P.E.R.C. NO. 99-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-290

PISCATAWAY TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, in a matter on remand from the Superior Court of New Jersey, Appellate Division, orders the Piscataway Township Board of Education to negotiate with the Piscataway Township Education Association in response to the Association's February 14, 1994 demand to negotiate over the impact of its decision to cancel the scheduled spring recess to make up lost school days due to a harsh winter. The Association had filed an unfair practice charge seeking an order restoring the spring recess or granting employees with non-refundable tickets permission to continue with their plans; making unit employees whole for any economic losses; and requiring the posting of a notice. A Hearing Examiner recommended dismissing the Complaint.

The Association appealed and the Court reversed and remanded. With respect to the first issue, the Court agreed with the Hearing Examiner that the Board was not obligated to negotiate over its decision to cancel the spring recess and reopen schools on those days. With respect to the second issue, the Court determined that negotiations over all impact issues arising from calendar changes necessitated by weather-related closings were not precluded. The Court remanded the case to the Commission to determine whether negotiations over the specific issues raised by the Association would significantly encroach upon the Board's prerogative to change the calendar.

The Commission finds that the Board did not have a contractual right to refuse to negotiate over any impact issues. The Commission further finds that the negotiations over the issues presented in the Association's demand to negotiate would not have significantly encroached upon the Board's right to change the calendar.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, David B. Rubin, attorney

For the Charging Party, Klausner & Hunter, attorneys (Stephen E. Klausner, of counsel)

DECISION

On January 14, 1998, the Appellate Division of the Superior Court reversed a Hearing Examiner's decision and remanded the case to this Commission for reconsideration in light of the legal standard set forth by the Court. Before addressing the issues on remand, we will recapitulate the procedural history.

This case began when the Piscataway Township Education Association filed an unfair practice charge against the Piscataway Township Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq., specifically 5.4a(1) and (5),[1/] when, as a result of a harsh winter, it announced that it was cancelling the scheduled spring recess and when it refused a demand to negotiate over issues arising from the impact of the calendar change on negotiations unit members. The charge sought an order restoring the spring recess or granting employees with non-refundable tickets permission to continue with their plans; making unit employees whole for any economic losses; and requiring the posting of a notice.

On July 1, 1994, a Complaint and Notice of Hearing issued. The Board did not file an Answer.

On October 12, 1995, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On May 2, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 96-22, 22 NJPER 228 (¶27119 1996). With respect to the aspect of the Complaint contesting the decision to cancel the spring recess, he found that the Board had a prerogative to change the school calendar and a contractual right to reschedule teacher work days. With respect to the aspect of the Complaint contesting the rejection of the demand to negotiate over impact

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1/ These provisions 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 ...."

issues, he concluded that the impact of weather-related school calendar changes on employees was not negotiable given Edison Tp. Bd. of Ed., NJPER Supp.2d 66 (¶47 App. Div. 1979), rev'g P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978), certif. den. 82 N.J. 274 (1979).

Neither party filed exceptions. The Hearing Examiner's report became a final decision pursuant to N.J.A.C. 19:14-8.1.

The Association appealed and the Court reversed and remanded. __ N.J. Super. __ (App. Div. 1998). With respect to the first issue, the Court agreed with the Hearing Examiner that the Board was not obligated to negotiate over its decision to cancel the spring recess and reopen schools on those days. With respect to the second issue, the Court determined that Edison did not preclude negotiations over all impact issues arising from calendar changes necessitated by weather-related closings. The Court concluded that under Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980), and City of Elizabeth and Elizabeth Fire Officers, 198 N.J. Super. 382 (App. Div. 1985), a specific impact issue involving a term and condition of employment may be mandatorily negotiable so long as, on balance, negotiations over that issue would not significantly interfere with the related prerogative. The Court remanded the case to the Commission to determine whether negotiations over the specific issues raised by the Association would significantly encroach upon the Board's prerogative to change the calendar.

The Board asked the Appellate Division to reconsider its decision. The Board asserted that the Court's negotiability ruling should be applied prospectively only and that the Hearing Examiner had ruled that it had a contractual right to refuse to negotiate over any impact issues.

