P.E.R.C. No. 77-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-129-55

HOBOKEN TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding the Commission determines that it must disregard the exceptions to the Hearing Examiner's decision filed by the Board of Education due to their lateness, their failure to conform to the requirements of the Rules as to specificity, identification of the matter excepted to, and failure to support their general statements with legal or factual argument. Nevertheless, the Commission has carefully reviewed the entire record and affirms the findings of fact and conclusions of law of the Hearing Examiner and adopts his recommended order with one small modification. The Hearing Examiner found that a memorandum of agreement had been executed by duly authorized agents of both parties, and together with certain contemporaneous oral agreements, constitutes a successor agreement; and that the Board's refual to execute the agreement as a new collective negotiations agreement violates N.J.S.A. 34:13A-5.4(a)(1) and (5). The Hearing Examiner did not find that such conduct established violations of N.J.S.A. 34:13A-5.4(a)(2), (3) and (4) in this case. The Board is ordered to cease and desist such conduct; and to reduce to writing and execute the renewal agreement and give retroactive effect to its provisions; to negotiate, upon request, with the Association concerning terms and conditions of employment; to post notices informing employees of the corrective action, and notify the Commission of the steps taken to comply with the Order.

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Appearances

For the Respondent, Robert W. Taylor, Esq.

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs. (Mr. Emil Oxfeld, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on November 17, 1975 by the Hoboken Teachers Association (the "Association") against the Hoboken Board of Education (the "Board") alleging unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the Charge alleges unfair practices within the meaning of N.J.S.A. 34:13A-5.4(b)(1), (2), (3), (4) and (5) by virtue of the Board's refusal to "ratify and consummate" a collective negotiations agreement reached by the parties' "duly authorized agents".

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Executive Director that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint[1/] and Notice of Hearing was issued on December 18, 1975. On January 6, 1976 the Board filed its answer to the Complaint.

A plenary hearing was held before Hearing Examiner Robert T. Snyder on January 14, 1976 at which both parties were represented and were afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. The Association filed a post-hearing memorandum and the Board filed a brief, proposed findings of fact, and proposed conclusions of law. On May 18, 1976 the Hearing Examiner filed with the Commission and served on the parties his Recommended Report and Decision (H.E. No. 76-9, published at 2 NJPER 150), a copy of which is attached hereto and made a part hereof.

Pursuant to N.J.A.C. 19:14-7.3(a) exceptions to the Hearing Examiner's Report, with any supporting brief, were due May 31,

1/ Prior to the issuance of the Complaint, the Association on December 11, 1975 filed and served a letter amendment stating that the Charge should have referred to N.J.S.A. 34:13A-5.4(a) (employer unfair practices) rather than 5.4(b) (employee organization unfair practices). The Complaint incorporated the original Charge without reference to the letter amendment. While this was no doubt an oversight, the Board argued that the Complaint should be dismissed due to the Charge's recitation of the incorrect subsections of 5.4. We affirm the Hearing Examiner's ruling against the Board for the reasons stated at page 28 of his Report, to which the Board has not excepted.

1976. By letter dated May 21, 1976 the Board requested an extension of approximately six and one-half weeks within which to file its exceptions and brief. The Association objected to such a lengthy extension, and the Commission granted the Board an extension to the close of business on June 10, 1976 to file its exceptions and brief. On June 14, 1976 the Board filed its exceptions, and in lieu of a supporting brief the Board requested oral argument before the Commission. The Association has filed no papers in opposition to the Board's exceptions and request for oral argument. See N.J.A.C. 19:14-7.3(d).

Based upon the entire record herein as specified in N.J.A.C. 19:14-7.2, the Commission has decided to affirm the rulings, findings, and conclusions of the Hearing Examiner, to adopt his recommended Order, as modified herein, and to deny the Board's request for oral argument.

N.J.A.C. 19:14-7.3(b) provides that

> Each exception shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; shall identify that part of the recommended report and decision to which objection is made; shall designate by precise citation of page the portions of the record relied on; and shall state the grounds for the exception and shall include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

The Board's exceptions herein, in addition to being filed late, fail to conform to the above-cited requirements of specificity, identification and precision. Rather, the exceptions are merely

conclusionary (e.g. exception #1: "Respondent did not commit an unfair labor practice within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and (1), as it did not refuse to reduce to writing any agreement with the Charging Party"), or refer generally to the "weight of evidence" without further amplification (e.g. exception #8: "Respondents assert that the determination by the Hearing Officer to reject its Proposed Findings of Fact...is in error and against the weight of evidence in this matter"), or contain general and unsupported legal argument (e.g. exception #4: "Respondents assert that the determination by the Hearing Officer of a 'contract' between the parties herein, is an act totally in excess of the legal authority under the New Jersey Employer-Employee Relations Act"). We will accordingly disregard the Board's exceptions.

Notwithstanding the foregoing, in view of the importance of the issues presented herein we have nevertheless carefully reviewed the entire record on our own motion and we conclude that the Hearing Examiner's findings of fact are amply supported by credible record evidence and his conclusions of law are clearly correct. We accordingly affirm his rulings, findings and conclusions substantially for the reasons contained in his Report. 2/

ORDER

The Public Employment Relations Commission adopts as its Order the recommended Order of the Hearing Examiner as modified

2/ The Board's request for oral argument is denied since in our opinion, the record adequately presents the issues and positions of the parties.

below and hereby orders that the Respondent, Hoboken Board of Education, its officers, agents, successors, and assigns, shall take the action set forth in the Hearing Examiner's recommended Order, as so modified:

1. Substitute the following paragraph for paragraph B.5.

"B.5. Notify the Public Employment Relations Commission, in writing, within 20 days of receipt of this Order, what steps the Respondent has taken to comply herewith."

BY ORDER OF THE COMMISSION

Charles H. Parcells, Commissioner

Commissioners Forst and Parcells voted for the Decision.
Chairman Tener and Commissioners Hartnett and Hipp did not participate in this matter.
Commissioner Hurwitz was not present.

DATED: Trenton, New Jersey
July 19, 1976

Issued: July 20, 1976

H.E. No. 76-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-129-55

HOBOKEN TEACHERS ASSOCIATION,

Charging Party.

For the Respondent, Robert W. Taylor, Esq.

For the Charging Party, Harris & Oxfeld, Esqs.
(Emil Oxfeld, Esq., of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On November 17, 1975 [1] an unfair practice charge was filed by the Hoboken Teachers Association (herein called the "Association") against the Hoboken Board of Education (herein called the "Respondent" or "Board") alleging that the Respondent had violated N.J.S.A. 34:13A-5.4(b) [2](1), (2), (3), (4) and (5) by refusing to ratify and consumate an agreement reached by the Association and Board and executed by their duly authorized agents on October 8, 1975. It appearing to the Executive Director, Jeffrey B. Tener, that the allegations in the said charge, if true "may constitute unfair practices on the part of the said Respondent and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues," the said Executive Director, as the Commission's designee, issued a Complaint and Notice of Hearing on December 18, 1975. In its answer, filed on January 6, 1976, the Respondent denied commission of the unfair practices alleged.

