

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WHARTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-199-162

WHARTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Wharton Board of Education violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally assigned homeroom responsibilities to certain teachers who previously had duty-free preparation time during this period, and concomitantly relieved certain other teachers from their regular homeroom duties and gave them duty-free preparation instead. The Board did not violate these subsections, however, when it declined to submit these matters to binding arbitration.

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In the Matter of

WHARTON BOARD OF EDUCATION,

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-and-

Docket No. CO-81-199-162

WHARTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Fullerton, Porfido & Wronko, Esqs.
(Eugene J. Porfido, of Counsel)

For the Charging Party, Bucceri and Pincus, Esqs.
(Sheldon H. Pincus, of Counsel)

DECISION AND ORDER

On January 12, 1981, the Wharton Education Association (the "Association") filed an unfair practice charge against the Wharton Board of Education (the "Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (5), ^{1/} when it unilaterally assigned homeroom responsibilities to teachers known as Allied Team members, concomitantly relieved several teachers known as Team Leaders from their regular homeroom duties, and refused to submit these matters to binding arbitration

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

pursuant to the collective agreement.

On May 14, 1981, the Director of Unfair Practices issued a Complaint. The Board filed an Answer in which it denied all material allegations except that it unilaterally required Allied Team members to perform homeroom duties, despite the Association's demand for negotiations.

On September 9, 1981, the Hearing Examiner conducted a hearing at which the parties examined witnesses and presented documentary evidence. Post-hearing briefs were filed by November 10, 1981.

On June 7, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-55, 8 NJPER ____ (¶ ____ 1982) (copy attached). He found that the Board committed an unfair practice when it unilaterally ordered the Allied teachers to assume homeroom duties, thus changing a past practice which allowed Allied Team teachers duty free time during the homeroom period so they could prepare for classes. He also found that the Board did not commit an unfair practice when it refused to submit to binding arbitration since the contract provides that grievances may be submitted to arbitration only with its concurrence. The Hearing Examiner did not address the Association's contention that the Board committed an unfair practice when it relieved Team Leaders from homeroom duties.

On June 23, 1982, the Association filed Exceptions. The Association contends that the Hearing Examiner erred in:

- (1) not ruling on its contention concerning relieving Team Leaders from homeroom duties,
- (2) not recommending a monetary remedy for

the violation found, and (3) using the word "transfer" instead of "duties" in his recommended order.

On July 9, 1982, the Board, after receiving an extension of time, filed its Exceptions. The Board asserts that the Hearing Examiner erred in" (1) finding a past practice allowing Allied Team teachers duty free time during homeroom periods so they could prepare for classes, (2) finding an increase in student contact time and workload, (3) not holding that the Board had a non-negotiable, managerial prerogative to make the changes in question, (4) not finding that the contract empowered the Board to make these changes, and (5) finding an oral understanding that the Allied Team members would have duty-free time during home room periods. In addition, the Board requested that the hearing be reopened so that it could present rebuttal testimony from members of its negotiation teams in 1970, 1972, and 1973 which would show that no oral understanding was reached on whether Allied Team members would be on duty during homeroom periods.^{2/} On August 23, 1982, the Board submitted two affidavits supporting its request to reopen the hearing.

We have reviewed the record and find substantial evidence supporting the Hearing Examiner's findings of fact (pp. 1-4). We adopt them and incorporate them here.

The Board first contends that a past practice did not exist prior to 1980 which would allow Allied Team teachers duty-free time during homeroom periods and that there was no increase in student contact time and workload. The Board argues in particular that Allied Team teachers were expected to be on duty during

^{2/} The Board has also requested oral argument. Because we find the parties' arguments in their briefs sufficient to decide this case, we deny this request.

the home room period and points to the superintendent's testimony that he had observed some teachers on playground or hall duty during homeroom time and that five teachers not teaching major subject categories had previously received homeroom assignments. Our review of the record, however, reveals that playground and hall duties were performed prior to the homeroom period when children were returning from the playground to their homerooms, that four of the five teachers previously assigned homeroom duty were not Allied Team teachers, and that the one Allied Team teacher who did homeroom duty volunteered to do so. We find, as a fact, that Allied Team teachers before 1980 regularly used the homeroom period as duty-free preparation time for their upcoming classes. We further find, as a fact, that the imposition of homeroom duty on Allied Team members increased their workload and student contact time since they now have to supervise students during that period and have lost preparation time.

