P.E.R.C. NO. 88-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BETHLEHEM TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-159-151

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Bethlehem Township Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally increased pupil contact time of its teachers and assigned special teachers to teach a seventh period. The Commission further holds, however, that the Board did not violate the Act when it assigned 7th and 8th grade teachers to teach a sixth teaching period since that was consistent with the prior practice.

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BETHLEHEM TOWNSHIP
BOARD OF EDUCATION,

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-and- Docket No. CO-86-159-151

BETHLEHEM TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gebhardt & Kiefer, Esqs.
(Richard Dieterly, of counsel)

For the Charging Party, John A. Thornton, Jr., NJEA
UniServ Representative

DECISION AND ORDER

On December 18, 1985, the Bethlehem Township Education Association ("Association") filed an unfair practice charge against the Bethlehem Township Board of Education ("Board"). The Association alleges the Board violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1), (3) and (5),[1/] by unilaterally changing the school day, increasing

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees

Footnote Continued on Next Page

pupil contact and teaching assignment time and decreasing unassigned time.

On April 10, 1986, a Complaint and Notice of Hearing issued. On April 18, the Board filed an Answer denying the allegations. It also asserted these affirmative defenses: (1) the parties' contract does not prohibit the changes; (2) it has a managerial prerogative to implement this schedule; (3) a past practice gives it the right to implement the schedule; (4) the scheduling changes were made for important educational reasons, and (5) the Association waived any right to negotiate over the changes by agreeing to a new contract.

On June 13 and July 17, 1986, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by September 26, 1986.

On January 26, 1987, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 87-43, 13 NJPER 184 (¶18079 1987). He found that the Board did not violate the Act because the parties' agreement and past practice operated as waivers of the

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1/ Footnote Continued From Previous Page

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."

Association's right to negotiate over changes in homerooms schedules and additional teaching periods.

On February 11, 1987, the Association filed exceptions. It claims the Hearing Examiner erred by: (1) not finding that the contract was violated by reducing the homeroom period and adding a sixth teaching period; (2) finding a contractual waiver of the Association's right to negotiate over teacher work hours and workload; and (3) finding that the Board need not negotiate over these issues since it reduced the workday by five minutes.

On February 17, 1987, the Board filed a reply. It agrees with the Hearing Examiner's determinations that its actions conformed to the contract; that the parties had negotiated its right to set the workday and work schedules, and that past practice permitted it to assign six periods to teachers. It further contends that the Association's exception about the workday reduction should be disregarded because it does not sufficiently identify the portion of the Hearing Examiner's decision to which exception is taken as required by N.J.A.C. 19:14-7.3.

We have reviewed the record. The Hearing Examiner's findings of fact are generally accurate. We adopt and incorporate them here, but we modify finding no. 2 to add that Article 4, section A is entitled Notification. This section provides:

> A. Notification
>
> 1. Date for Presently Employed Teachers
>
> All teachers shall be given written notice of their tentative salary schedules, class

> and/or subject assignments, building assignments and room assignments for the forthcoming year not later than April 30. A list of said tentative schedules and assignments shall be simultaneously supplied to the Association.
>
> 2. Revisions
>
> In the event of changes in schedules, class and/or subject assignments, building assignments, or room assignments are proposed after April 30, the Association and any teacher affected shall be notified promptly in writing and, upon the request of the teacher and the Association, the changes shall be promptly revised between the principal or his/her representative and the teacher affected and at his/her option a representative of the Association.

Teacher work hours and workload are mandatorily negotiable and a unilateral increase in pupil contact time or the number of teaching periods violates the Act. See Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); see also cases cited in the Hearing Examiner's report at p. 9, n. 4. A majority representative, however, may waive its right to negotiate changes in contact time or workload through a collective negotiations agreement or past practice. Cf. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986) aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87); Old Bridge Municipal Utility Auth., P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984). Such a waiver must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

The Hearing Examiner found that the Association waived its negotiations right by agreeing to certain contract language and by past practice. Our task is to decide whether the record establishes that the Association clearly and unequivocally waived its statutory right to negotiate.

