P.E.R.C. NO. 84-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION,

Respondent,

-and- Docket No. CO-82-197-13

WESTLAKE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Union County Educational Services Commission failed to negotiate in good faith with the Westlake Teachers Association concerning the hours of work for Centennial High School teachers. The Commission also holds, however, that the Association failed to prove by a preponderance of the evidence that the Educational Services Commission and the Association had agreed to reduce the hours at Centennial High School.

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-and- Docket No. CO-82-197-13

WESTLAKE TEACHERS ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Nichols, Thomson, Peek & Myers, Esqs. (Kenneth E. Meyers, Of Counsel)

For the Charging Party, Schneider, Cohen & Solomon, Esqs. (J. Sheldon Cohen, Of Counsel)

DECISION AND ORDER

On February 9, 1982, the Westlake Teachers Association ("Association") filed an unfair practice charge against the Union County Educational Services Commission ("Educational Services Commission") with the Public Employment Relations Commission.[1/] The Association alleged that the Educational Services Commission violated subsections 5.4(a)(1) and (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), by refusing to change the hours of work for teachers at Centennial High School ("Centennial") in accordance with an

1/ The Association filed an amended charge on February 19, 1982. The amended charge merely corrected the name of the public employer.

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 employees in that unit, or refusing to process grievances presented by the majority representative."

alleged agreement reached during negotiations. The Association also alleged that the Educational Services Commission refused to negotiate in good faith over hours of work for Centennial teachers.

On August 2, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On August 10, 1982, the Educational Services Commission filed its Answer. It asserted that although it had negotiated in good faith with the Association, the parties had not agreed to the change in hours the Association alleged.

On January 5, and February 9, 1983, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, presented exhibits, and argued orally. Both parties filed post-hearing briefs.

On August 16, 1983, the Hearing Examiner issued his report and recommended decision. In re Union County Educational Services Commission, H.E. No. 84-12, 9 NJPER 548 (¶14228 1983) (copy attached). He concluded that the parties had not reached agreement concerning the hours of work at Centennial, but recommended a finding that the Educational Services Commission had violated subsections 5.4(a)(1) and (5) by failing to negotiate in good faith over the hours of work at Centennial. In particular, he found that the Educational Services Commission violated its negotiations obligations when, after factfinding and under the particular circumstances of this case, it introduced an hours proposal which provided for longer work hours than its last proposal. He recommended an order requiring the Educational Services Commission to negotiate in good faith over the hours of work at Centennial

and to post a notice of its violation and remedial action.

On August 16, 1983, the Hearing Examiner served the parties with a copy of his report and advised them that they could file exceptions within ten days of service of the report pursuant to N.J.A.C. 19:14-7.3.

On August 25, 1983, the Educational Services Commission notified the Hearing Examiner that it did not intend to file exceptions and would comply with his recommended order.

On October 3, 1983, after receiving two extensions of time, the Association filed exceptions. The Association asserts that the Hearing Examiner erred in: not finding that the parties reached agreement concerning the hours of work at Centennial; not crediting the testimony of one of the Association's witnesses; not finding that the recognition clause of the 1979-1981 collective negotiations agreement encompassed Centennial teachers; and, not recommending an order requiring the Educational Services Commission to comply with the parties' alleged agreement on hours, to compensate teachers for extra hours worked, and to pay attorney's fees and costs.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-11) are supported by substantial evidence and specific credibility determinations. We adopt and incorporate them here.

The Hearing Examiner correctly identified the threshold issue: whether the parties reached an agreement during the July 13, 1981 mediation session limiting hours of work at Centennial to

8:30 a.m. to 2:30 p.m.[3/] Based on our review of the record and all the particular circumstances of this case, we agree with his conclusion that the Association has not proved by a preponderance of the evidence that there was such an agreement.[4/] In particular, in light of this review, we adopt the credibility determinations underpinning this conclusion.

We next consider the Hearing Examiner's conclusion that the Educational Services Commission refused to negotiate in good faith. The Educational Services Commission has not excepted to this determination. Based upon our review of the totality of the circumstances established in the record, we accept it. See, e.g., In re Woodbridge Township Bd. of Ed., P.E.R.C. No. 81-31, 7 NJPER 330 (¶12147 1981); In re Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980).

We finally consider the remedy recommended by the Hearing Examiner. We adopt his recommended order.[5/] We also deny the Association's request for attorney's fees and costs.

3/ The Association also asserts that the 1979-81 agreement recognized it as the majority representative of Centennial teachers and established these work hours for Centennial teachers. This argument is without merit. Centennial did not open until September 1980. After it opened, the Educational Services Commission and the Association agreed that the Association would be the majority representative of Centennial teachers and that the hours of the Centennial teachers' workday, exclusive of non-teaching time before and after school, would remain from 8:30 a.m. to 3:15 p.m. until the parties negotiated a successor contract.