The Board asserts that it had a non-negotiable managerial prerogative to assign Allied Team teachers homeroom duty. We have consistently ruled, however, that a Board cannot unilaterally eliminate duty free preparation periods. In re City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Docket No. A-954-79, pet. for certif. den. 87 N.J. 310 (1981). See In re Wanaque Bd. of Ed., P.E.R.C. No. 82-54, 8 NJPER 26 (¶13011 1981); In re Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981); In re Dover Bd. of Ed., P.E.R.C. No. 80-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Docket No. A-3380-80T2 (3/16/82); In re Weehawken Bd. of Ed.,

P.E.R.C. No. 80-91, 6 NJPER 50 (¶11026 1980); In re Newark Bd. of Ed., P.E.R.C. No. 79-54, 5 NJPER 109 (¶10063 1979). Further, the Board has not persuaded us that negotiation over the elimination of the Allied Team teachers' preparation time would have significantly interfered with its ability to provide educational skills. Rather, it appears that the Board has unilaterally reshuffled the amount of duty-free time available to Allied Team teachers and unit leaders not because of educational policy, but because it wished to distribute preparation time more equitably among the teaching staff (Exceptions, p. 2). While the Board may seek to accomplish this objective through negotiations, it cannot do so unilaterally.

We further reject the Board's contract defense. N.J.S.A. 34:13A-5.3 provides, in part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Here, the Board's change modified an existing working condition: the preparation time Allied Team teachers had previously enjoyed during the homeroom period. We agree with the Hearing Examiner that the contractual language the Board cites is much too broad to serve this purpose. In re Township of Ocean PBA Local No. 57, P.E.R.C. No. 81-133, 7 NJPER 333 (¶12149 1981); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Docket No. A-1818-80T6; In re State of New Jersey, P.E.R.C.

No. 77-40, 3 NJPER 78 (1977).^{3/}

The Board next contends that there was no previous oral agreement allowing Allied Team teachers duty-free time during the homeroom period. The Hearing Examiner credited the unrebutted testimony of an Association witness that during the early 1970's, Board and Association negotiators reached an oral understanding that Allied Team teachers would be allowed to use homeroom periods for extra preparation time because they taught more students in a greater range of grade levels than other teachers. We accept this testimony as shedding light on why the past practice of allowing Allied Team teachers duty-free time during homeroom period existed. We emphasize, however, that the crucial fact is what the past practice was, and not whether the parties formally agreed to it. As we have previously indicated, the record demonstrates the existence of a past practice of affording Allied Team teachers duty-free time during the homeroom period.

We also reject the Board's request to reopen the hearing so that it may present the testimony of some of its negotiators during the early 1970's. When the Association presented its

^{3/} As a subpart of its Exceptions, the Board asserts that the Association never demanded the right to negotiate the assignment of duties. In fact, the Board's Answer admits paragraph 4 of the charge. That paragraph states:

The Association demanded negotiations of the assignment of homeroom duties to the 'allied team members,' but the Board refused and rejected any proposed negotiations.

In any event, N.J.S.A. 34:13A-5.3 does not require an employee representative to demand negotiations in the first instance; instead, it requires employers to negotiate changes before making them.

testimony concerning negotiations during that time, the Board became aware that these negotiations were an issue in the case. During the hearing, it had an ample opportunity to cross-examine the Association witnesses, call its own witnesses on this issue, or, if necessary, ask the Hearing Examiner for a continuance. Given this knowledge and opportunity during the hearing, we will not reopen the hearing now.

We turn now to the Association's Exceptions.^{4/} We agree that the Hearing Examiner should have ruled on the Association's contention that the Board violated the Act when it unilaterally relieved unit leaders of their homeroom duties, thus decreasing their student contact time and increasing their duty free time. In effect, the unit leaders, who already receive an extra \$360.00 a year for performing unit leader duties as well as teaching, now receive an additional employee benefit: duty free time. This contention, of course, merely presents the other side of the Allied Team teacher coin: when it decreased the duty free time of the Allied Team teachers, it increased the duty free time of the unit leaders. All of these teachers are unit employees, and the Board must seek to negotiate before either increasing or decreasing the duty free time of any of these employees.

Turning to the question of appropriate remedy, we agree with the Association that the word "transfers" should be stricken

^{4/} The Association does not object to the Hearing Examiner's conclusion that the Board did not violate the Act when it refused to arbitrate this dispute. The Hearing Examiner correctly resolved this dispute for the reasons set forth in his opinion (pp. 5-6).

from the Hearing Examiner's proposed order since this case does not involve a transfer of any kind, but rather a unilateral change in preparation time. We will instead order the Board to rescind its directive requiring Allied Team teachers to perform homeroom duties and relieving unit leaders of homeroom duties until such time as it negotiates over this change.

Finally, we will not reverse the Hearing Examiner's determination that an award of back pay is not appropriate under the circumstances of this case and Galloway Township Bd. of Ed. v. Galloway Township Ed. Assn., 157 N.J. Super. 74 (1978).^{5/} While we will not affirmatively order back pay in this case, we do believe, as did the Hearing Examiner, that it would be appropriate for the parties to negotiate over the issue of compensation for the duty free time the Allied Team teachers lost.