The Hearing Examiner first concluded that the Board had an explicit contractual right under Article 4 to make the disputed changes. We disagree. Article 4, subsection A(1) is a notification clause. It confers no substantive rights. It simply requires the Board to provide written notice by April 30 of teachers' tentative salary schedules and class, subject, building and room assignments. Some of these items may be governed by the contract (e.g. salary schedules) and some may not. This clause, however, only addresses the written notice requirement.

Article 4, subsection A(2) contemplates that there may be proposed changes after April 30 and that the teacher and Association may request a meeting to "revise" the changes. The changes are in "schedules, class and/or subject assignments, building assignments, or room assignments." The Hearing Examiner found that this subsection contemplates that the Board can unilaterally change work schedules. However, when the clause is read in conjunction with subsection (A)(1), it is apparent that "schedules" refers to salary schedules, not work schedules, and does not confer upon the employer the right to increase workload. When we read Articles 3 and 4 in this light, we cannot find that the contract language constitutes a

clear and unequivocal waiver of the Association's right to negotiate over workload increases. Compare Old Bridge (waiver where contract gave management the right to maintain flexibility in the scheduling of personnel, subject to notice requirements and shift differentials).

Given this analysis, and absent any claim of a past practice permitting homeroom schedule changes, we hold that the Board violated the Act when it increased pupil contact time by changing homeroom schedules.

The Hearing Examiner concluded, in the alternative, that the parties had an established past practice permitting the Board to require teachers to teach six periods. We agree, but find a violation to the extent the Board exceeded the accepted past practice by requiring some special teachers to teach a seventh period.

The assignment of a sixth teaching period for 7th and 8th grade teachers was consistent with the established practice of assigning six teaching periods to the large majority of teachers in the same unit and in the same school. The lower grade teachers historically had been assigned to teach six periods. The contract does not differentiate between lower and upper grade teachers; rather, it refers simply to teachers. Further, one seventh and eighth grade teacher had taught six periods previously, without any objection. Accordingly, under all these circumstances, we find that the Board did not violate the Act when it assigned teachers an additional teaching period consistent with established past

practice. South River; Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pert. part, 180 N.J. Super. 440 (App. Div. 1981).

We agree with the Hearing Examiner that the past practice, with only limited exceptions, was to assign teachers no more than six periods a day. Accordingly, we find a violation of subsections 5.4(a)(1) and (5) to the extent special teachers were assigned to teach a seventh period. See discussion, supra.

The Association has not specifically requested a return to the status quo. In light of this and the timing of this decision at the end of the subsequent school year, we will not order a return to the status quo and instead will order the Board to negotiate retroactively regarding past changes and to negotiate before any future changes.

Finally, we agree that the Association failed to prove that the Board made these changes to discourage the exercise of protected rights. We therefore dismiss the allegations of a subsection 5.4(a)(3) violation.

ORDER

The Bethlehem Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act, particularly by unilaterally changing homeroom schedules and adding a seventh teaching period for special teachers.

2. Refusing to negotiate in good faith with the Bethlehem Township Education Association, particularly by

unilaterally changing homeroom schedules and adding a seventh teaching period for special teachers.

B. Take this affirmative action:

1. Negotiate in good faith before changing the homeroom schedules or adding a seventh teaching period.

2. Negotiate retroactively regarding the changes in homeroom schedules and the seventh teaching period for special teachers.

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

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

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

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 employees in the exercise of the rights guaranteed them by the Act, particularly by unilaterally changing homeroom schedules and adding a seventh teaching period for special teachers.

WE WILL cease and desist from refusing to negotiate in good faith with the Bethlehem Township Education Association, particularly by unilaterally changing homeroom schedules and adding a seventh teaching period for special teachers.