The Court granted reconsideration, but rejected the Board's arguments on the merits. With respect to the prospectivity argument, the Court stated that its opinion reiterated Woodstown-Pilesgrove's viability and was not a clear break with past precedents; an order to negotiate, if issued, would simply place the Board in the same position it would have been in had Woodstown-Pilesgrove been observed initially; and the Association was entitled to the benefit of its labors. With respect to the contractual question, the Court held that the record did not show that the Hearing Examiner had ruled on the Board's claimed contractual right to refuse to negotiate over impact issues. The Court added, however, that any outstanding contractual issue should be addressed on remand.

The Board petitioned for certification. The parties asked that this case be held pending disposition of that petition.

On June 17, 1998, the Supreme Court denied the Board's petition for certification. __ N.J. ___ (1998). We then permitted the parties to file supplemental submissions.

On August 27, 1998, the Board filed a submission asserting that the parties' contract permitted it to make the changes without

negotiating over impact issues; alternatively, the hearing should be reopened to take evidence of the parties' intent on the contractual issue; negotiations should not be required over the impact of mid-term calendar changes needed to ensure 180 days of school; and monetary relief should be denied since the Board relied on Edison in refusing to negotiate. On September 2, the Association filed a statement relying upon the record.

We begin with the issue of whether the Board had a contractual right to refuse to negotiate over any impact issues. We hold it did not.

XVII is entitled School Calendar. It provides:

> A. School Calendar
>
> The Superintendent shall prepare the annual school calendar consistent with N.J.S.A. 18A-25.3 and other pertinent regulations of the State Board of Education. The Superintendent shall meet and confer with the representative of the Association to discuss distribution of holidays.
>
> B. Work Year
>
> The total in-school work year for teachers shall not exceed one hundred eighty-six (186) scheduled work days which shall be reduced by emergency closing except that teachers may be required to report for work during unscheduled emergency closing resulting from student disruptions or situations which require the participation of teachers in the solution, problems or planning of procedures dealing with the emergency.
>
> C. State Aid
>
> In the event of any emergency, or unusual reason notwithstanding anything contained in the Article to the contrary, the Board may require a teacher to work in order to meet the minimum requirements of the law to receive state aid.

This article permitted the Board to set a teacher work year between 180 days, the minimum number of school days under State laws, and 186 days and to change the school calendar and teacher work days when necessary to ensure 180 days of instruction. The Hearing Examiner thus found that the Board had a contractual right to change the calendar and to reschedule teacher work days during spring recess.

The Hearing Examiner, however, did not address the separate issue (not litigated before him) of whether the Board also had a contractual right to refuse to negotiate over the adverse effects of the calendar change on employees who relied on the announced calendar and to instead determine leave of absence adjustments unilaterally. See Edison, 4 NJPER at 152. Nothing in the contract addresses that issue. See Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). Neither the contractual language nor the testimony indicates that the parties' attention had been focussed on impact issues or that a negotiated waiver had resulted.2/

We next address whether negotiations over the issues presented in the Association's demand to negotiate would have significantly encroached upon the Board's right to change the

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2/ On remand, the Board asks us to reopen the hearing so it can introduce additional evidence. We deny that request. The Board has not specified what evidence it would present, how that evidence would support its contract defense, and why that evidence could not have been presented at the hearing.

calendar. Applying Woodstown-Pilesgrove's balancing test to the particular issues and circumstances of this case, we hold that negotiations would not have had that effect and that the Board should have negotiated given the demand.

The Board had a prerogative to set and change the school calendar. When it set the calendar, it announced to the public and its employees that there would be a spring recess and it included an express and unconditional statement in the calendar that any required make-up days would begin on June 21 and continue as needed. Several employees allegedly made travel plans for the announced spring recess and paid non-refundable trip deposits. When the Board later scheduled make-up days during spring vacation days, its superintendent recognized that this deviation from the announced calendar might cause some employees to suffer "irreparable harm" and "severe consequences" and that ways should be explored to "ease the pain." The superintendent then declared that "special consideration" would be given to personal leave and unpaid leave requests by employees suffering hardships and invited employees to submit their requests to the Director of Personnel. Several requests were approved, including some situations where ticket payments could not be refunded.