4/ In the absence of such an agreement, there is no basis for granting the Association's request for additional compensation for teachers.

5/ Implicit in this order is our determination that the Educational Services Commission must withdraw the regressive proposal on hours it made after the conclusion of the mediation and factfinding proceedings.

ORDER

The Public Employment Relations Commission orders the Union County Educational Services Commission to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by failing to negotiate in good faith with the Westlake Teachers Association concerning the hours of work of Centennial High School teachers; and

2. Refusing to negotiate in good faith with the Association concerning the hours of work of Centennial High School teachers.

B. Take the following action:

1. Negotiate in good faith with the Association concerning hours of work at Centennial.

2. Post copies of the attached notice, marked as Appendix "A", in all places where notices to employees are customarily posted. The Commission will supply copies of such notices which the Educational Services Commission shall immediately post. A representative of the Educational Services Commission shall sign the notices before such notices are posted. The Educational Services Commission shall post the notices for at least sixty (60) consecutive days. The Educational Services Commission shall take reasonable steps to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Educational Services Commission has taken to comply with this Order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
December 9, 1983
ISSUED: December 12, 1983

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 employees in the exercise of the rights guaranteed to them by the Act by failing to negotiate in good faith with the Westlake Teachers Association concerning the hours of work of Centennial High School teachers.

WE WIL NOT refuse to negotiate in good faith with the Association concerning the hours of work of Centennial High School teachers.

WE WILL negotiate in good faith with the Association concerning hours of work at Centennial.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION

(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.

H. E. No. 84-12

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

In the Matter of

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION,

Respondent,

-and-

Docket No. CO-82-197-13

WESTLAKE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Association did not prove by a preponderance of the evidence that the parties had reached an agreement concerning the hours of work at the high school and the reporting and leaving time in general. However, the Hearing Examiner recommends that the Commission find that the Respondent violated subsection 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it failed to continue negotiations over hours during the mediation and fact-finding sessions, and when it later engaged in surface bargaining not seriously intended to reach agreement. The Hearing Examiner recommends that the Respondent be ordered to negotiate in good faith.

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. 84-12

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

In the Matter of

UNION COUNTY EDUCATIONAL
SERVICES COMMISSION,

Respondent,

-and- Docket No. CO-82-197-13

WESTLAKE TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Nichols, Thomson, Peek & Meyers, Esqs.
(Kenneth E. Meyers, Of Counsel)

For the Charging Party
Schneider, Cohen and Solomon, Esqs.
(J. Sheldon Cohen, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 9, 1982 and amended on February 19, 1982, by the Westlake Teachers Association ("Association") alleging that the Union County Educational Services Commission ("Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association has alleged that the Respondent unilaterally changed the hours of work for teachers at its Centennial High School which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. 1/

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 employees in that unit, or refusing to process grievances presented by the majority representative."

The Association asserted that the Respondent had agreed to its negotiations proposal for the length of the workday at the High School, and that it agreed to delete a prior contractual provision requiring teachers to report to work 30 minutes before school opened and to remain after school for up to 30 minutes. The Respondent denied that it agreed to the Association's proposal as to the High School workday, but admitted it erred in not noting the separate workday at the High School as opposed to the elementary school. In addition, the Respondent denied that it agreed to delete the "30 minute" clause.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 2, 1982, and hearings were held in this matter on January 5 and February 9, 1983, in Newark, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs the last of which was received on April 25, 1983. 2/

2/ When the Notice of Hearing issued herein on August 2, 1982, this matter was assigned to Commission Hearing Examiner Alan R. Howe who scheduled a hearing for October 14 and 21, 1982. However, due to Mr. Howe's subsequent unavailability for hearing on those dates the matter was reassigned to the undersigned Hearing Examiner on September 29, 1982, for the same hearing dates. However, pursuant to the parties' request, the hearings for October were cancelled, and a settlement conference was conducted by the undersigned Hearing Examiner on October 20, 1982, at which time the parties attempted to resolve the matter. Subsequently, by letter dated October 27, 1982, the undersigned was advised that the settlement efforts had failed, therefore, on November 2, 1982 the undersigned scheduled the hearing for January 5, 1983. When it became apparent on January 5 that the hearing could not be completed that day, the date of February 9, 1983 was selected by mutual agreement to complete the hearing.

The delay between the close of hearing and the receipt of the last brief is attributable to mutual requests by the parties to extend the time for submission of briefs.

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

Upon the entire record the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Union County Educational Services Commission is a public employer within the meaning of the Act and is subject to its provisions.