1/ All dates referred to hereafter relate to 1975 unless otherwise stated.

2/ N.J.S.A. 34:13A-5.4 prohibits employer unfair practices in subsection (a) and employee organization unfair practices in subsection (b).

Hearing was held in Newark and Hoboken, New Jersey, on January 14, 1976. The parties appeared thereat and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Subsequent to the hearing, the Association filed a memorandum on February 18, 1976 and the Respondent filed a brief, proposed findings of fact and proposed conclusions of law on February 27, 1976.

Upon the entire record, my observation of the witnesses and the memoranda filed by the parties, I make the following:

FINDINGS AND CONCLUSIONS [3/]

I. THE UNFAIR PRACTICES

A. Sequence of Events

At least since 1968, the Association has been the exclusive representative for thepurposes of collective negotiations concerning the terms and conditions of employment of the teachers, guidance counselors and all other certified personnel except those paid on a ratio employed by the Respondent. [4/]

An existing collective negotiations agreement between the parties covering the unit employees expired by its terms on June 30, 1975. A dispute arose regarding the terms of a renewal agreement for the next succeeding and subsequent school years. During the course of that dispute employees in the unit engaged in a strike or work stoppage. [5/] Negotiations were conducted to resolve the dispute. A key

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3/ The complaint alleged, the answer admits, the parties stipulated and I find that the Respondent is a public employer and the Association is an employee representative, both within the meaning of the Act.

4/ On November 21, 1973, after an election conducted in accordance with the New Jersey Employer-Employee Relations Act (herein called the "Act"), the Commission certifed the Association as exclusive representative of certified personnel, excluding certified personnel whose salaries are determined by a ratio and including Supt. of Schools, Ass't. to the Superintendent, Adm. Ass't., Principals, Vice Principals, Coordinators, Supervisors and Directors.

The Association alleges, the Respondent admits, and I find that the said unit is an appropriate unit for purposes of collective negotiations within the meaning of the Act.

5/ That stoppage was the subject of applications made in New Jersey Superior Court in September, 1975 by the Board seeking to enjoin the Association from engaging in a strike, and, later, to punish the Association and certain members for contempt of an order prohibiting such conduct. A judgment of conviction for contempt of a court order of September 4 enjoining the strike issued against the Association on September 23. The State of New Jersey v. Hoboken Teachers Association, N.J. Super. (Law Div., Hudson Cty.), (O'Brien, AJSC). A later summary hearing for violation of conditions of probation contained in the judgment, (failure to pay fines imposed for failure of its members to return to work) resulted in a lifting by the court of (Continued)

item in dispute was the matter of a salary increase for the 1975-76 school year, the Association demanding an increase and the Board resisting the demand on the ground of inability to pay. According to Association President, Mary Tecktonius, early in October 1975, at a meeting between the parties, a discussion was held in the presence of the Mayor of Hoboken, concerning City funding of $160,000 to pay for an immediate $400 increase for the approximately 400 employees in the unit. That meeting did not result in any agreement on the central question of a salary increase for the 1975-76 year. 6/

Negotiations continued in an effort to resolve the dispute. On the evening of October 8, representatives of the parties assisted by a Commission mediator, Executive Director Tener, were gathered at the Jersey City Holiday Inn. The representatives for each of the parties remained in separate suites while the mediator went back and forth between them in an attempt to assist the parties to resolve their differences. At various times during the evening and

5/ (Continued) suspension of the fine imposed against the Association. On November 13, the Court denied Association application to set aside the fines. The Board's application to enjoin the strike also resulted in an order directing the parties to continue negotiations during its pendency. Hoboken Board of Education v. Hoboken Teachers , N.J. Super., Chanc. Div. (Order entered 9/4/75, Judge Frederick C. Kentz). On Sept. 29, Judge O'Brien signed an order dismissing an application by the Association to hold the Board in contempt for failing to comply with the order to negotiate. The judgments of conviction of the Association for contempt and denying remission of penalty as well as the order dismissing application to hold the Board in contempt are presently on appeal to the Appellate Division.

The Association's and Board's conduct in connection with events preceding the strike and the strike itself are also the subject of separate consolidated proceedings before the Commission in which complaints have issued and hearing is pending. In Docket No. CE-76-10-57 the Board charges that the Association's alleged support of the strike is a refusal to negotiate in good faith and interferes with employee rights under the Act. In paragraph 4 of its answer the Association alleges "that even if its conduct constituted a strike such action is protected activity when the Charging Party has been guilty of an unfair labor practice." In Docket No. CO-76-90-56, the Association alleges a refusal to negotiate in good faith by the Board since September 4, 1975 in violation of the Act.

6/ Board Attorney Robert W. Taylor placed a discussion with the Mayor relative to funding a $400 increase for the unit employees sometime toward 9 or 10 o'clock on the evening of October 8, 1975. He testifed the Mayor advised him by telephone that the City could not fund such an increase. In any event, Taylor admitted that a great deal of discussion with Association representatives took place relative to payment of a $400 increase to employees in addition to salary increases which the Board was willing to pay during the second and third years of a proposed three year agreement.

into the early morning hours of October 9, the parties were brought together for face-to-face negotiations in a separate room.

Sometime in the early morning of October 9, Mediator Tener entered the Association's Caucus Rooms and dictated a writing 1/ to D. Ray Wenger, Associate Director of Research for the New Jersey Education Association ("N.J.E.A.") who was assisting the Association's negotiating team. After Mr. Wenger made the writing, he, Gerald Lange, Field Representative for the N.J.E.A., Association President Tecktonius, and Association negotiating team members Michael D'Onofrio, Louise Del Boccio and Kenneth Johnston all accompanied Mediator Tener to the Essex Room where the Respondent representatives were then present. In the Essex Room, when the Association team and Mr. Tener arrived, were Respondent attorney Taylor, Respondent President Otto Hottendorf, and Respondent members Michael Costello, Aurelio Lugo, Jr., Mary C. Gaspar and James J. Farino.

The events which then transpired in the Essex Room are basically not in dispute. It was now approximately 3:00 a.m. in the morning of October 9.

1/ In my presentation of the facts and my later evaluation of the evidence I have scrupulously refrained from considering in any manner, and, indeed, on motions made by Respondent's counsel struck from the record, statements attributed to Mr. Tener during his presence in the Association's Caucus Rooms. The admissability of a mediator's evaluation of the negotiating posture, or disclosure of the position of one party, made to the other, at least outside the presence of the first, clearly violates Section 19:12-3.4 of the Commission's Rules prohibiting disclosure of "information...by a party to a mediator in the performance of his mediation functions... voluntarily or by compulsion." The vice is in the attempted use of the mediator's statements, whether or not an attempt is later made to produce or introduce the mediator's files or testimony in an attempt to rebut or corroborate earlier testimony or otherwise. Such attempts are, of course, prohibited by the following sentences of the same Section which foreclose use of a mediator's records or testimony in unfair practice proceedings, among others.