WE WILL negotiate in good faith before changing the homeroom schedules or adding a seventh teaching period for special teachers.

WE WILL negotiate retroactively regarding the changes in homeroom schedules and the seventh teaching period for special teachers.

Docket No. CO-86-159-151

BETHLEHEM TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____

By _____
(Title)

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

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

H.E. NO. 87-43

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

In the Matter of

BETHLEHEM TOWNSHIP BOARD OF EDUCATION

Respondent,

-and- Docket No. CO-86-159-151

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Bethlehem Township Board of Education did not violate the New Jersey Employer-Employee Relations Act when it implemented certain changes in the homeroom and teaching schedules for teachers. The Hearing Examiner concluded that the Bethlehem Township Education Association had contractually waived its right to negotiate over such changes, and that the Board's actions were in compliance with the parties' collective agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-43

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

In the Matter of

BETHLEHEM TOWNSHIP BOARD OF EDUCATION

Respondent,

-and-

Docket No. CO-86-159-151

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION

Charging Party.

Appearances:

For the Respondent
Gebhardt & Kiefer, Esqs.
(Richard Dieterly, of Counsel)

For the Charging Party
John A. Thornton, Jr.
NJEA UniServ Representative

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 18, 1985 by the Bethlehem Township Education Association ("Association") alleging that the Bethlehem Township Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act").[1/] The Association alleged that the Board violated the Act by unilaterally changing the school day, increasing pupil contact time, and decreasing previously unassigned time.

A Complaint and Notice of Hearing was issued on April 10, 1986. The Board filed an Answer denying the Charge on April 18, 1986. It also asserted affirmative defenses alleging that the parties' collective agreement did not prohibit the changes, that past practice gave the Board the right to make such changes, and that the Association waived the right to negotiate over the changes because it failed to demand such negotiations during negotiations for a new collective agreement.

Hearings were held in this matter on June 13 and July 17, 1986 at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.[2/] Both parties filed post-hearing briefs the last of which was received on September 26, 1986.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; 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."

2/ The transcript from June 13 will be referred to as "TA" and the transcript from July 17 will be referred to as "TB."

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

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

2. The Board and Association are parties to a collective agreement, Exhibit J-1, which was reached in December 1985 and retroactively effective from July 1, 1985 through June 30, 1987. Article 2 of the teachers part of J-1 provides for a work year fixed by the Board.[3/] Article 3 of the teachers' part of J-1 is entitled "Teaching Hours and Teaching Load" but does not list the hours of employment nor does it list the number of teaching periods. The pertinent parts of Article 3 provide:

> A. Teachers are expected to devote to their assignment the time necessary to meet their responsibilities, and shall be required to sign in and sign out.

3/ The pertinent part of Article 2 of J-1 provides that:

> The school calendar shall be established by the Board...upon the recommendations of the superintendent after his/her consultation with representatives of the Association.

B. The arrival and departure time for all teachers shall remain in accord with the established policy of the Board of Education.

Article 4 of the teachers' part of J-1 is entitled "Teacher Assignment" and subsection A(1) of that Article provides that the Board advise teachers and the Association of teacher class and subject assignments by April 30 prior to the next school year. Subsection A(2) of Article 4 provides that if changes in such assignments are made after April 30, the teacher or the Association could request a meeting with the principal to revise those changes.

Article 4, subsection A(2) provides:

Revisions

> In the event of changes in schedules, class and/or subject assignments, building assignments, or room assignments are proposed after April 30, the Association and any teacher affected shall be notified promptly in writing and, upon the request of the teacher and the Association, the changes shall be promptly revised between the principal or his/her representative and the teacher affected and at his/her option a representative of the Association.

There are no other articles in J-1 pertaining to the teacher workday, teaching periods, or non-teaching duties.