The Association sought to negotiate collectively over the concerns of negotiations unit members rather than have the employer accommodate individual claims outside the negotiations process. In its demand to negotiate, the Association asserted that employees had

relied on the original calendar and made vacation plans with non-refundable costs and these employees had been told that they would be docked pay for each day lost if they did not attend school and did not have personal days to use. The Association further asserted that the calendar change would cause employees to suffer financial losses and would result in employment conditions being changed. Having made the required demand to negotiate over specified issues, Town of Kearny, P.E.R.C. No. 91-42, 16 NJPER 591 (¶21259 1990), the Association asked the Board to contact it immediately because it believed the matter could be resolved easily.

The Board declined to negotiate. Instead, the Director changed the employer's practice of prohibiting employees from receiving time off before or after a holiday and granted "special dispensations." He also granted leaves to some employees who had rearranged their vacation plans to take fewer days off. The Director dealt with employees individually and did not negotiate with the Association over any personal leave issues.

On balance, and under all the circumstances of this case, we believe that the Board had a duty to accept the demand to negotiate. We have fully considered the difficulties facing the administration as well as its employees during the harsh winter of 1994. The Board had a unilateral right to change the school calendar independent of and prior to any required impact negotiations. We add that the administration had the correlative

right to ensure that it had sufficient staff at work on the rescheduled school days to teach the students. Local 195, IFPTE v. State, 88 N.J. 392, 412 (1982). However, the right to change the calendar and to set staffing levels did not necessarily mean that nothing could be done to alleviate the "severe consequences" employees faced as a result of that decision. Contrast In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. denied, 81 N.J. 292 (1979) (reduction-in-force necessarily meant that the workload of the remaining employees would have to be increased). In fact, the administration sought to "ease the pain" of its employees and determined that certain personal leave and unpaid leave accommodations could be made.

While we commend the administration's desire and efforts to minimize the harm suffered by its employees, we believe that its approach on accommodations should have been addressed through negotiations rather than through unilateral action. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978) (unilateral changes in employment conditions is antithesis of Legislature's labor relations goal).3/ We stress that employees may have relied on the unconditional assurance in the original school calendar that make-up days would be scheduled in June and that assurance may have contributed to the hardships faced by

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3/ Personal leave policies are mandatorily negotiable. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Barnegat Tp. Bd. of Ed., P.E.R.C. No. 84-123, 10 NJPER 269 (¶15133 1984).

employees when the spring recess was cancelled. We also note that the employer's practice of prohibiting employees from receiving time off before or after a holiday was unilaterally changed rather than addressed through negotiations as it could have been. Given these circumstances, we conclude, on balance, that the employees' interests in negotiating over the personal and unpaid leave issues identified in the demand to negotiate outweighed the employer's interests in not negotiating and that such negotiations would not have significantly encroached on the Board's unilateral decision, already taken, to change the school calendar. Accordingly, we hold that the Board violated 5.4a(5) and, derivatively 5.4a(1), by rejecting the demand to negotiate.

We now address the appropriate remedy. At hearing, the Association initially sought to prove that individual unit members sustained financial losses due to the calendar change. The parties ultimately agreed that such discussion was premature and that it should be dealt with only should a violation of the Act be found. We have concluded that the Board violated the Act by refusing to negotiate over the issues raised by the Association. However, the remedy for such a violation does not require any further evidence on individual financial losses since it would be inappropriate for us to order a monetary remedy.

Unfair practice remedies seek to restore the status quo before an unfair practice and to make the injured party whole. When an employee has been illegally discharged, the employer has been

ordered to reinstate the employee and pay lost wages. See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1, 8-9 (1978). When an employer has unilaterally changed an employment condition conferring an economic benefit, the employer has been ordered to restore the benefit, make employees whole for lost monies, and negotiate before changing the benefit again. See, e.g., State of New Jersey (Dept. of Corrections) v. CWA, 240 N.J. Super. 26, 29 (App. Div. 1990). When an employer has not taken away an economic benefit and has refused to negotiate over an employment condition, the employer has been ordered to negotiate with the majority representative over that issue and no monetary remedy has been imposed. See, e.g., Bloomfield Bd. of Ed., P.E.R.C. No. 93-95, 19 NJPER 242 (¶24119 1993), aff'd 20 NJPER 324 (¶25165 App. Div. 1994); Morris Cty., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982) aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984); Edison, 4 NJPER at 303-304.[4/] The Commission cannot make an agreement for the parties. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 338 (1989). See generally Hardin, The Developing Labor Law, 1844, 1854-1856 (3d ed. 1992).