> The Rule is intended to preserve the confidentiality of the mediation process. That process is designed to encourage free disclosure to the mediator so that he may assist the parties themselves in settling their dispute. If in the process, a party's frank disclosure to the mediator may ultimately result in an understanding which, absent the mediator's testimony or files may be incapable of proof, the unavailability of the unfair practice proceeding to establish the understanding is a small enough price to pay in order to reaffirm the confidentiality of the process.

terms: There would be no reprisals to any employee for having engaged in the work stoppage, in effect the parties reaffirmed a no-reprisal clause contained in their expired agreement; teachers laid off as a result of cuts in federal and other programs would have preference in new jobs; during the term of the agreement, there would be no lay-offs except as dictated by changes in student enrollment; and the expired agreement would otherwise continue without change. 10/ Furthermore, the parties agreed that after a thirty day cooling off period, 11/ negotiations would be held on Association demands (1) for make-up days to compensate the employees for the pay days lost during the strike, any agreement to be retroactive to September 1, and (2) additional compensation for coaches, department heads and the like.

Within a day following the signing of the memorandum, the Association prepared and issued to its members a four-page document entitled on the facing page "Tentative Agreement Between the Hoboken Teachers' Association and the Hoboken Board of Education, School Years 1975-76 through 1977-78." The second page, headed "Additions to Contract" listed the three oral agreements regarding priority in rehiring, no reprisals, and all other contract language to remain the same. The third page headed "Salary Guides", contained two separate guides for the school years 1976-77 and 1977-78, each containing eleven steps and separate columns for those holding Bachelor of Arts degrees, Master of Arts degrees, 30 or 60 additional graduate credits, and doctorates. The following

10/ According to Hottendorf, as to the no-reprisal agreement, the Respondent was merely affirming its position that it would not utilize its offers /to resolve the contract/ for the purpose of reprisals, and as to the agreement limiting future lay-offs, he had agreed and it was in accord with the terms of an Association notice regarding the October 9 agreements distributed to its members, discussed below. The Respondent at no time disputed the two other oral agreements that laid off teachers would be preferred for new jobs and all other contract language would remain the same.

11/ There is some conflict in the record regarding the date on which the thirty day period was to commence. Tecktonius testifed the period commenced October 9 and she alluded to a "memorandum" to this effect, later clarifying that the understanding may not have been memorialized. The Association's circular to its members, discussed below, runs the thirty days from "ratification of this agreement." In fact, a meeting to negotiate the two open matters took place on or about November 17, some thirty-nine days later. In any event, the Respondent did not dispute in its testimony Tecktonius' understanding derived from the events of October 9.

language appeared after the guide for 1976-77:

> "In addition, each teacher shall receive $400 to be paid as part of the regular salary and paid over the 1976-77 school year." 12/

No salary guide was listed for 1975-76. 13/ The fourth page, entitled "Other Agreements" set forth the two Association demands relating to make-up days and additional compensation areas which the Board had agreed to negotiate after a thirty day cooling off period and the agreement prohibiting lay-offs except those dictated by changes in student enrollment.

The Respondent learned of the contents of the Association document within a few days following the meeting of October 8 and 9 when Board attorney Taylor was made aware of the salary guides the Association had prepared and circulated. 14/

A period of time then elapsed during which there was no contact between the parties nor formal Board consideration of the memorandum. 15/ Then, on November 4, 1975 at approximately 9:00 p.m. in the evening, by which date

12/ This language and the language in paragraph 3 of the memorandum are identical.

13/ As noted in the memorandum of understanding, the salary guide for 1975-76 continued the 1974-75 salary guide without change. The annual step increments of the 1974-75 guide applied in 1975-76 provided the employees qualified. See Clifton Teachers' Association, Inc. v. Board of Education of Clifton, 136 N.J. Super. 336 (App. Div.) (Sept. 29, 1975), 1 N.J.P.E.R. 63.

14/ Board President Hottendorf testified he first became aware of "some ambiguous interpretation" of the October 9 agreement - presumably the Association's four page circular - several weeks later.

15/ According to Board President Hottendorf, at the regular monthly Board meeting (the second Tuesday of the month) held on October 14, no formal Board resolution was introduced with respect to the memorandum. The record does reflect that sometime during the month following October 9 discussion ensued among Board members with reference to a desire to repudiate the agreement. Then a month following the negotiation session of October 9 - in all likelihood at the regular Board meeting of November 4 - the Board officially noted that a disagreement existed with the Association with respect to a portion of the salary agreement contained in the October 9 memorandum.

according to Association President Tecktonius, the Association was getting ready to prepare the full, renewed collective agreement for printing, [16] at a Shannon Hall, Board member Michael Costello signed the memorandum of agreement in Tecktonius' presence. Later the same evening, at the same location Costello asked the three other Board members who had been present (in addition to himself and President Hottendorf) at the original signing of the memorandum, to also affix their signatures. Each of these three, Charles Lugo, Jr., Mary C. Gaspar and James J. Farino, [17] read the memorandum and then signed [18] in Costello's presence. Their signatures, as well as Costello's were placed seriatim in a right hand column at the foot of the memorandum opposite all other prior signatures except that of Association member Radigan's which headed that column.

Then, at a pre-arranged meeting of the parties stipulated as held on November 19 [19] - the first since October 9 - when the Association raised the subject matter of additional compensation for coaches and department heads, the Board responded that it wished to withhold discussion at this time. Board attorney Taylor then announced he wanted to discuss some problems in connection with the salary guide. [20] The Association's representatives present stated that they would not discuss the salary guide, that as far as the Association was concerned, the salary items had been agreed upon and there was nothing open to discuss in that area. The meeting then concluded. No negotiations with respect to the two open items of make-up days and additional compensation had

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16/ As previously noted, two items still remained open for further negotiation.

17/ According to Costello, Farino had earlier expressed some reservation about signing.

18/ By November 4 the agreement thus contained the signatures of a majority of the nine member Board.

19/ The date may be incorrect by at least two days. The instant unfair practice charge, predicated upon the Respondent's refusal to consummate the memorandum of October 9, announced at this November meeting, was filed on November 17.

20/ In its answer to the complaint, certified by Hottendorf, the Respondent affirmatively states it made a wage offer to the Association in November, 1975. The date could only have been on or about November 17, the occasion of this last meeting.

been held through January 14, 1976, the close of the hearing. Furthermore, the memorandum and contemporaneous oral agreements, in so far as they reflected basic agreements of the parties arrived at during the course of negotiations, had not been reduced to writing, integrated or incorporated in any successor agreement for the period commencing September 1, 1975, nor executed by the Respondent. 21/ The instant unfair practice charge 22/ and the complaint herein followed.

B. Allegations of the Complaint and Respondent's Defenses

The complaint alleges that on October 8 the parties reached agreement and had the same executed by their duly authorized agents; that notwithstanding said agreement and representations and communications, the Respondent has refused to ratify and comsummate the said agreement. The complaint concludes with a prayer for relief that the Board be immediately directed to effectuate the agreement and to take such legal steps as are necessary to bring about proper ratification. As previously noted, the Association couched its charge, and thus the complaint 23/ in terms of violation of N.J.S.A. 34:13A-5.4 subsection (b) rather than subsection (a) although the (b) subsection prohibits employee organization unfair practices and the (a) subsection prohibits employer unfair practices.