2. Westlake Teachers Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. In approximately 1970 the Union County Educational Services Commission which had been created by the Boards of Education in Union County, opened the Westlake Elementary School to provide educational instruction for emotionally disturbed, and neurologically and orthopedically handicapped students. When Westlake first began operations formal academic instruction took place between 9:00 a.m. and 2:00 p.m., however, students then and now have always begun entering the building at 8:30 a.m. (Transcript "T" II pp. 5, 33). In approximately 1975 or 1976, formal academic instruction at Westlake began at 8:45 a.m., but was changed to 8:40 a.m. in approximately 1978. Currently, the student day at Westlake is 8:30-2:10, and the teachers are required to report from 8:20-2:30

(T II p. 44). The students at Westlake receive five hours of instruction plus 40 minutes for lunch and/or other activities.

4. In approximately 1975 the Association became the majority representative of the teachers and other professional employees employed by the Respondent. The last signed (emphasis added) collective agreement entered into by the parties, Exhibit J-1, covered 1979-81 and contained clauses in Article 5 concerning the teachers workday (hours) and reporting and leaving time. The pertinent portions of that clause provide as follows:

ARTICLE V

WORK YEAR AND HOURS

A. The teachers' work day will be from 8:30 A.M. to 2:30 P.M.

B. Teachers will be in their classrooms thirty minutes before the opening of school and remain after school for such time as may be required to meet parents, prepare for the next day's work (normally 30 minutes) and to attend committee or faculty meetings. On days preceding holidays or vacations, the teachers' day shall end at the close of the pupils' day.

When J-1, and particularly Article V Subsections A and B were first adopted, Westlake was the only school operated by the Respondent, and therefore, Article V of J-1 was obviously intended to cover only Westlake. However, beginning in September 1980, which was during the life of J-1, the Respondent opened Centennial High School as a school for severely emotionally disturbed and socially maladjusted students. The Respondent apparently fixed the 8:30-3:15 workday at Centennial for 1980-81 without negotiations with the Association (T II pp. 15-18), but no charge was filed by the Asso-

tion at that time. 3/ However, due to a change in the counseling program the Respondent reduced the hours at Centennial to 8:30-2:40 beginning in September 1981. The student day at Centennial is still 8:30-2:40 and the teachers at that school are required to report to work from 8:20-3:00 (T II p. 36). The students at Centennial receive five hours 30 minutes of instruction plus 40 minutes for lunch and/or other activities (T II p. 37).

5. Pursuant to the parties' agreement in J-5 and J-6, and in an effort to reach a successor to J-1, the parties began negotiations in February 1981 for a new collective agreement, including negotiations over the hours of work. Specifically, on or about February 13, 1981, the Respondent presented the Association with its contract proposals, Exhibit J-7, in which it proposed

3/ It would be inaccurate to infer that the Association did not contemplate taking some action over the Respondent's fixing of hours at Centennial in 1980. Quite the contrary. By letter dated October 16, 1980, Exhibit J-2, John Guedes, then president, now vice president of the Association, asked Superintendent Hartnett to extend all rights of the Association contract to the professional employees at Centennial. Hartnett responded on October 23, 1980, Exhibit J-3, and indicated that he intended to extend equal rights to the Centennial personnel. However, he indicated that the work hours at Centennial differed from those at Westlake because "the administration exercised its right to determine a schedule...in light of the projected curricula for this special secondary unit." Guedes wrote Hartnett again on January 5, 1981, Exhibit J-4, expressing the Association's continued concern that the Respondent established work hours at Centennial without recognition of and negotiations with the Association. Thereafter, by letter dated January 30, 1981, Exhibit J-5, Guedes wrote Hartnett suggesting that if the Respondent recognized the Association as the majority representative for the Centennial teachers, the Association would accept the Centennial hours for the 1980-81 year and would not file a charge. Hartnett responded and accepted that offer on February 3, 1981, Exhibit J-6. Since J-1 was due to expire in June 1981 coinciding with the agreement in J-5 and J-6, the parties recognized the need to negotiate the workday and hours for 1981-82 and thereafter.

in Article V Subsections A and B the hours of work for both Westlake and Centennial (T II p. 30). Those proposals were as follows:

ARTICLE V
WORK YEAR AND HOURS

A. Change paragraph to read:

The teachers work day will be from 8:15 A.M. to 2:45 P.M.

B. Change paragraph to read:

Teachers shall be on duty in their classroom or assigned posts during the fifteen (15) minute period prior to the admission of pupils at 8:30 A.M. Pupils shall be dismissed at 2:30 P.M. Teachers shall remain in their classroom or assigned area for an additional minimum of fifteen (15) minutes or for such longer time as is necessary to meet parents, prepare for the next day's work or to attend committee or faculty meetings. On days preceding holidays or vacations, the teacher's day shall end at the close of the pupil's day.

Thereafter, on or about February 25, 1981, the Association submitted its own proposals, Exhibit CP-1, and proposed in Article V the same hours of work for both Westlake and Centennial that existed in J-1, and proposed eliminating Article V Subsection B. Their actual proposals were as follows:

Article V - Work Year and Hours

A. No change

B. Delete

Becomes B.