Restoration of the status quo requires putting the parties back in the positions they would have been in had no unfair practice been committed. In this case, that means that the Board must respond affirmatively to the Association's request to negotiate and negotiate in good faith.

4/ In Edison, we specifically rejected the monetary remedy sought here.

Given the procedural history and the nature of the violation, we will not order the Board to post a notice.

ORDER

The Piscataway 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 to them by the Act, particularly by refusing to negotiate with the Piscataway Township Education Association in response to its February 14, 1994 demand to negotiate.

2. Refusing to negotiate with the Association in response to its February 14, 1994 demand to negotiate.

B. Take this action:

1. Negotiate with the Association in response to its February 14, 1994 demand to negotiate.

2. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioners Klagholz and Wenzler were not present.

DATED: October 26, 1998
Trenton, New Jersey
ISSUED: October 27, 1998

H.E. NO. 96-22

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

In the Matter of

PISCATAWAY TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-94-290

PISCATAWAY TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found the Piscataway Twp. Bd. Ed. did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by changing the school calendar necessitated by weather related emergencies, or by refusing to negotiate over the impact of the changes on unit members.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 96-22

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

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Charging Party.

Appearances:

For the Respondent, David B. Rubin, Esq.

For the Charging Party, Klausner & Hunter, attorneys
(Stephen E. Klausner, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 28, 1994, the Piscataway Township Education Association/NJEA filed an unfair practice charge against the Piscataway Township Board of Education alleging that the Board violated subsections 5.3, and 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] The

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1/ Subsection 5.3 of the Act provides in pertinent part that:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the

Footnote Continued on Next Page

Association specifically alleged that the Board violated subsections 5.4(a)(1) and (5) of the Act by unilaterally, and arbitrarily, changing the school calendar, failing to comply with the policy and practice relating to make-up days and changing the calendar, and refusing to negotiate with the Association.

The Association also alleged the Board violated subsection 5.3 of the Act because it allegedly changed rules governing working conditions without negotiations.

The Association sought an order restoring Easter vacation, or allowing employees with non-refundable tickets to continue their plans, or, requiring the Board to make employees whole for any economic losses they suffered due to the calendar change.

A Complaint and Notice of Hearing issued on July 1, 1994. A hearing was held on October 12, 1995.[2/] Both parties filed post-hearing briefs by January 19, 1996.

Based upon the entire record, I make the following:

1/ Footnote Continued From Previous Page

majority representative before they are established.

Subsections 5.4(a)(1) and (5) of the Act 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."

2/ The transcript will be referred to as "T".

FINDINGS OF FACT

1. The Board and Association were parties to a 1992-95 collective agreement which contained the following School Calendar clause in Article 17 (J-1).

> XVII. SCHOOL CALENDAR
>
> A. School Calendar
>
> The Superintendent shall prepare the annual school calendar consistent with N.J.S.A. 18A-25.3 and other pertinent regulations of the State Board of Education. The Superintendent shall meet and confer with the representative of the Association to discuss distribution of holidays.
>
> B. Work Year
>
> The total in-school work year for teachers shall not exceed one hundred eighty-six (186) scheduled work days which shall be reduced by emergency closing except that teachers may be required to report for work during unscheduled emergency closing resulting from student disruptions or situations which require the participation of teachers in the solution, problems or planning of procedures dealing with the emergency.
>
> C. State Aid
>
> In the event of any emergency, or unusual reason notwithstanding anything contained in the Article to the contrary, the Board may require a teacher to work in order to meet the minimum requirements of the law to receive state aid.

2. The original 1993-94 school calendar (J-13) included 186 work days for teachers. There were 20 scheduled work days in January with January 17 scheduled off for Martin Luther King holiday; 18 scheduled work days in February with February 18 and 21

scheduled off for mid-winter recess; 19 scheduled work days in March with March 28, 29, 30 and 31 scheduled off for spring recess; 19 scheduled work days in April with April 1 and 4 scheduled off for spring recess; 21 scheduled work days in May with May 30 scheduled off for Memorial Day; and, 14 scheduled work days in June with the last work day scheduled for Monday, June 20.