3. The record shows that the teacher workday in the 1984-85 school year was from 8:00 a.m. to 3:00 p.m., and that was the same workday for 1985-86. (TA34-TA35). In 1984-85 the morning homeroom was 8:15-8:30 a.m., and the last period ended at 2:40 p.m. with afternoon homeroom ending at 2:45 p.m. But in 1985-86 the morning homeroom was 8:10-8:20 a.m., and during the month of September 1985, the last period ended at 2:45 p.m. and afternoon

homeroom ended at 2:50 p.m. (TA90-TA91). By October 1, 1985, however, the afternoon schedule was adjusted back five minutes so that the last period again ended at 2:40 and homeroom ended at 2:45 p.m. (TA47, TA100).

In 1984-85 the first period for teachers in grades 5-8 began at 8:30 a.m. In that year teachers in grades 5-8 had four 45-minute periods prior to lunch and a 30-minute recess or lunch duty, and they then had two 45-minute periods and one 40-minute period in the afternoon (Exhibit CP-10).

In 1985-86 the first period for teachers in grades 5-8 began at 8:20 a.m. In that year teachers in grades five and six had three 45-minute periods and one one-hour period prior to lunch, they had the same 30-minute lunch and 30-minute duty, and they then had two 40-minute periods and one 45-minute period after lunch (Exhibit CP-11). The seventh and eighth grade teachers in 1985-86, however, had five 45-minute periods prior to lunch, they had a 30-minute lunch but no 30-minute duty. After lunch they had two 40-minute periods and one 45-minute period (CP-11).

4. In 1984-85 all of the teachers in grades 1-6 were teaching six periods per day (TA76, CP-10). In addition, during that year at least one seventh/eighth grade teacher, Mr. Bleck, was also teaching six periods per day (CP-10, TB7). Most of the "special" teachers in 1984-85 also taught six periods per day. Special teachers are those responsible for physical education, industrial arts, music, library, basic skills, resource room, and

P.I. room (TB31-TB32). The basic skills teacher in 1984-85 worked some days with five and other days with six teaching periods, and the physical education teacher, Mr. Suarez, in that year worked some days with six and other days with seven teaching periods (CP-10).

In 1985-86 three seventh/eighth grade teachers, Dwyer, Dixon, and Riddle, were also required to teach six periods per day. They had only taught five periods per day in 1984-85 (TA124). The remainder of the regular teachers in grades 1-6, and Mr. Bleck, continued to teach six periods per day in 1985-86. Mr. Bleck, however, was assigned one non-teaching supervisory "silent reading" (study) period once ever six days (CP-11).

In 1985-86 the teaching periods for special teachers varied. The library and industrial arts teachers had six teaching periods and one study period; the basic skills teacher had some five, six and seven teaching period days; the resource and P.I. teachers had some six and some seven teaching period days; and the physical education and music teachers had seven teaching periods per day (CP-11).

5. Nancy Pierro is the local president of the Association and was involved in the negotiations leading to J-1. Negotiations occurred during the summer of 1985 (TA68), and the Association ratified a contract on the first school day in September 1985 (TA42, TA68). A dispute subsequently arose regarding the salary guide, however, and the Association then voted to reject the contract (TA70). By December both parties had ratified a modified agreement and it was signed that month (TA73-TA75).

Pierro testified that she believed that the language items for negotiations were closed in August 1985 (TA82). She further testified that she was aware of the new teaching schedules on the first day of school, but she did not raise that issue during the Fall of 1985 while negotiations were being completed (TA82-TA83, TA85).

6. In September 1985 Pierro complained to Dennis Murphy, principal of the Middle School which includes grades five through eight, about the change in the time of morning homeroom, the extra five minutes at the end of the day, and the assignment of the additional teaching period to certain teachers (TA48-TA49). Murphy met with Pierro in September in an attempt to resolve at least some of the problems. With respect to the morning homeroom and the five minutes at day's end Murphy testified that he told Pierro:

> ...I will be willing to negotiate with you to adjust that schedule back to the way it used to be (TA125).
>
> I'm willing to meet you halfway if you're willing to meet me halfway. I'll adjust the end of the day if you live with the beginning of the day (TB46).