(new) Each teacher shall be entitled to 5 duty-free preparation periods each week, each such period to be not less than 30 minutes in length.

6. During the late winter and early spring of 1981 the parties continued to negotiate over hours and other issues but no

agreement over hours was reached. Pursuant to inquiries to the State Department of Education made by the Respondent regarding the length of the instructional day for its students, Ronald Benford, a Child Study Supervisor in the Department, informed Hartnett by letters dated March 30 and May 14, 1981, Exhibits R-2 and R-3 respectively, that the length of the school day for handicapped students must be the same as that established for all pupils. In a subsequent letter on June 8, 1981, Exhibit R-1, Benford advised Hartnett that the median length of school day for elementary schools was five hours and 18 minutes, and for secondary schools was five hours 48 minutes. He also indicated that the five hours of instruction actually provided in Westlake, though below the mean, was in compliance with state law.

After receiving the information from Benford the Respondent determined that the hours at Centennial had to be at least 30 minutes longer than the Westlake hours (T II pp. 20-24). Association Vice-President John Guedes admitted that the Respondent presented information regarding hours, contact time, and the County-wide school day average in negotiations, but no agreement on hours was actually reached during negotiations (T I pp. 39-40).

Guedes also admitted that due to the nature of the Respondent's students, i.e. their profound disabilities and handicaps, instruction time (contact time) begins when the students actually enter the classroom regardless what time formal academic instruction begins. (T I pp. 47-48). This testimony corroborates Hartnett's testimony that instruction time begins once students enter

the building. (T II p. 5).

7. Having reached impasse in negotiations over hours and other issues the parties requested a mediator, and a mediation session was held on July 13, 1981. Both Guedes, and MaryLynn Palmer, a teacher and union negotiator, were present at the mediation on behalf of the Association, and, Hartnett, and Alice Holzapfel, Vice-President of the Respondent Commission, were present on behalf of the Respondent. Palmer testified that hours of work were discussed during mediation and that the mediator told the Association during a separate session that he would recommend to the Respondent to drop its hours proposal. She then indicated that in a joint session the mediator stated that the Respondent's proposals on hours was dropped and that the Association's proposal on preparation time was dropped. (T I p. 63) Although she admitted that the Association dropped its proposal for preparation time, she stated that the Association never dropped its proposal to delete Art. V § B of J-1. (T I p. 72). She claims that after mediation she believed there was an agreement that the hours at both schools was 8:30-2:30, and that Art. V § B was entirely deleted.

Guedes testified that he did not recall discussing hours with the mediator (T I p. 41), but indicated that the mediator stated that the only open issues after mediation concerned salary and the dental plan. (T I p. 42).

Under cross-examination Palmer testified that the mediator said that the Respondent dropped its proposal for Art. V § A and B, but she said that the Association never dropped its proposal for Art. V § A, or its proposal to delete § B. (T I pp. 72-75). She

maintained that the Association traded its preparation time proposal for the Respondent dropping its hours proposal on § A and B. When asked why she thought that the Respondent's withdrawal of its hours proposal meant that it was accepting the Association's proposal, she responded "that's the procedure in negotiations." (T I pp. 75-76). However, when pressed further on that point the following exchange occurred:

> Q Well, if the Commission's proposal was withdrawn and the Association's proposal was not affiramtively accepted, would it not mean that the current, that the old terms were still in effect?
>
> A. I don't think I can answer that. The Commission's proposal was dropped and I believe that ours was accepted and it was 8:30 to 2:30. T I p. 76.

Hartnett testified that throughout the negotiations process the Respondent sought a minimum school day or instructional time of 8:30 through 2:40 at Centennial (T II p. 30). He further testified that during the mediation session the Respondent did withdraw its proposal for expansion of hours as to Westlake thinking that Westlake would remain 8:30-2:30, but did not withdraw its hours proposal as to Centennial (T II pp. 30-31, 40). He indicated that the hours for Centennial were to be discussed further, but he admitted that the Respondent erred in omitting further discussion on those hours prior to the conclusion of negotiations. (T II pp. 31, 42).

Hartnett also admitted that he knew that the Association was proposing a uniform teaching day for both schools, and, that he could not recall whether the Respondent's withdrawal of its hours proposal only as to Westlake was communicated to the Association

(T II pp. 40-41).

Holzapfel also testified that the Respondent's hours proposal was withdrawn only as to Westlake (T II pp. 58-59), and she also testified that she thought there was confusion on both sides as to what the mediator had said. (T II p. 63).

Neither the parties nor the mediator prepared a memorandum of agreement on what had been agreed to during mediation.