3. After June 20, there were eight more weekdays remaining in June. A statement at the bottom of J-13 provided that:

> If schools are closed for inclement weather, make-up sessions will begin on June 21st and continue as needed.3/

Three inclement weather work days had already been included in J-13 (T38).

4. The winter of 1993-94 was extremely harsh. The Piscataway schools were closed for a total of twelve days. There were eight snow days in January 1994: January 7, 13, 18, 19, 20, 21, 26 and 28; three snow days in February: February 9, 11 and 23; and one snow day in March: March 3 (J-15). Although three snow days had been built into the calendar, the Board still needed to make up 9 days.

5. During January 1994, as more and more school days were being lost to weather emergencies, Superintendent Philip Geiger, Director of Personnel Gordon Moore, and others, were discussing how

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3/ The school calendars for 1991-92 (J-12); 1989-90 (J-11); 1988-89 (J-10); and 1987-88 (J-9), contained similar language regarding make-up sessions in June.

to make up the lost school days. They considered extending school beyond the June 20th closing date but there were several problems with that option. First, there were only eight days available in June and it might not be enough time if more snow days were taken in late January, and February and March. Second, graduation had to be scheduled in June well in advance to allow for adequate planning. Third, many parents and other citizens opposed extending school to the end of June. Fourth, the schools were not air-conditioned and there could be many hot days in late June (T41-T42). The Superintendent also considered using some of the mid-winter, and spring recess days as make-up days.

6. By January 28, 1994, the Board had already lost eight days due to snow and ice. On that date Superintendent Geiger sent a letter (J-3) to parents and guardians indicating that the last five days had to be made up. He indicated he would recommend the Board eliminate school holidays scheduled for February 18 and 21, and April 4, and use those days as make-up days, with additional make-up days to be added to the end of the school year. He noted that his recommendation had been developed in consultation with the leaders of the Districts' parent organizations, but he invited additional input be provided to the Board.

7. That same day Geiger sent a copy of J-3 to faculty and staff members as part of another document (J-4). In J-4, Geiger advised the employees of his recommendation but asked for their thoughts. He was interested in knowing whether his recommendation

would cause anyone "irreparable harm". He noted that if the three holiday days were used, the two remaining days (of the original five days that needed to be made up) would be added at the end of the year.

8. Association President Giovanne Musto received a copy of J-3 and J-4 on or about the time they issued (T32), but neither Superintendent Geiger, nor any Board member, contacted, discussed or negotiated with the Association over the scheduling of the make-up days (T18, T54-T55).

9. A Board meeting was held on Wednesday, February 2, 1994, at which the make-up days and school calendar changes were discussed and decided. Association President Musto was aware that Geiger's recommendation on make-up days would be considered at that meeting, but Musto did not make a demand to negotiate over the make-up days prior to that meeting (T34).

10. At the meeting the Board broadened Geiger's recommendation and decided to open school on February 18 and 21, March 28, 29 and 30; and April 4 as make-up days. Geiger informed all the employees of the Board's decision by letter of February 4, 1994. In J-5, Geiger also advised the employees that those who would suffer "severe consequences" would be given special consideration to use personal or unpaid leave. Office, custodial and maintenance employees were told that in place of April 4, they would be given another floating holiday. Finally, Geiger advised the employees that if no other school days were lost, school could

end on June 17, instead of June 20, because of the three snow days built into the schedule. The Board did not negotiate with the Association over the calendar changes, or over the impact of the changes on unit members (T24, T57).

11. Pursuant to Geiger's offer in J-5 to consider special personal leave circumstances during the previously scheduled mid-winter or spring recesses, several requests were approved for vacations and use of personal leave. They included situations where tickets could not be refunded, and where leave without pay was granted (T46-T48). The Board did not negotiate with the Association over the decision to grant the special requests (T57).

12. On February 8, 1994, Geiger sent a letter to parents and guardians (J-6) informing them of the Board's decision to conduct school on February 18 and 21, March 28, 29 and 30, and April 4 as make-up days.