Respondent interposed various defenses to the complaint at various times during the course of the proceeding. In its answer Respondent defended as follows:

1. The Board and the Association did not reach agreement on October 8.

2. Neither the Board nor Association signers of the October 8 agreement had authority to conclude an agreement.

3. The Association refused to negotiate in good faith in violation of its negotiation duty under the Act in November, 1975 by accepting, through the silence of its negotiating committee which was then present, N.J.E.A. representative Lange's stated refusal to discuss the matters of a wage offer.

21/ At the present time, during the 1975-76 school years, the unit employees are being paid salary in accordance with the 1974-75 salary guide, receiving as well, where applicable, normal increments due to them under the guide.

22/ See footnote 19.

23/ Under Section 19:14-2.1 and 2.1(a) of the Commission's Rules, and practice, Complaint issues on the charge, if the acts complained of in the charge, if true, may constitute unfair practices in violation of the Act.

4. The Board has been ready and willing at all times to negotiate in good faith, but the Association has consistently refused to do so and has attempted to coerce the Board by among other acts of illegal conduct, engaged in an illegal strike for which the Association and its members were found guilty of violating court orders, sentenced to jail and fined.

5. The Association's four page "Tentative Agreement" circulated to its members establishes that, in addition to wages, other matters are still subject to negotiation.

During the hearing, Respondent interposed the following defense:

6. The October 9 agreement required the mutual understanding of both parties to formulate it into a contract. This did not occur.

In its post-hearing brief, devoted primarily to an explication of defense No. 6, Respondent asserted the following additional defense:

7. By virtue of the fact that the Association in its charge alleged violation of N.J.S.A. 34:13A-5.4(b) (1), (2), (3), (4), and (5), the subsections pertaining to employee organization prohibited unfair practices, the charge is improper and cannot form a valid predicate for the complaint, which must accordingly be dismissed.

c. Analysis

It is undisputed that although representatives of the Association and the Respondent executed a memorandum relating to wage and salary items for three school years commencing September, 1975, and orally agreed as to other matters, including agreements retaining all other contract language and to negotiate later on two limited matters, the agreements were never adopted or confirmed in written form by the Respondent. Furthermore, when, pursuant to agreement, the time had come to continue negotiations on the unresolved items, it is clear that the negotiations broke down, that an impasse [24/] was reached over the

24/ "Impasse" is used here in its classic sense to define a difference in the negotiating process which is so basic as to foreclose further negotiations as to the subject matter. Such a difference, if it clearly results from an unlawful negotiating posture, does not and should not require utilization of the impasse procedures under the Act in an attempt to resolve that difference. Cf. Borough of Roselle and New Jersey State Policemen's Benevolent Association, Local No. 99, Roselle Police, P.E.R.C. No. 76-29 at page 4 of the Commission's Decision and Order, 2 N.J.P.E.R. ___. (4/27/76)

Respondent's insistence that salary be negotiated anew and the Association's refusal to do so. Thus, only if the original memorandum of October 9 was a valid subsisting agreement resolving all salary and wage items did the Respondent incur the obligations (1) of consumating or reducing the memorandum and contemporaneous oral agreements to written, executed form (Bergenfield Board of Education and Bergenfield Teachers Association, P.E.R.C. No. 90, N.J.P.E.R. 44); (2) refraining from insisting to the point of impasse upon renegotiating previously settled salary items (see Palomar Corporation and Gateway Service Co., 192 NLRB No.98,78 LRRM 1030(1971); NLRB v. Herman Sausage Co., 275 F. 2d 229, 45 LRRM 2829 (C.A.5., 1960) [25/] and (3) negotiating on November 17 and thereafter, if necessary,the open and unresolved matters which remained after October 9. See Pool Mfg. Co., 70 NLRB 540, 18 LRRM 1364 (1946). On the other hand, if no salary agreement resulted from the October 8 and 9 negotiating session, Respondent was well within its rights in insisting on continuing salary negotiations and obtaining a response to any salary offer it presented in November at the parties' last meeting; and the Association's refusal to respond in any fashion on the salary items relieved the Respondent of any continuing obligation to negotiate as to salary, the open items, or to consumate the memorandum and oral agreements other than those relating to salary, (Cf. Board of Education, Englewood Public Schools and Englewood Administrators' Association, P.E.R.C. No. 76-18, 2 N.J.P.E.R. 53). Accordingly, the legality of Respondent's insistence on negotiating salary at the parties' November meeting must be considered in the light of Respondent's defenses relating to the memorandum of agreement of October 9.

These defenses will now be discussed in turn, followed by a discussion of Respondent's other defenses.

1. The Board and Association did not reach agreement on October 8.

This defense presented in respondent's answer is ambiguous. Simply stated, Respondent denies agreement. It may have reference to a lack of capacity or authority on the part of a representative to bind the principal.

25/ Decisions in cases arising under the National Labor Relations Act, after which the wording of the prohibited conduct in the Act is patterned, is accepted as an intended guide for the Administration of the Act. Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970). Compare N.J.S.A. 34:13A-5.3 and 5.4(a) (5) with 29 U.S.C. §§ 157, 158(a)(5) and (d) and 159.

Yet that argument was separately enunciated in the answer and will be dealt with below. It may refer to the fact that certain matters were not resolved but were left open for further negotiations. That defense was also separately asserted as an affirmative defense and will be treated, supra. Finally, this defense may refer to an asserted lack of mutuality in all of the terms of the agreement. This was separately and specifically asserted for the first time during the hearing and will be discussed below.

2. The defense that the signers of the October 8 agreement had no authority to conclude an agreement.

a. The Evidence

The signers for the Association were Tecktonius, D'Onofrio, Del Buccio, Johnston, and later Rusnak and Radigan, all members of its negotiating committee and the first named, its President. Tecktonius testified that she was authorized to execute the memorandum on behalf of her employee organization.

Under cross-examination, Tecktonius amplified that while the Association had through past practice and under normal procedure, held ratification meetings of the membership for the purpose of accepting or rejecting labor agreements, in this instance, Superior Court, which prior to October 9 had heard applications, of the Respondent to enjoin a strike and hold Respondent and its officers including Tecktonius in contempt for violating such an order, and of the Association to direct Respondent to continue negotiations, had held that she had, (and Tecktonius stated that she had), the right to execute the agreement. Tecktonius also testified on cross-examination that in fact, she had brought the memorandum before the membership on October 9 (presumably after its execution and at the time of, or after the return to classes that day). While Tecktonius appeared to hedge a previous response that the memorandum had been submitted to the membership for its approval, with a statement immediately thereafter, denying submission for membership approval, I do not find Tecktonius' testimony thereby discredited. It would be natural for the Association's chief signatory of the memorandum to immediately inform the membership and seek support, even approval, for the actions of its negotiating committee. Such an expression of support is not equatable with a condition of the acceptance of the agreement that the Association's membership ratify it. Furthermore, the Respondent has failed to offer any evidence contradicting Tecktonius' understanding of her authority

which she derived, at least in part, from the Courts' directions to her. 26/

With respect to the Board representatives' authority, Respondent's President admitted under cross-examination that any agreement reached in writing and orally on October 9 was not subject to ratification, was final and was so intended by the parties. Hottendorf testified:

> Q: Okay. As a matter of fact, if your interpretation was to govern, you'd want to enforce it; wouldn't you?
>
> A: Yes.
>
> Q: You regard this as a binding agreement. The only problem is one of interpretation; isn't that so?
>
> A: It could very well be.
>
> Q: Not could it; isn't that so?
>
> A: I couldn't answer for the Teachers' Association.
>
> Q: I'm talking about the Board.
>
> A: Yes.
>
> Q: There's nothing tentative about this agreement; it's a final, binding agreement, which you would like to enforce as is?
>
> A: Yes.
>
> Q: You say that as President of the Board; do you not?
>
> A: I say that as a witness, a School Board member.
>
> Q: You're President of the Board?
>
> A: Yes, I understand.

b. Concluding findings

As noted, the testimony of both chief negotiators contradicts Respondent's assertion in its answer that the signers of the memorandum lacked authority to conclude an agreement. Given Hottendorf's admissions on the record, it is readily apparent why Respondent did not pursue this defense through its other witness, Attorney Taylor, or in its post-hearing memorandum. Neither has Respondent ever claimed that the language at page 4 of the Association's four page circular it offered in evidence, distributed to Association

26/ See Superior Court Judgment of Conviction of Contempt of Court by the Association which states, inter alia, "It is further ordered that Teckonius (sic) as President of the Association shall represent the Association in compliance with the rules of Probation including, but not limited to reporting /with respect to the Court's order that its members return to school on Wednesday, September 24, 1975/", The State of New Jersey v. Hoboken Teachers Association, N.J. Super., Hudson Cty., Law Div. - Criminal Branch (Thomas S. O'Brien, A.J.S.C., 9/23/75).

members (noting with respect to make-up days, that "...negotiations shall start thirty (30) days after ratification of this agreement by both parties..."), evidenced the parties' lack of authority to bind. Given that authority established by their testimony, I do not construe this phrase in the Association's circular as evidencing a contrary intent. 27/ Neither the prior dealings of the parties, nor the context and setting in which the October 8 and 9 negotiations took place, nor the memorandum itself indicates that either the Board or the Association conditioned the effectiveness of the agreement reached by its representatives upon later approval by its respective memberships. Bergenfield Board of Education, P.E.R.C. No. 90, 1 N.J.P.E.R. 44.

In any event, and apart from the foregoing, approval, in fact, of the memorandum was achieved by both parties by November 4, prior to the Respondent's rejection of the salary agreement on November 17. 28/

I find that each of the representatives had the authority to bind his principal, and that the parties are bound by the agreement reached by their representatives, assuming the agreement is not defective because of some other impediment such as lack of mutuality as claimed by Respondent.

3. The defense that the October 9 agreement lacked mutuality of understanding because of the mistaken belief of Respondent as to its meaning, and therefore, no contract was ever formed.

a. The Elements of the Defense

The Respondent claims that paragraph 3 of the memorandum reading "in addition, each teacher shall receive $400 to be paid as part of the regular salary and paid over the 1976-77 school year" was misunderstood by its representatives on October 9. The misunderstanding is asserted to have taken the form of a belief that the $400 referred to in paragraph 3 is the same $400 which, under paragraph 2, was to be added to each step of the 1975-76 salary prior to increasing each step by 8.7%.

27/ Compare e.g. Hottendorf's testimony, in spite of his admissions, that "the only way you can implement this /agreement/ is by resolution of the Board."

28/ Tecktonius took the agreement before her membership on October 9 and further testified that the only items remaining for negotiation thereafter were make-up dates and distribution of additional money for coaches, etc. Board member Costello testified that four members signed the agreement on November 4 which, in addition to Hottendorf's earlier signature, provided a Board majority.

In Respondent's asserted understanding, only one $400 was to be added to the salary of each unit employee for the 1976-77 school year. 29/ Respondent further urges that since the Association claims that the $400 described in paragraph 3 is in addition to all other salary increases to be received by the employees in the 1976-77 school year as described in paragraph 2, a basic misunderstanding arises which prevents the memorandum from constituting a valid agreement. The Respondent arrived at this conclusion in the following manner. In the course of the October 8 - 9 negotiations the Respondent offered only one $400 increase plus 8.7%. Respondent also advised the Association that there would be no increase in the current year 1975-76. The Association then made a counter offer for the school year 1976-77 that the employees receive $400 added to their base pay, increments to be added where applicable, 8.7% to be added thereto and $400 more not on the salary guide to be paid to employees over the school year. This counter offer, claims the Respondent, was never accepted by it. The memorandum that Respondent signed contained a provision, to wit, paragraph 3, which Respondent's representatives mistakenly believed accorded with its offer. Accordingly, as the memorandum was excuted by Respondent in error as to its meaning, under well recognized principles of contract law, no contract can result.

b. The Evidence

As previously noted, this defense of lack of mutuality was not raised by Respondent in its pleading. There is also no evidence in the record that Respondent claimed this defense at any time in any discussion with the Association, including the meeting held by the parties in mid-November. Respondent introduced this defense for the first time during the hearing on January 14, 1976.

The memorandum provides as follows:

> "1. The salary guide for 1975-76 shall be the 1974-75 salary guide.
>
> 2. The salary guide for 1976-77 shall be established by adding $400 to each step of the 1975-76 salary guide and then increasing each step by 8.7%.

29/ Respondent's attorney Taylor makes a further contention with respect to another alleged misunderstanding which will be discussed in due course.

3. In addition, each teacher shall receive $400 to be paid as part of the regular salary and paid over the 1976-77 school year.

4. The salary guide for 1977-78 shall be established by increasing each step of the 1976-77 salary guide by 8.0%."

The meaning of the four paragraphs are fairly evident and appear to contain no ambiguity. In the first paragraph the Association agrees to no increase for the 1975-76 school year (other than annual increments to which an employee may be entitled). In the second paragraph, the parties agree during the second year of the agreement, 1976-77, the employees shall receive a $400 increase added to each step of the guide, to which new amount a percentage increase of 8.7% shall be applied. The last figure shall represent the 1976-77 salary guide. The third paragraph provides that in addition to the salary increases provided for in the previous paragraphs, each teacher shall receive $400 as part of his regular salary which amount shall be paid over the 1976-77 school year. It is not provided that this additional $400 shall be incorporated in the salary guide. It thus constitutes a one time payment and does not increase the base salary. In the fourth paragraph, the parties agree that the employees shall receive a salary increase of 8% on each step of the 1976-77 salary guide for the 1977-78 year. This increase shall be incorporated in the salary guide. For the second and third years increments shall be applied prior to multiplying by the respective percentage.