ORDER

IT IS ORDERED that the Wharton Board of Education

(1) Rescind its order compelling Allied Team teachers to perform homeroom duties and relieving unit leaders of homeroom duties until such time as said homeroom duties are negotiated in good faith;

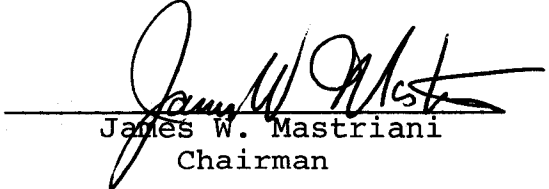
^{5/} We have reservations about the continued vitality of the cited case after the Supreme Court's affirmation of our broad remedial powers in Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc. of Educ. Secretaries, 78 N.J. 1, 8-16 (1978). We believe, however, in the exercise of our discretion to fashion appropriate remedies, that a fixed monetary award would be an artificial way of resolving this dispute.

(2) Negotiate with the Wharton Education Association concerning compensation for those Allied Teachers who served homeroom duty without negotiations;

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

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Suskin and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

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 rescind the order compelling Allied Team teachers to perform homeroom duties and relieving unit leaders of homeroom duties until such time as said homeroom duties are negotiated in good faith.

WE WILL negotiate with the Wharton Education Association concerning compensation for those Allied Teachers who served homeroom duty without negotiations.

WHARTON 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,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

WHARTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-199-162

WHARTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission (Commission) find that the Wharton Board of Education committed an unfair practice when it unilaterally ordered a certain class of teachers to perform homeroom duties. These teachers formerly had duty free homerooms. It was found that the Board and the Association had previously negotiated the duties of this class of teachers and the result of these negotiations were that this class of teachers would not have homeroom duty.

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

WHARTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-199-162

WHARTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent:

Fullerton, Porfido & Wronko, Esqs.
(Eugene J. Porfido, Esq.)

For the Charging Party

Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 12, 1981, the Wharton Education Association filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Wharton Board of Education (Board) violated N.J.S.A. 34:13A-5.4(a)(1) and (5). ^{1/} It was specifically alleged that the Board has unilaterally assigned certain teachers, known as Allied Team members, with homeroom duty. It was claimed that this assignment resulted in an increased workload for these teachers. The charge further alleges that the Board

^{1/} These subsections prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

has refused to submit this matter to binding arbitration pursuant to the collective negotiations contract.

It appearing that the allegations of the charge if true might constitute an unfair practice, the Director of Unfair Practices issued a Complaint and Notice of Hearing on May 14, 1981. Pursuant to the complaint a hearing was held on September 9, 1981. Both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. ^{2/}

The Wharton Board of Education (Board or Respondent) and the Wharton Education Association (Association or Charging Party) are parties to a collective negotiations contract. The Board has for a number of years engaged in a program of individualized instruction, known as Individual Guided Education. Teachers were divided into groupings according to grade levels called units. Each unit consists of a unit leader and unit members. The leaders had extra responsibilities acting as liaison between the administration and unit members. In return for carrying out the extra duties assigned to them, unit leaders receive an extra stipend of \$360.

Allied Teachers are teachers who work within the I.G.E. program but who do not teach major subject areas, i.e. math and reading, and are not assigned to regular classrooms. They teach physical education, industrial arts, art, home economics and music. The school nurses are also considered Allied Teachers.

Prior to the 1980-81 school year Allied Teachers were not assigned homeroom duties. The one exception was in 1979-80. Ken

^{2/} Briefs were received from both parties by November 10, 1981.

Rosen, a school psychologist served as a homeroom teacher.

The contract is silent as to the assignment of homeroom duties.

Section XI of the Collective Bargaining Agreement provides that the Board has the right

"...(a) to direct employees of the school district; (b) to hire, promote, transfer, assign, and retain employees in positions in the school district, and to suspend, demote, discharge, or take other disciplinary action against employees; (c) to relieve employees from duty because of lack of work or for other legitimate reasons; (d) to maintain efficiency of the school district operations entrusted to them; (e) to determine the methods, means and personnel by which such operations are to be conducted;..."

The Board argues that the language specifically reserves to the administration the right to make the assignment in question.

The Association claims that on the basis of past practice they have the right to have a duty free homeroom period.

The uncontradicted testimony of Thomas Keffer, the Association's witness, was that in the contract negotiations in the early 1970's the question of compensation for unit members was discussed in negotiations. It was agreed that the Unit Leaders would receive a special stipend and further since Allied Teachers teach more students and since the students taught came from more varied grade levels they needed additional preparation time to make up for this additional load, there was an oral understanding that the Allied Teachers would use the homeroom periods for extra preparation time.