13. In a February 14, 1994 letter to the Board (J-7), Musto, on behalf of the Association, made a demand to negotiate the impact of the calendar changes on Association membership. Musto noted that the calendar changes were made without consultation with the Association, it constituted a change in terms and conditions of employment, and the impact would cause financial loss to some

individuals.[4/] The Board neither negotiated, nor met and confered with Musto regarding the changes (T20-T21).

14. On February 18, 1994, Geiger sent Musto a response to J-7 (J-8), informing him that the Board was not required to negotiate over the make-up day scheduling, but he offered to informally discuss the matter.[5/]

4/ J-7 provides: The Association has received many calls from its membership reporting hardships caused by the Board of Education's decision to alter the 1993-94 school calendar to accommodate the "extraordinary number" of inclement weather days.

Please be advised that the Association is issuing a "Demand to Negotiate" the impact of the calendar changes on the PTEA membership. The calendar adopted by the Board of Education stated that any days schools were closed due to inclement weather would be made up at the end of the year. Relying, on the Board's calendar many of our members made plans to leave the area on these "vacation days".

Members having plans with non-refundable costs have been informed that, if they do not attend school and do not have personal days to use, they will be docked pay for each day lost.

The change in the school calendar was done without consultation with the Association. The impact of the change will cause financial loss to some individuals we represent and also constitutes a change in terms and conditions of employment.

Please contact the Association immediately so the issue can be resolved fairly and quickly. We believe this issue can be easily resolved.

5/ J-8 provided: In response to your letter of February 14, please be advised that we have consulted with our attorney and have reviewed your "Demand to Negotiate" with the Board of Education.

Footnote Continued on Next Page

15. After the last snow day on March 3, 1994, the Board developed a revised 1993-94 calendar (J-14) for the remainder of that school year. Exhibit J-14 reflected the days that had been scheduled as make-up days which included February 18 and 21; March 28, 29 and 30; April 4; and, June 21, 22 and 23, 1994 (T43, J-14). The three snow days built into the original schedule were not made up, thus, the final number of teacher work days was 183, not 186.

5/ Footnote Continued From Previous Page

The school calendar is addressed in Article VXII of the Board/PTEA Agreement. Subsection A requires the Superintendent to "meet and confer with the representative of the Association to discuss distribution of holidays" during preparation of the annual school calendar. That has been done. Subsection B provides for the teachers' work year not exceed 186 scheduled work days. In fact, because of the significant amount of snow, we have actually reduced the number of planned work days for this year to 183. This certainly reflects a significant adjustment to the work year of the teachers that was not planned when the calendar was developed.

Subsection C entitled "State Aid", provides: "In the event of any emergency, or unusual reason notwithstanding anything contained in the Article to the contrary, the Board may require a teacher to work in order to meet the minimum requirements of the law to receive state aid." In fact, with the revised calendar we will only conduct 180 student days of school, the minimum required by law.

As you certainly recognize, this has been the most unusual winter that this district has ever faced, and school closings could not be anticipated.

Therefore, I am informing you that the Board has determined that the "snow make-up days" do not require the Board to negotiate with the PTA on this matter.

However, as always, should you wish to discuss this matter informally with me, I would be more than happy to do so.

ANALYSIS

The issue in this case is whether the Board was obligated to negotiate with the Association over changing the school calendar to make up for lost school days, and/or whether the Board was obligated to negotiate over the impact of those changes on unit members. In support of its position, the Association argued in its post hearing brief that the Board violated the exclusivity doctrine, and the legal principals of equitable estoppel and detrimental reliance.

The Board, even without further negotiations with the Association, did not violate the Act by changing the calendar[6/] to make-up for school days lost due to inclement weather. As recognized by Article 17 of J-1, the superintendent had the authority to prepare the school calendar.[7/] The superintendent

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6/ The school calendar fixes the length of the school year; when the school is open for class instruction and when it is closed. Establishment of the school calendar is a matter of educational policy and not mandatorily negotiable. Burlington Cty. College Faculty Assoc. v. Bd. of Trustees, 64 N.J. 10 (1973); Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed., 81 N.J. 582 (1980).

7/ Article 17 provided the superintendent prepare the calendar consistent with N.J.S.A. 18A:25-3. The relevant portion of that statute provides that:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday....