8. After mediation was completed the parties requested fact finding concerning salary and dental coverage. The parties met with the fact finder on September 4, 1981, and he was successful in mediating a settlement between the parties on those issues which was memorialized in a Memorandum of Agreement (Exhibit J-9) signed the same day. Part 3 of that Memorandum contained the following language.

> 3. All other agreements made by the parties remain in effect. All unresolved issues are considered dropped.

There was no language in J-9 specifically dealing with the hours of work.

Subsequent to that Memorandum the Respondent began to draft the final agreement, and the language in that draft of § A and § B of Article V (Exhibit J-10), was the same as the language for those provisions in J-1. By letter dated October 15, 1981 (Exhibit J-12), however, the Respondent's attorney notified a representative of the Association that it had mistakenly failed to note the separate teaching day at Centennial and it attached a proposal for hours at Centennial which is contained in Exhibit J-11.

The pertinent part of J-12 is as follows:

> ...During the recent round of negotiations the Commission attempted to adjust the hours of Westlake school and the Teacher's Association refused to concede. It was then our intent, at least as far as Ed [Hartnett] and I understood it, to continue with past practice and make no changes expanding teaching hours. Unfortunately, in withdrawing our proposal for the expanded hours we failed to note for the record the separate teaching day at the high school and further compounded this in the draft of the proposed language.
>
> The teachers at the high school knew of the hours when they accepted their position. I believe that the hours in fact have been reduced by one-half hour since the creation of the high school at the recommendation of the building Principal. The contract language should reflect the practice of the parties. Therefore, I have revised paragraph A to reflect current and past practice. Please let me know in writing whether or not the Association will accept the same.

The Respondent's hours proposal contained in J-11 is as follows:

> Article V
>
> A. The teachers' workday at Westlake school will be from 8:30 a.m. to 2:30 p.m. and at Centennial High School from 8:30 a.m. to 3:00 p.m.
>
> B. (Same as contained in J-1)

No evidence was introduced at hearing to show that the Association responded in writing to J-11. As a result of their disagreement over the hours clause the parties never signed a successor agreement to J-1 for 1981-1983, however, since that was the only unresolved issue, those items that had been agreed upon, including salary, were implemented. (T I pp. 58-59).

ANALYSIS

The Hours Clause

The primary issue in this case is whether there was an

agreement between the parties on the hours clause during the mediation process. Any decision on that issue, however, is complicated because the mediator did not testify, [4/] and because no written memorandum of agreement was prepared at the end of the mediation session. Nevertheless, the undersigned has considered all of the evidence presented by the parties and finds that, except for the Westlake hours, no meeting of the minds was reached over the hours of work (Article V, § A and B) during the entire negotiations-mediation-fact-finding process. The undersigned cannot credit the Association's contention that the Respondent dropped its proposals for Art. V, § A and B in exchange for the Association dropping its proposal for new duty-free preparation time. Such an exchange, after the Respondent had already clearly expressed an educational need for a longer student day at Centennial, simply does not make sense. In addition, even if the Respondent dropped its proposal for Art. V, § A as to both schools, the Association did not prove by a preponderance of the evidence that the Respondent dropped its proposal for Art. V, § B, or that it actually accepted the Association's proposals for either § A or B.

The Association's contention that the Respondent dropped its proposal for Art. V § A and B was based entirely upon what Palmer and Guedes believe the mediator said, and upon the Association's interpretation of those remarks. An examination of the facts, however, raises doubt as to what the mediator said, and certainly raises speculation as to the meaning of his remarks.

4/ The law is well settled that it would be inappropriate, and destructive to the labor relations process to require mediators to testify concerning what occurred and what was said during their mediation sessions. In this case neither party even attempted to require the mediator to testify.

For example, Palmer testified that regarding the length of day "[the mediator] said the [Respondent's] proposal was dropped and he said that also prep time was dropped." However Guedes, the Association's own witness, did not recall discussing hours with the mediator, and Holzapfel, who was also present at the mediation, testified that there was confusion on both sides as to what the mediator said. Given the above analysis, and noting the lack of any written agreement concerning hours, the undersigned cannot rely upon Palmer's or Guedes' hearsay recollection of the mediator's remarks.

Notwithstanding the above analysis, even if the mediator made the remarks attributed to him by Palmer and Guedes, those remarks are subject to a variety of interpretations. Palmer never claimed that the mediator said that the Respondent specifically dropped its proposal for Art. V § B, or that it accepted the Association's proposal for either § A or B. In addition, given Hartnett's and Holzapfel's testimony that the Respondent withdraw its hours proposal only as to Westlake, the mediator may have misunderstood the Respondent's proposal, or at the very least, since the Respondent was actually proposing a <u>decrease</u> in the Centennial hours, he may simply have meant that the Respondent dropped its proposal to increase hours at Westlake. The point is, the evidence does not substantiate the Association's contention. Similarly, even if the mediator said that the only open issues after mediation concerned salary and dental coverage, that, by itself, is not an indication as to what agreement, if any, the parties may have reached regarding hours.