Murphy did adjust the end of the day back five minutes by the end of September. Pierro, however, was still not satisfied with the change in morning homeroom (TA126), and she and Murphy continued to discuss that issue. Murphy testified that he told Pierro that he was willing to restore the beginning of the day to that which existed in 1984-85 (TB46, TB62-TB63). He indicated, however, that in order to return morning homeroom to 8:15 to 8:30 he would need to shorten some morning teaching periods (TA126).

By October 15, 1985 Murphy could not reach agreement with Pierro or grievance chairperson Cathy Holcomb regarding the assignment of an additional teaching period and the start of morning homeroom; thus, Holcomb filed a grievance regarding those matters (TA104, TA106, TB23). In an effort to resolve the grievance Pierro and Holcomb met Murphy and Superintendent O'Brien for lunch on November 13 (TA50, TA106-TA107). O'Brien suggested that the Association recommend some solutions to the problems and Pierro and Holcomb responded by submitting Exhibit CP-7 to Murphy several days later (TA50, TA107). Exhibit CP-7 addressed the assignment of an extra teaching period. The Association made several recommendations including additional pay, hiring additional personnel, and hiring aides. The Board, however, rejected those recommendations (TA51).

By January 1986 the morning homeroom issue had not been resolved and Murphy discussed the issue with teachers at a faculty staff meeting at which Holcomb was present (Exhibit CP-12, TB37-TB38, TB64). At that meeting Murphy offered to change morning homeroom back to 8:15-8:30 by cutting some time from academic periods (TA126, TB63-TB64). Murphy testified, however, that the teachers were not in favor of cutting the academic periods; thus, morning homeroom was not changed (TA128-TA129, TB64).

Analysis

The Board did not violate subsections (a)(1) and (5) of the Act by changing the morning and afternoon homerooms or adding an additional teaching period. Articles 2, 3(A), 3(B), and 4(A)(2) of

the teachers' part of J-1 operated as a waiver of the Association's otherwise right to negotiate over such changes. In fact, Murphy complied with Article 4(A)(2) of J-1 in agreeing to revise the homeroom schedules. In addition, past practice did not support the Association's position that the addition of a sixth teaching period violated the Act.

General Negotiability and Waiver

It is well established law in this state that teacher work hours, as well as teacher workload, are mandatorily negotiable, and normally, the unilateral increase in pupil contact time and the unilateral addition of a teaching period is a violation of the Act.[4/] However, where a collective agreement or the parties' past practice permits the employer to make certain changes in hours or workload, it serves as a waiver of the labor organizations right to negotiate over what would otherwise be mandatorily negotiable subjects. Old Bridge Municipal Utility Authority, P.E.R.C. No. 84-116, 10 NJPER 261 (¶15126 1984); Randolph Twp. Bd.Ed., P.E.R.C.

4/ Burlington Co. College Faculty Ass'n v. Bd. Trustees, 64 N.J. 10 (1973); Red Bank Bd.Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Byram Twp. Bd.Ed., 152 N.J. Super. 12 (App. Div. 1977); Maywood Ed. Ass'n, 168 N.J. Super. 45 (App. Div. 1979), pet. for certif. den. 81 N.J. 292 (1979); Kingwood Twp. Bd. Ed. v. Kingwood Twp. Ed. Ass'n, App. Div. Dkt. No. A-1414-84T7 (Nov. 25, 1985); City of Bayonne Bd.Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. A-954-79 (1980), pet. for certif. den. 87 N.J. 310 (1981); Newark Bd.Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/20/80); Dover Bd.Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981) aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82)

No. 83-41, 8 NJPER 600 (¶13282 1982); Randolph Twp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley Bd.Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980); Maywood Bd.Ed., 168 N.J. Super. 45, 5 NJPER 171 (¶10093 1979).