What has just been stated with respect to the plain meaning of the memorandum might normally be held to resolve the issue presented by the Respondent's claim of mistake. (See, e.g., Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 Fed. 504, 508 (1957);(Cf. Eustis Mining Co. v. Beer, 239 Fed. 976, 982). However, such an approach "excludes evidence of trade usage and prior dealings between the parties as well as evidence of surrounding circumstances and prior and contemporaneous expression." (The Law of Contracts, Colamari and Perillo, West Publishing Co., 1970; U.C.C. §§ 2-202, Comment 2). As the memorandum, although complete in itself, lacks the normal requisites of a fully integrated agreement, is not dated, was supplemented by certain oral agreements previously described, including agreements to incorporate the memorandum in a fully integrated successor agreement and to continue negotiations after a cooling off period, evidence may properly be received to explain the terms

used. 30/ Thus, an opportunity was provided to the Respondent to cross-examine Association witnesses and to present its own witnesses in support of its contention that the agreement as to salary lacked mutuality. A review of that testimony will now be undertaken.

Association President Tecktonius testified that during negotiation meetings prior to October 8, with respect to a $400 item the Association had initially demanded to be paid this sum for the school year 1975-76; that because of the Board's inability to pay or receive additional immediate funding from the City, the Association advised it would forego receipt of this money in 1975-76 school year and would agree to be paid in one lump sum in July, 1976. Tecktonius noted that at several negotiation sessions not attended by attorney Taylor, several Board members notified Tecktonius and other Association representatives that Taylor had advised them that it was illegal to make such payment in a lump sum. Tecktonius further testified that the Association then advised it was agreeable to payment of that $400 over a year's time. Tecktonius testified that she had discussed this matter directly with Board attorney Taylor and that Taylor had confirmed the Board's position that it could not afford to pay $400 in terms of the budget for the 1975-76 calendar year and therefore, it would be paid in an additional sum of money next year. 31/ These last discussions preceded the preparation and execution of the October 9 memorandum and may, indeed, have preceded the meeting which commenced on October 8.

30/ See also, generally, 3 Corbin §§ 542, 542A, 543, 579. See also Food Fair Stores, Inc., 202 NLRB 347 at 353. ("The evidence was received, and has been considered, not to vary the terms of the labor contract, but for such aid as it may afford in resolving any ambiguity in the language of the 24 hour clause or possible incompatibility with other pertinent provisions of the contract."); Teamsters, Local No. 439 and Pittsburgh - Steel Company, 196 NLRB 971 at 975. ("/The parol evidence rule/ does not exclude evidence to explain a latent ambiguity.").

31/ Witness Tecktonius did admit under cross-examination that Taylor told her that there will be no increase for this year, 1975-76. Taylor's statement is not inconsistent with the payment of a deferred increase for the year 1975-76 in school year 1976-77.

Respondent witness Hottendorf recalled that at the time the memorandum of agreement was presented for execution, and was executed by him, he told Tecktonius "...the Board and the teachers would agree that the teachers would receive a raise of $400 plus 8.7% and then in addition this here raise would be spread out, the $400 to be spread out over the ensuing year." Hottendorf then clarified this testimony by noting that he and Tecktonius "...had a discussion as to the legality of putting that $400 at that moment in payable—in the beginning of the year and for that reason [32] that the raise was spread out over the whole period of time. That's what we had agreed to." Hottendorf denied at any time making an offer to the Association of a salary increase for the current year.

Board attorney Taylor testified that he was a member of the Respondent's negotiating team, which consisted of a Mr. DiPasquale, Labor Negotiator, Superintendent McFeeley, Assistant Superintendent Gainor and himself. Taylor continued that after various discussions with the Board members and the negotiating committee he personally made the following offer to the Association on the evening of October 8: (1) No increase for the current year; (2) for the following year, an 8.7% increase to the base salary, $400 added to this figure, and where applicable, increments to be paid to those employees eligible. Taylor further testified that during the course of the Association's separate consideration of this offer, Board member Costello suggested to him that the $400 be added to the base before the increase of 8.7% was applied, and increments then to be added. Taylor stated that he then conveyed a modified offer incorporating Costello's proposal of a $400 increase prior to adding the 8.7% increase (thereby adding roughly $35.00 for each employee as an additional "sweetener"). Taylor testified that he conveyed this final offer to Tecktonius, Johnston and D'Onofrio in the Essex Room, that these Association representativies asked how the Board offer was computed, "seemed satisfied" and then left for their own quarters and he returned to the Board's room. According to Taylor, "later on, we were called down together", at which time the memorandum was read and he affixed his signature. Taylor admitted that there had been a great deal of discussion relative to the second $400 but added that the Board position steadfastly had been to provide only one $400 increase. Taylor also noted that he did not speak to the mediator after he met the three Association representatives.

32/ Presumably because of Board attorney Taylor's objection.

Taylor did not testify directly to any discussion he had with Costello that morning relative to the provisions which ultimately were included in the writing comprising the memorandum. Taylor claimed that as he heard the memorandum being read in the early morning of October 9, he understood it to be exactly in accordance with the offer he had previously conveyed.

Taylor stated that a few days later when he saw that the Association presentation of the 1976-77 salary guide to its membership included two $400 increases, rather than one, he first became aware of the misunderstanding. 33/ Taylor noted that the misunderstanding not only related to a second $400 item but also that the increment had been added prior to the 8.7% increase. Taylor said that he discussed these differences with Board members on October 10 and 11 at a series of meetings and that on November 19 34/ at the meeting scheduled to take up the three unresolved items he introduced the question concerning the salary settlement. When N.J.E.A. representative Lange advised he that the Association would not discuss the matter, he, Taylor, replied that the agreement would not be ratified by the Board because it was not the offer made by the Board.

Board member Costello was called as a witness by the Association. 35/ He testified that the memorandum of agreement reflected his understanding of the agreement reached on October 9 and, to his knowledge, Taylor and Hottendorf were authorized to sign an agreement which incorporated that offer. Costello testified that he and Board member Mary Gaspar made a proposal in conformity with the memorandum of agreement to the Board representatives present prior to going into conference for the last time that morning with the Association. He stated that subsequent to October 9, after there had been discussion by Board members or at a Board meeting in connection with a repudiation of the memorandum, he arranged for the other four members present - himself, Gaspar, Lugo, and Farino - to execute the memorandum on November 4. Costello testified that he

33/ As earlier noted, the Association circular contained language identical to paragraph 3 of the memorandum. However, Taylor's point here was that the salary guide distributed, in contrast to the wording of the memorandum, already had built into it a single $400 increase, 8.7% and increments and, thus, graphically presented what to him was the discrepancy.

34/ See footnote 9 as to the probably more accurate date of November 17.

35/ The Association's attorney stated that the Association would have called Costello in its case-in-chief but for the fact that the witness was recuperating at home after a hospital stay and rested its case subject to calling Costello if necessary, without objection. After Hottendorf testified for the Respondent, request was made to reconvene the hearing at Mr. Costello's home. Arrangements were then made to do so with Mr. Costello's approval. His testimony was then followed by Mr. Taylor's for Respondent.

more or less made the deal and he stuck by it. Costello added that the offer which he had made was delivered to the Association and then was actually read by an Association representative in his presence at the time the memorandum was executed. Costello was firm that the Board attorney Taylor did not deliver the offer or terms comprising the memorandum to the negotiating table. According to Costello, the final offer comprising the proposed written terms read to the assembled representatives and signed by them on the morning of October 9 was devised by Attorney Taylor, Assistant Superintendent Gainor, Board members Lugo, Gaspar, Farino and himself.