The only witness for the Board was Richard Ruffer, the Superintendent of Schools. He did not directly challenge the testimony that the issue of duty free homeroom periods had been the subject of negotiations. He did challenge the concept that there was an established past practice in the school district. He testified that for the preceding four years some twelve non-major teachers had homeroom assignments. However out of that group only one teacher, Ken Rosen, the psychologist, was an Allied Teacher; the rest constituted non-major teachers such as special ed, compensatory and learning center teachers.

Ruffer also testified that when he has visited the schools he has observed Allied Teachers on hall duty before the start of classes. From that he inferred that the school principal has assigned Allied Teachers during homeroom time. The testimony of Thomas Keffer is that there is no hall duty per se. All teachers participate in rotating early morning outside duty and part of that duty is monitoring the hallways.

Keffer also testified that Ken Rosen was asked if he would take a homeroom when the number of homerooms grew from 10 to 16 at the start of the school year. Rosen volunteered to take a homeroom but left during the school year.

I find the testimony of the Association witnesses to be far more convincing. The Superintendent of Schools was not able to testify on the basis of firsthand knowledge as to assignments within the school. Further the testimony as to the negotiations history stands unrebutted.

The broad, general language of the contract is not controlling here. In order to find that the language of the contract waives a right to negotiate it must be clear and unequivocal. Further the bargaining history indicates that no waiver was contemplated. See Deptford Bd/Ed, P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Docket No. A1818-80T1; In re State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977).

On the basis of the testimony here I am satisfied that a valid past practice was in effect at the time the Board unilaterally and without negotiations assigned Allied Teachers homeroom duty. A past practice is not dependent on any written contract provision and is determined by the conduct of the parties and is a mandatorily negotiated term and condition of employment. In re New Brunswick Bd/Ed, P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040, 1978). And here the underlying issue is mandatorily negotiable for it involves student contact time and a change in teacher workload. In re Byram Twp. Bd/Ed, 152 N.J.Super. 12, 21 (App. Div. 1977); Jamesburg Bd/Ed, P.E.R.C. No. 81-75, 7 NJPER 26, 27 (¶12011 1981).

Accordingly, I find that the Board violated §5.4(a) when it assigned homeroom duty to Allied Teachers without first negotiating same.

The second part of the charge filed by the Association alleges that it was an unfair practice for the Board to refuse to take this matter to arbitration.

The contract language in question provides that

"Any grievance not resolved to the employees' satisfaction after review by the Board of Education may at the request of the Association or the employees and with the concurrence of the Board of Education and the grieved employee(s) be submitted to arbitration...."

In South River Bd/Ed, P.E.R.C. No. 77-62, 3 NJPER 174 (1977) the Commission held that where a contract's arbitration provision was conditioned on the consent of both parties it was not an unfair practice for that board of education to refuse to proceed to arbitration. There the contract limited the use of arbitration to disputes as to contract interpretation. In the instant case the contract provides that submission of a case to arbitration may be made only with the concurrence of the Board of Education (and the grieved employee(s)). Nothing in this language serves to compel the Board to submit to the process. It follows that the Board's failure does not violate the terms of the contract or other "terms and conditions of employment." Accordingly this aspect of the Association's charge is dismissed.


The Association has asked for money damages. Monetary damages here are not appropriate. In Galloway Twp. Bd/Ed, 157 N.J. Super. 74 (1978) the length of the school day of teachers was unilaterally increased by 15 minutes. The Commission ordered a monetary award to compensate the teachers for the extra time they were forced to work. The Appellate Division sustained the finding of an unfair practice but they reversed the award, stated at p. 84, the "teachers...suffered no loss of income by reason of the 15-minute increase in their work-day. Their salary remained the same as

teachers (who work a longer work-day). The award did not make them whole; rather, it gave them more than they were actually entitled to." Accordingly, I will recommend that the Commission issue the following

ORDER

It is hereby recommended that the Commission ORDER the Wharton Board of Education to

- 1) Rescind its order to compel Allied Teachers to take homeroom duty until such time as said transfers are negotiated in good faith;
- 2) Negotiate with the Wharton Education Association concerning compensation for those Allied Teachers who served homeroom duty without negotiations;
- 3) Post at all places where notices to employees are customarily posted, copies of the notice marked Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.
- 4) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Edmund G. Gerber
Hearing Examiner

DATED: June 7, 1982
Trenton, New Jersey

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 assign Allied Teachers to homeroom duty without first negotiating in good faith with the Wharton Education Association.

WE WILL negotiate in good faith with the Wharton Education Association concerning the compensation for those Allied Teachers who were ordered to serve as homeroom teachers without negotiations.

WHARTON BOARD OF EDUCATION
(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.