and Antolick, or any successor in the position of C.I.E. Coordinator, for any summer thereafter, during the period the Caldwell-West Caldwell Board of Education continued its unilateral reduction of the summer work schedule and until the time of its compliance with the Commission's Order by paying to Antolick, or any successor, what he would have earned had the Board not unilaterally reduced such work schedule, less all monies actually earned by Antolick or any successor during the same period of time.

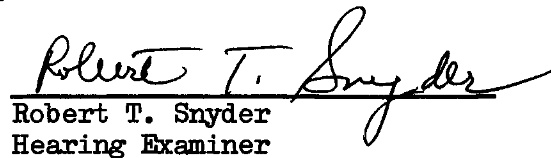
e. Preserve and, upon request, make available to the Commission or its agents for examination and copying all relevant payroll records, personnel records and reports and all other records necessary to analyze the amount

of backpay due under the terms of this Order.

f. Post in its Administration Building in Caldwell-West Caldwell, as well as in the Grover Cleveland Junior High School, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by Respondent be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicious places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

3. Notify the Chairman of the Commission, in writing, within 20 days of receipt of the Commission's Order, what steps the said Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the Complaint alleging that the Caldwell-West Caldwell Board of Education engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1) and (5) with regard to the increased hours and workload among seventh, eighth and ninth grade teachers other than the seventh grade core teachers be dismissed in their entirety.



DATED: Newark, New Jersey
May 4, 1979

Robert T. Snyder
Hearing Examiner

"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 New Jersey Employer-Employee Relations Act by refusing to negotiate in good faith with the Caldwell-West Caldwell Education Association concerning changes in terms and conditions of employment of unit employees and more specifically by making unilateral changes in the length of the summer work schedule and workload of unit employees.

WE WILL within 60 days of the date of this Decision and Order, restore the status quo ante as to the working hours of both the seventh grade core teachers and the Audio-Visual Aids Coordinator prior to the changes in workload and negotiate in good faith concerning the impact on the core teachers, and the decision and impact on the Coordinator during which their workloads were unilaterally increased.

WE WILL restore the four week summer work schedule for the Cooperative Industrial Education Coordinator as it existed prior to 1976.

WE WILL make the C.I.E. Coordinator and any successor whole by paying him what he would have earned had the Board not unilaterally reduced his summer work schedule, until the date the Board restores the prior work schedule, less all monies actually earned by the C.I.E. Coordinator or successor during the same period of time.

CALDWELL-WEST CALDWELL 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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780