In fact, where the pertinent clause(s) in a collective agreement is (are) clear, any past practice developed to the contrary is not controlling. The Commission in Randolph Twp. School Bd. supra, held:

> It is not necessary to address any past practice of working less than that period of time required...by the Board since the provisions of the collective agreement controls over past practice where, as here, the mutual intent of the parties concerning working hours "can be discerned with no other guide than a simple reading of the pertinent language." (citations omitted) 7 NJPER at 24.

See also, New Brunswick Bd.Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977), mot. for reconsid. den. 4 NJPER 56 (¶4073 1978).

When Article 3, Sections A and B, and Article 4, Sections A(1) and A(2) of J-1 in the instant case are read together it becomes apparent that the Board negotiated the right to set the workday and work schedules. In fact, Art. 4, Sec. A(2) provides that in the event of changes, changes obviously contemplated to be made by the Board, the Board is required only to give notice, and to allow the teacher(s) and/or Association to meet with the principal to revise the changes.

Morning and Afternoon Homeroom Changes

The homeroom schedules in 1985-86 were certainly changed from those which existed in 1984-85. Pursuant to J-1, however, the

Board had the right to make those changes. Murphy then complied with Article 4, Section A(2) by meeting with Pierro and changing the afternoon homeroom schedule back to 2:40-2:45, and he met with the teachers and offered to revise the morning homeroom schedule. That offer, however, was rejected by the teachers and the afternoon homeroom was not revised. In addition, since Article 4, Section A(2) gave any teacher affected by the change the right to discuss it and revise it with the principal, the Association waived the right to be the only entity on the employees' behalf to be involved in revision discussions with the principal over the change. Thus, the principal, in meeting with teachers over the homeroom schedule, did not unlawfully circumvent the Board's negotiations obligations to the Association, and thus, the Board did not violate the Act.

The Additional Teaching Period Assignment to Dwyer, Dixon and Riddle

The assignment of a sixth teaching period to Dwyer, Dixon and Riddle did not violate the Act for two reasons. First, as in the homeroom situation, under Article 3, Section A and Article 4, Sections A(1) and (2) the Board had the right to fix and change schedules and class and subject assignments. The Association did not actually seek a revision, pursuant to Article 4, Section A(2), of the Board's decision to assign those teachers a sixth period. Rather, it sought to negotiate over the issue which led to its proposal in CP-7. Although at that point the Board was not required to further negotiate over that issue, the principal and superintendent nevertheless met with the Association and attempted

to resolve the matter. The parties could not reach agreement, however, and given the language in Articles 3 and 4, the Board was under no further obligation to negotiate over the change.

Second, the past practice in this district was that the overwhelming number of regular teachers, including at least one seventh/eighth grade teacher, had six teaching periods per day.[5/] The fact that only three teachers had a history of teaching only five periods per day does not establish a separate labor relations practice for just them. That would present an intolerable situation. Rather, I find that absent a contractual clause to the contrary, the evidence shows that a practice has existed giving the Board the right to assign regular (and special) teachers at least six teaching periods per day. The Board certainly was not required to assign six teaching periods per day to all teachers at all times. But it had--and has--the right to make that choice on a need

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5/ The facts suggest that Richard Bleck, a seventh/eighth grade teacher had apparently agreed to teach a sixth period in 1984-85. The Association argued that such agreement did not establish a practice of Bleck teaching six periods per day. I do not agree. First, pursuant to Articles 3 and 4 of J-1 the Board had the right to make the change. Second, the parties' past practice shows that the Board had the right to require teachers to teach six periods. Third, the Association did not establish that it ever challenged the assignment of a sixth teaching period to Bleck. Although an employee may be willing to assume additional work without additional compensation, a majority representative is not required to accept that situation and it may demand negotiations over the issue. The Association agreed to or acquiesced in the assignment of a sixth teaching period to Bleck and but for circumstances that were not present here, it could not subsequently challenge that change.

basis. Consequently, the parties' past practice does not support a finding that the assignment of a sixth period to Dwyer, Dixon and Riddle violated the Act.