The Association seems to overlook the fact that the hours at Centennial were 8:30-3:15 and were agreed upon by the Association as such through the interaction of J-5 and J-6 which occurred during the life of J-1. Since the Centennial hours were agreed upon during the life of J-1, it is reasonable to infer that Art. V, § A of J-1 was modified by the parties to include the hours at Centennial as agreed to in J-5 and J-6. Thereafter, the Respondent in J-7, by making one hours proposal for both schools, actually proposed a decrease (emphasis added) in the Centennial hours, an increase in the Westlake hours, and a decrease in the time required in § B in that, unlike the requirement in Art. V § B of J-1, the duty time required in Art. V § B of J-7 would be only 15 rather than 30 minutes, and was already included in the total workday proposed in Article V § A of J-7. 5/

The Association rejected that entire proposal and in CP-1 proposed 8:30-2:30 for both schools, 6/ and to delete old § B and add preparation time instead. Soon thereafter the parties reached impasse and entered mediation.

5/ The evidence herein supports a finding that the parties read Art. V, § B of J-1 as a modifier to Art. V § A of J-1 in that the teachers could be required to be in school up to 30 minutes before school and up to 30 minutes after school which could add as much as one hour to the hours already listed in Art. V § A of J-1. However, in reality the Respondent never exercised Art. V § B to its maximum, but it did require teachers to report at 8:20 in both schools, and to stay at Centennial until 3:00 beginning in the 1981-82 school year.

In J-7, the Respondent sought to change the previous practice so that the time required in Art. V § B would already be included in Art. V § A.

6/ The language in the Association's actual proposal for Art. V § A of CP-1 stated simply "No change." In doing so, however, the Association was not seeking to keep the Centennial hours at 8:30-3:15. Rather, the Association intended to apply the time set forth in J-1, 8:30-2:30, as its offer for both schools. The Respondent does not dispute the Association's assertion that Art. V § A and § B of CP-1 was intended to apply to both schools.

When one studies the parties' respective proposals it becomes obvious that the Respondent's proposal to increase the Westlake hours and the Association's proposal seeking new or additional preparation time are of an equivalent nature -- seeking something more than that which existed in J-1. However, in the Respondent's other relevant proposals in J-7 it actually sought a decrease in the Centennial hours and a decrease in the time required in § B. Given this analysis of the parties' proposals the undersigned credits the Respondent's claim that it dropped its proposal in Art. V, § A of J-7 only as to Westlake, since that was the only proposed increase, in exchange for the Association dropping its request for new preparation time. 7/ Apparently the Association incorrectly inferred from the mediator's remarks that the Respondent dropped its proposals for § A and B. The Respondent, however, did not drop § B as to either school or § A as to Centennial, thus, the parties did not have a meeting of the minds on that issue.

Moreover, the only support for arguing that the Respondent accepted the Association's hours proposal was Palmer's testimony that she thought such had occurred. The undersigned cannot credit her testimony in that regard and believes it was nothing more than a mere guess which was not supported by reliable evidence. Palmer first claimed that the Respondent's withdrawal of its hours proposal meant it was accepting the Association's proposal. That is not necessarily an accurate description of the negotiations process. One party does not just drop its proposal on an important topic

7/ The undersigned recognizes that the Association, because of its incorrect interpretation of the mediator's remarks, did believe that it had an agreement with the Respondent as to the hours of work for both schools. However, for the reasons stated hereinabove, the evidence does not support a finding that the Respondent dropped its Art. V § A and B proposals in their entirety or that the Association's proposals were agreed upon by the Respondent.

without a realistic quid pro quo. If the Respondent dropped its proposal for longer hours at Centennial and agreed to 8:30-2:30 for both schools in exchange for keeping § B the same as it was in J-1, that could have been a reasonable quid pro quo and made sense, because it would have been consistent with the Respondent's need for longer hours at Centennial since the Respondent could still have required the Centennial teachers to remain until 3:00 p.m. However, the Association's contention that the Respondent traded away its proposed increase in longer hours at Westlake, its need for hours beyond 2:30 at Centennial, and § B, in exchange for the Association dropping its request for additional preparation time makes no sense and is hardly a reasonable quid pro quo since it would probably mean that the Respondent would be unable to provide five hours and 30 minutes of instructional time at Centennial.

Palmer also testified that she "believed" that the Association's hours proposal was accepted, but she offers no independent evidence to support that statement. In formulating that "belief" she was apparently relying upon the mediators remarks, and the undersigned has already determined that those remarks were subject to different interpretations and cannot be relied upon to prove that the Respondent accepted the Association's hours proposal.