There was no showing here that any of the make-up days were scheduled on a public holiday.

was expected to meet and confer--but not negotiate--with the Association to discuss distribution of holidays, but there was no allegation here that the superintendent failed to do that regarding J-13.

Article 17 also provided for 186 work days, and that as a result of emergencies, the Board could require teachers to work in order to meet the minimum requirements to receive state aid. That language gave the Board the right to reschedule work days lost to weather emergencies in order to meet the state's 180 day minimum requirement, but also allowed it to schedule up to 186 days of work. This Board choose, however, to reschedule up to only 183 days, well within the intent of Article 17.

Since the parties negotiated over and agreed to the language in Article 17, and since that language gave the superintendent/Board the right to schedule up to 186 work days, the Board was not obligated to further negotiate over scheduling the make-up days. Compare, Passaic County Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990). A public employer meets its negotiations obligation if it acts pursuant to its collective agreement. Sussex-Wantage Reg. B/E, P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Twp. B/E, P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); and Pascack Valley B/E, P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). That was the result here.

The result is the same regarding the Association's allegation that the Board violated subsection 5.3 of the Act. I do

not find that the calendar change here constituted a new "rule" within the meaning of subsection 5.3, but even if it did, pursuant to Article 17, the Association waived the right to negotiate over preparation of the calendar. Passaic County at 447.

Similarly, the Association's reliance on the last sentence in J-13 to prove its case, lacks merit. That sentence states the following:

> If schools are closed for inclement weather, make-up sessions will begin on June 21st and continue as needed.

Neither that sentence, nor any other part of J-13, was part of the parties collective agreement (J-1), thus, the Board was not contractually obligated to impose make-up days in June. Since the superintendent/Board had the contractual authority to prepare the calendar which was J-13, and the authority to require teachers to work up to 186 days, the Board had the right to decide when to schedule make-up days as long as it was not inconsistent with other statutes. The last sentence of J-13 may have been the parties prior practice, but to the extent that practice is inconsistent with the Board's authority in Article 17, it is unenforceable. Randolph Twp. B/E, P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980).

Having found that the Board was not obligated to negotiate with the Association over scheduling make-up days, the Association's exclusivity argument must fall. The Association had noted in its brief that subsection 5.3 of the Act also made a majority representative the "exclusive" representative for collective

negotiations. The Association argued that by consulting and reaching agreement with the parent teacher organization (PTO) over the scheduling of make-up days, the Board was violating the exclusivity doctrine.

The exclusivity doctrine was intended to protect a majority representative from an employers attempt to circumvent the majority representative and negotiate directly with employees or some other labor organization. That did not happen here. Meeting with the PTO is not the kind of activity the exclusivity clause was intended to restrict. Furthermore, there is no evidence the Board "negotiated" over make-up days with any other individual or group, or otherwise acted inconsistent with its negotiations obligation to the Association. Since the Board was not obligated to negotiate with the Association over scheduling the make-up days, it could not have violated the exclusivity doctrine by consulting with the PTO over such days.

The heart of this case is really whether the Board was obligated to negotiate with the Association over the impact the calendar changes had on the employees. It was not.

In Edison Twp. B/E and Edison Tp. E.A., NJPER Supp.2d 66 (¶47 App. Div. 1979), certif. den. 82 N.J. 274 (1979), the Appellate Division, relying on its decision in Maywood B/E, 168 N.J.Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979), clearly held that the impact of required calendar changes necessitated by weather related closings is non-negotiatiable. Recently, the Commission in

Middletown Twp. B/E, P.E.R.C. No. 96-30, 21 NJPER 392 (¶26241 1995), applied Edison and held the same.

The Association in its brief argued against applying Edison and Middletown because those decisions did not address equitable estoppel or detrimental reliance, and because it could not understand how the courts could hold that the economic impact of subcontracting was negotiable, but the economic impact of school calendar changes was not. Despite the Association's concerns, Edison and Middletown control here. Those cases leave no doubt that the impact of weather related school calendar changes is not negotiable.

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

Conclusion of Law

The Board did not violate the Act by changing the school calendar or by refusing to negotiate with the Association over the impact thereto.

Recommendation

I recommend the complaint be dismissed.

Stuart Reichman
Hearing Examiner

Dated: May 2, 1996
Trenton, New Jersey