Teaching Periods for Special Teachers

The record reveals a past practice for special teachers of assigning them six teaching periods per day. Although the basic skills teacher had some five and some six teaching period days, and the physical education teacher had some six and some seven teaching period days, the norm was clearly six teaching periods per day. The Board obviously changed the schedules for specials in 1985-86 resulting in an increase in the number of teaching periods for certain special teachers. Pursuant to Articles 3 and 4 of J-1, however, the Board had the right to change the schedules, and there was no evidence that Murphy refused to meet with the teachers and/or the Association in accordance with Article 4, Section A(2) to revise those schedules. In fact, there was no showing that the Association ever asked to revise those changes. Since the Board did nothing more than act in accordance with its collective agreement it satisfied its negotiations obligation and did not violate the Act. See Borough of Moonachie, P.E.R.C. No. 85-15, 10 NJPER 509 (¶15233 1984); Randolph Twp. Bd.Ed., supra; Bound Brook Bd.Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd.Ed., supra.

In finding contractual waivers in Randolph Twp. Bd.Ed., Bound Brook Bd.Ed., supra; Randolph Twp. School Bd.; and Pascack Valley Bd.Ed., the Commission found that the changes therein were

still within the workday and workload limits set forth in the parties' collective agreements. The same is true in the instant case. The workday for teachers here had been--and remained--8:00 a.m. to 3:00 p.m. and the homeroom alterations were contained within that time. The parties' contract (J-1) did not establish limitations for the amount of contact time or the number of teaching periods. Rather, it provided that teachers were expected to devote to their assignment the time necessary to meet their responsibilities (Article 3, Section A), responsibilities undoubtedly to be determined by the Board. It further provided that the Board would establish the schedules, and that where there were changes, the teachers and/or Association could seek revisions (Article 4). There was no deviation here from the terms or apparent intent of the parties' agreement.

I believe it helpful here to draw a distinction between a public employer's threshold duty to negotiate over changes in existing terms and conditions of employment prior to implementing any changes, and a labor organization's burden to demand negotiations in order to change contractual waivers of its right to negotiate prior to implementation over changes in existing terms and conditions of employment. If there had been no contractual waivers or past practice defenses here, the Board could not have legally changed the number of teaching periods without first negotiating with the Association over negotiable items such as additional compensation. But with the existence of contractual waivers and

past practice, the burden shifted to the Association to demand negotiations to change the contract or pre-existing practice. Compare, Monroe Twp. Bd.Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). The Association made no such demand.

The parties did not offer to introduce the collective agreement that preceded J-1. I infer therefrom that the pertinent language from Articles 3 and 4 of J-1 was the same language as that contained in J-1's predecessor. Consequently, during negotiations in the Fall of 1985 the status quo predecessor agreement permitted the changes made by the Board. Since the new contract still was not resolved in early September 1985, and since the Association was then aware of the instant changes, the Association had the opportunity to demand negotiations in the hope of changing the language in Articles 3 and 4. Since no such demand was made, the Association again accepted the contractual language in Articles 3 and 4 which continued to waive its right to negotiate over those changes.

The 5.4(a)(3) Allegation

In order to have established that the Board violated subsection 5.4(a)(3) of the Act by making the instant changes it had the burden to prove animus--an anti-union motive--for the changes, Borough of Haddonfield Bd.Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); Cape May City Bd.Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (¶11022 1980), and that protected activity was a motivating factor in the Board's actions. Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). The Association, however, did not offer

any evidence of animus, or any evidence that the Board's actions were taken as a result of any protected activity. Thus, that allegation must be dismissed.

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

Conclusions of Law

The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), or (5) by changing the homeroom schedules or adding an additional teaching period to certain employees.

Recommendation

I recommend that the Commission ORDER that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: January 26, 1987
Trenton, New Jersey