The undersigned also finds that part 3 of J-9 which states that outstanding proposals would be dropped, does not apply to the hours clause herein. The Association believed that the hours issue had been settled, and the Respondent (Hartnett), although admitting that hours at Centennial needed further negotiations, had forgotten to continue negotiations on that issue. As a result, neither party

intended to agree in J-9 to drop their respective hours proposals.

Having concluded that no agreement was reached with respect to hours, the parties may continue to negotiate concerning hours in both § A and § B of Article V.

The Unfair Practice

Although no agreement regarding hours was reached herein except as to Westlake, it was the Respondent's totality of conduct that resulted in the confusion and failure to reach agreement over hours which amounted to a failure to negotiate in good faith in violation of 5.4(a)(1) and (5) of the Act. 8/

First, Hartnett admitted that once the Respondent withdrew its proposal to increase hours at Westlake further negotiations were necessary regarding the hours at Centennial. However, the Respondent, even if unintentionally, nevertheless, unlawfully failed to continue negotiations on that subject at that time. Even the Respondent's attorney admitted in J-12 that the Respondent failed to finalize the hours at Centennial. The Association did not unlawfully fail to continue negotiations at that time because it was unaware that further negotiations on hours was necessary because it thought, although incorrectly, that an agreement had been reached, and even if the mediator was partly at fault for the confusion, the Respondent clearly knew and admitted that further negotiations were necessary. Had the Respondent reminded the mediator of the need to continue negotiations over the Centennial hours the matter may have been resolved at that stage, or could have been submitted to

8/ It is an accepted labor law practice to draw an inference from the evidence and an employer's conduct that the employer did not bargain in good faith. See, J.P. Stevens & Co. v. NLRB, 104 LRRM 2573 (4th Cir. 1980); Televisision Wisconsin, 224 NLRB No. 96, 93 LRRM 1494 (1976).

fact finding. The Respondent's failure to continue negotiations over hours at that time, therefore, resulted in the matter now placed before the Hearing Examiner, and although its failure may have been unintentional, it was, nevertheless, a failure to negotiate in good faith.

Second, having failed to complete the negotitions over hours at Centennial during mediation, the Respondent made matters worse by not notifying the Association until three months after the mediation, and over a month past the fact finding/mediation session, that a problem over hours existed. But to further compound the problem the Respondent proposed in J-11, an entirely new and increased hours proposal for Centennial.

In J-7 the Respondent proposed the hours of 8:15-2:45 for both schools which included the 15 minutes required before and after school in § B. Assuming that Westlake was reduced to 8:30-2:30, the Respondent's proposal for Centennial was still at 8:15-2:45 as a maximum day inclusive of § B. But in J-11 the Respondent changed its proposal for Centennial to be 8:30-3:00 exclusive of the § B requirements. In fact, the Respondent in J-11 proposed the same § B as previously existed in J-1, and the evidence shows that Art. V § B of J-1 was read as a modifier to § A giving the Respondent the right to require teachers to report up to 30 minutes early and leave up to 30 minutes late. Consequently, the Respondent in J-11 was actually proposing that the potential maximum day for Centennial teachers be from 8:00-3:30. 9/

9/ Historically the Respondent has not exercised Art. V § B to its maximum and has only required ten minutes prior to school and 20 minutes after school. But even if those times are applied to the Respondent's proposal for Centennial in Art. V § A of J-11, the result would be 8:20-3:20 as the maximum day at Centennial which would still be 30 minutes more than the Respondent's hours proposal for Centennial in Art. V of J-7.

Although Art. V § A and B of J-7 was proposed prior to the time the Respondent determined that it needed five hours and 30 minutes of instructional time at Centennial, the facts show that the actual instructional hours at Centennial in the fall of 1981 which met the five hours and 30 minutes requirement were 8:30-2:40 with a reporting time of 8:20-3:00. In either case, the hours proposed by the Respondent for Centennial in J-11 in October 1981 were greater than the previously proposed or already existing hours. The undersigned believes that such conduct and such a regressive proposal by the Respondent at that time could only have a detrimental and devisive effect to the negotiations process and is evidence of a lack of good faith negotiations. 10/

The undersigned finds that by proposing in J-11 a greater amount of hours for Centennial than it had previously proposed, or than actually existed in the fall of 1981, the Respondent was engaged in illegal surface bargaining in that it was not seriously negotiating towards an agreement over the Centennial hours which, in and of itself, is a failure to negotiate in good faith. 11/ If the Respondent in October 1981 had reiterated its hours proposal from J-7, or if it had proposed 8:30-2:40 (for Centennial) with a reporting time of 8:20-3:00, it would have at least shown some consistency with

10 See NLRB v. Pacific Grinding Wheel Co., 98 LRRM 2246 (9th Cir. 1978), wherein the Court upheld an NLRB determination that an employer engaged in bad faith bargaining where its proposals became more and more regressive.