Costello did admit on cross examination that prior to the offer being presented to the Board an estimated cost of $160,000 had been discussed with Attorney Taylor. 36/

The testimony of Board President Hottendorf was internally inconsistent as to when he became aware of the alleged ambiguity in the memorandum. His testimony was also inconsistent with that of Board member Costello as to the weight of Board sentiment supporting his interpretation. Hottendorf's testimony was also marked by a vagueness as to his participation in the crucial events of October 8 and 9, upon which Respondent grounds its defense of lack of mutuality. He was also responsive to suggestion of Association counsel which was contrary to a stipulated fact.

At one point, Hottendorf testified on cross-examination that he signed an ambiguous agreememt because it was 3:30 a.m. and because the agreement had been expressed hurriedly. On redirect, Hottendorf testified that he first became aware of some ambigious interpretation of the agreement several weeks later. On another occasion, Hottendorf testified that he received a copy of the Association's four page document mailed to its members several weeks after the October 9 agreement had been reached. At another point, he testified that he first became aware of the contents of the Association's mailing to its members (and thus of a misinterpretation by the Respondent as to the meaning of paragraph three of the memorandum) a month after the signing. 37/ Finally,

36/ $160,000 represents a $400 increase for each of the approximate 400 employees.

37/ Hottendorf implied he did not see the Association's circular placed in his box until a month after October 9. This conflicts with Taylor's testimony that he, as Board attorney learned from the circular of the discrepancy in interpretation within a few days of October 9. It would have been extremely unlikely for Hottendorf to have been unaware of Taylor's discovery.

Hottendorf readily agreed with the suggestion of the Association's attorney on re-cross examination that the occasion of his first receipt of the Association's mailing was some time in late November, a month and a half after the memorandum had been signed. Hottendorf also testified that only one of the eight other Board members did not share his opinion that paragraph 3 of the memorandum represented a mistake, that it misrepresented the understanding of the parties and should be rejected by the Board.[38/]

While Board attorney Taylor testified that it was his last offer which formed the basis of the memorandum, he further testified that he did not read the memorandum before he signed but relied instead upon the reading of it to those assembled. He further testified that the terms which Tener dictated to Wenger, which terms Taylor agrees were later read to him, were not terms which could have been received by the Association from him. Taylor also readily acknowledged that a great deal of discussion relative to a second $400 increase took place between the Board and Association prior to the memorandum of October 9. Finally, Taylor's own last proposal, which he testified contained the terms he thought he was affirming when he signed the memorandum, differed substantially from the language in paragraphs 2 and 3 and thus, should have been readily apparent to him on its reading. For if, as Taylor advised the Association, the Respondent finally agreed to $400 being added to the guide before 8.7% was added, why was a separate paragraph drafted (paragraph 3) which clearly provided for $400 to be paid after the 8.7 percentage increase had been computed?

c. Concluding Findings

I am not persuaded by Respondent, on the basis of the testimony presented on the record at the hearing, that the memorandum of October 9 reflects in any way a misunderstanding on its part as to the intent or meaning of the language incorporated therein. As I have previously noted, the language incorporated

38/ As earlier noted, four Board members signed the memorandum on November 4 after the matter of an alleged mistake had surfaced within the Board.

in the crucial third paragraph appears to express a plain understanding of the parties. That understanding was that the employees would receive, in addition to salary increases already described in paragraph 2, during the second year of the agreement, an additional sum of $400, not to be incorporated in the salary guide, and to be paid over the year and not at one time or in a lump sum. The testimony adduced on the record, providing the setting and surrounding circumstances in which the memorandum was executed and then repudiated by Respondent, serves to strengthen my conclusion that the Respondent, indeed, had no mistaken belief as to the meaning of the language and that the writing expressed that which the parties had agreed upon in fact.

Respondent's defense requires me to engage in an examination of its motives at the time its representatives signed the agreement. Various factors proved cumulative in convincing me that Respondent had no misunderstanding as to paragraph 3 when its representatives signed the memorandum early in the morning of October 9.

Respondent's main defense as to lack of mutuality was belatedly raised for the first time during the hearing. While containing a number of other affirmative defenses, Respondent's pleading nowhere asserts a mistaken belief as to the meaning of the phrase "In addition" appearing in paragraph 3. Furthermore, Respondent failed to notify the Association that it had serious questions as to the agreement at any time, although attorney Taylor became aware of the Association's circular to its members, upon which document Respondent grounds its first knowledge that a misunderstanding existed, a few days after October 9. Even at the meeting of November 17 the record fails to disclose that Respondent ever asserted a misunderstanding as the basis for its desire to renegotiate salary.

Board President Hottendorf was particularly unpersuasive that he had mistaken the meaning of paragraph 3 when he signed the memorandum. If as he testified initially, he signed knowing at the time that the agreement was ambiguous, why would he have withheld notice of this fact to the Association so as to permit an opportunity for immediate renegotiation? Indeed, why would he have signed at all, unless he were conscious of the fact that a delay in disclosure of the Respondent's renunciation would only serve to delay ultimate agreement and undercut the Association's status as exclusive representative? His explanations for signing with such knowledge that the hour was late and the agreement

was expressed hurriedly, are inadequate and unacceptable. Even if I were to believe Hottendorf's later testimony that he became aware of the "ambiguity" several weeks later, why did he fail to notify the Association at that time, or at any time prior to the hearing? Furthermore, Hottendorf's asserted lack of knowledge of the position of three fellow Board members affirming the validity of the memorandum by November 4 stretches one's credulity. 39/ Board member Costello's testimony establishes a contrary position among at least four other Board members less than a month after the signing when the dispute surfaced within the Board. Finally, Hottendorf did not recall whether he was present when an offer which formed the basis of the memorandum was made, and so is in no position to, and has not, contradicted Costello as to the circumstances surrounding the preparation and submission of such an offer.

Board member Costello testified without dispute that he and member Gaspar made the proposal encompassed in the memorandum; that he read it later, on November 4 when it was presented for his signature and that it represented the proposal he and Gaspar had made; and that he and the other three Board members, Gaspar, Lugo and Farino signed after the question of repudiation had been raised within the Board. The inference I draw from Costello's testimony, an inference which he himself made explicit at its conclusion, was that when the matter of the preservation of the agreement had become an issue in the continuing dispute between the parties, he put his signature on the line to back up the agreement he, in effect, had made. 40/

Board attorney Taylor did not dispute, in fact he stipulated, that at the signing he stated that not only did he have the authority to conclude negotiations by signing the agreement but that he had it weeks before. That testimony does not square with Taylor's explanation of the manner in which the Board's last offer was formulated in the morning of October 9. Taylor claims

39/ Hottendorf's opinion that implementation of the memorandum required implementation by Board resolution is contrary to the law. See Bergenfield Board of Education and Bergenfield Teachers' Association, P.E.R.C. No. 90, 1 N.J.P.E.R. 44.