11/ An employer engages in surface or bad faith bargaining when it engages in negotiations or makes proposals with no intent to reach agreement, or where its proposals are intended to frustrate the negotiations process. See, Crystal Springs Shirt Corp., 229 NLRB No. 10, 95 LRRM 1038 (1977); Shaw College, 232 NLRB No. 33, 96 LRRM 1473 (1977).

its prior actions. However, since the Association had already voiced its objection to the hours proposal in J-7, the Respondent had to know that its hours proposal in J-11, which potentially required more reporting time than proposed in J-7, would be totally unacceptable to the Association. Therefore, by making that proposal at that time it can only be interpreted that the Respondent was delaying and frustrating the negotiations process. 12/

Furthermore, the undersigned finds that in view of the Respondent's failure to continue negotiations over hours during mediation, and in view of its hours proposal in J-11, its subsequent offer to negotiate hours for Centennial in October 1981 was too late and too little to satisfy its negotiations obligation. The Respondent cannot be permitted to benefit by its own mistakes. It cannot in October offer to do what it should have done in July without suffering the consequences, and then claim that the Association failed to accept its offer to negotiate. Once the Respondent failed to do what it was obligated to do (finish negotiations in July over hours at Centennial) it violated the Act. It then compounded the violation by making an unreasonable, and, under the instant circumstances, a regressive proposal. Consequently, the Respondent was not able to extricate itself from having committed a violation in July by subsequently offering to negotiate in October.

Finally, the Respondent in its argument on the record and in its post-hearing brief, seems to suggest that because it has

12/ Even if the Respondent only submitted its proposal for increased hours in J-11 as an initial bargaining position it was still a violation of the Act. Where an employer submits a proposal for purposes of discussion only with no expectation or intent that it be accepted, it is engaging in bad faith negotiations. Shaw College, supra.

determined that students at Centennial must have five hours 30 minutes of instructional time, that the Association cannot negotiate anything other than 8:30-2:40 as the instructional hours. The Respondent fails to differentiate between its managerial right to determine the amount of instructional time needed at Centennial, and the Association's undisputed right to negotiate the hours of work both as to time and total hours worked.

The New Jersey Supreme Court has held that work hours, including a teacher's workday, are mandatorily negotiable. See Englewood Bd/Ed v. Englewood Teachers Assn., 64 N.J. 1 (1973); Galloway Twp. Bd/Ed v. Galloway Twp. Assn. Ed. Sec., 78 N.J. 1 (1978); Galloway Twp. Bd/Ed v. Galloway Twp. Ed/Assn, 78 N.J. 25 (1978); and State v. State Supervisory Employees Assn., 78 N.J. 54 (1978). The Commission in a subsequent decision, In re Weehawken Bd/Ed, P.E.R.C. No. 81-17, 6 NJPER 391 (¶ 11202 1980), held:

> It is well settled that the length of a school district employee's workday is a term and condition of employment and, as such, is mandatorily negotiable notwithstanding a board of education's proffered justification for changes in working hours. 6 NJPER at p. 392.

In accordance with the above decisions there is no impediment herein to the Association's right to negotiate its hours of work at Centennial.

Accordingly, the undersigned finds that the Respondent failed to negotiate in good faith with the Association regarding the hours of work at Centennial and with regard to Art. V § B of the proposed agreement.

Based upon the entire record the Hearing Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively 5.4(a)(1), when it failed to negotiate in good faith with the Association regarding the hours of work.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from refusing to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly, by failing to complete negotiations over hours of work during the mediation and/or fact-finding process, and by engaging in surface bargaining by offering proposals not seriously intended to reach agreement.

B. That the Respondent take the following affirmative action:

1. Forthwith engage in good faith negotiations with the Association regarding the hours of work at Centennial High School and for the language, if any, to be used in Art. V § B of the parties' collective agreement for 1981-1983.

2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative

shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

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

C. That the Association's request for additional compensation for teachers, and its request for attorney fees and cost of suit be denied. 13/

Arnold H. Zudick
Hearing Examiner

Dated: August 16, 1983
Trenton, New Jersey

13/ Since there was no agreement herein regarding the Centennial hours there is no basis upon which to order that Centennial teachers receive additional compensation for the longer workday at that school. The Association's request for additional compensation, however, may be negotiated with the Respondent at the start of negotiations over the Centennial hours.

In addition, even if the Centennial hours had been agreed upon as 2:30-8:30, there would still be no basis upon which to award additional compensation to the Centennial teachers since Art. V § B had not been resolved leaving open the length of the teachers reporting day.

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, and

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly, by failing to complete negotiations over hours of work at Centennial High School, and by making proposals not seriously intended to reach agreement.

WE WILL forthwith enter into good faith negotiations with the Association concerning the hours of work for 1981-83 particularly as to Centennial High School.

UNION COUNTY EDUCATIONAL SERVICES COMMISSION

(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.