40/ Costello's testimony that he had discussed a single $400 increase for the employees with Taylor - the estimated $160,000 cost - does not diminish the thrust of Costello's explanation of the origin of the offer contained in the memorandum. That discussion, in fact, may have pertained to paragraph 3 alone, which deals with $160,000 alone, and so is not inconsistent with Costello's explanation.

that he revised a Board offer to include a single $400 increase prior to computation of the 8.7% increase applied to all steps of the salary guide. Taylor also testified that it was this offer which was the basis of the agreement he and Hottendorf thought they executed for the Respondent.

If this counter offer of the Board was formulated and incorporated in the memorandum on October 9, how would Taylor have had authority to sign an agreement incorporating such terms for a matter of weeks prior to October 9? Furthermore, Taylor's explanation of his last offer and its relationship to the agreement he signed do not square for another reason previously noted. Taylor specified clearly that in the revised offer he communicated to the Association representatives earlier in the October 9 session, the $400 item was to be added prior to multiplication of the salary figures by 8.7% in order to establish the salary increase for the second year, thereby adding $35 per employee to the Respondent's prior offer. 41/ If this was accepted by the Association and was the agreement Taylor thought he was signing, how can one then account for the separate listing, in paragraph 3 of a $400 item not incorporated in the guide prior to multiplication by 8.7%?

Contrary to Taylor's testimony, the $400 listed in paragraph 3 can not be interpreted as settling the manner in which the $400 encompassed in Taylor's last offer was to be paid. It was thus a separate item, separately stated, and Taylor as attorney for the Respondent had an obligation to understand the memorandum fully before signing and directing Hottendorf to sign for the Board. Yet Taylor, by his own account, did not read the memorandum but signed after hearing it read once. The only reasonable explanation I can draw from the foregoing is that the memorandum did, in fact, reflect Taylor's understanding.42/ In this connection, Tecktonius' rebuttal testimony that Taylor and Hottendorf in their testimony concentrated on a $400 figure ($1600 as applied to all teachers) and failed to note that $1600 represented only one facet of an overall package in which the Association agreed to forego a raise during 1975-76, takes on added significance.

41/ According to Taylor, the annual increments were not to be added prior to the application of 8.7%.

42/ Answering Respondent attorney's argument, it was not his modified counter-offer which formed the basis for the terms of the memorandum agreement, particularly paragraph 3, but rather a separate proposal put forward by Board member Costello, either identical or substantially similar to, the Association's last position on salary.

I therefore conclude that the memorandum was adopted by Respondent with full knowledge of its meaning.

Apart from the foregoing, even assuming Respondent had a geniune misunderstanding as to paragraph 3, I also find and conclude that its unilateral mistake in this regard does not justify a reformation of the terms to accord with Respondent's current interpretation. The law in New Jersey is clear that only where the mistake of one party is established by clear, cogent and convincing evidence, or the mistake of one is accompanied by fraud or other inequitable conduct by the other, will equity grant reformation, Millhurst Milling and Dying Company v. Automobile Insurance Company, 31 N.J. Super. 424, 107 A. 2d 46 (A.D. 1954). As stated by the Court, at pgs. 434-5 of its opinion:

> "Where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of a legal duty, equity will not interpose its relief..."

See also Stamen v. Metropolitian Life Insurance Company, 41 N.J. Super. 135, 124 A. 2d 328 (A.D. 1956).

To like effect is Corbin On Contracts, § 614 (1960 Edition) at page 734:

> "No petition for reformation is necessary in case the writing, as interpreted, in light of surrounding circumstances, preliminary negotiations and course of dealing is found by the court to express just what the plaintiff asserts that the two parties agreed upon in fact."

See, also, Murphy v. J.H. Bodenger Co. Inc., ___Misc. ___, 112 N.Y.S. 2d 239; Metzger v. Aetna Life Ins. Co., 227 N.Y. 411, 125 N.E. 814.

4. The Board has at all times been ready to negotiate in good faith but the Association has refused to do so and has attempted to coerce the Board by engaging in an illegal strike.

As earlier noted, the Respondent filed a separate unfair practice charge alleging the strike as a violation by the Association of its negotiating duty under the Act. Complaint has issued on that charge, as well as a companion charge by the Association alleging a refusal to negotiate by the Board prior to the strike.[43/]

As also earlier noted, the instant complaint was issued separately and was not consolidated with the two other matters for hearing. The two other complaints which have issued have not yet been heard. Respondent at no time has objected to the separate hearing and processing of the instant complaint.

Furthermore, the record is devoid of any evidence relating to this affirmative defense in Respondent's answer. The nature of the strike, as well as the enforceability of Respondent's obligation to continue negotiations in good faith to resolve the underlying dispute, are matters which are at present still to be determined during the course of judicial review.[44/]

Respondent's post-hearing memorandum makes no mention of this defense and places no reliance on the alleged illegal conduct engaged in by the Association and its members.[45/]

In view of the foregoing, I conclude that this defense, not pursued, lacks merit.

43/ Docket Nos. CE-76-10-57 and CO-76-90-56. The complaint based on the Association's charge appears to allege that the Board's earlier refusal to negotiate relieved the Association's membership of any obligation to remain at work and also constituted sufficient provocation for the resulting strike so as to relieve its members from any claim of harrassment or intimidation thereby.

44/ See Footnote 5, infra.

45/ My previous discussion of the Respondent's affirmative defense regarding lack of authority of its representatives to conclude an agreement makes clear that Respondent has placed its reliance upon its own interpretation of the memorandum of agreement as binding and fully enforceable. Such a claim is clearly inconsistent with the assertion (which has not been clearly stated but which may be implicit in this defense) that the memorandum was the product of illegal coercion from which the Association should not be permitted to benefit. Apart from the foregoing, the record clearly establishes that on October 8 - 9 the parties were engaged in a good faith effort to amicably resolve

(continued)

5. The Association's 4-page "tentative agreement" circulated to its members establishes that, in addition to wages, other matters are still subject to negotiation.

As the fact recital recounts, the parties' October 9 agreement included not only the writing, but oral understandings as well. One of those understandings was that negotiations would continue as to certain limited matters after a 30 day cooling off period. As to another of them, no lay-offs except as dictated by changes in student enrollment, Board President Hottendorf indicated that it was not the Respondent's intention to lay any employees off except where required by severe reductions in student enrollment. The two matters left open, make-up days and additional compensation previously discussed, did not require immediate action. The former related to additional days work to make up for time lost during the strike and the latter involved additional pay for coaches and department heads for succeeding school years. The fact that these subsidiary items remained open does not preclude a requirement that agreement on mandatory terms and conditions of employment, particularly such substantial terms as the salary matters involved herein, be consummated. Respondent cannot defend a charge of reneging on such an agreement by referring to the fact that full agreement on all the demands had not yet been achieved.[46/]

45/ (continued) their dispute with the assistance of a Commission mediator. It was only after the memorandum was executed that the Respondent appears to have had second thoughts about its terms. Such circumstances surrounding the negotiations hardly portrays an atmosphere of coercion, even assuming Respondent had adduced evidence on the record or argued in its support.

46/ The Respondent's failure to negotiate on these few remaining items by insisting, to impasse, upon reopening the salary matters warrants further comment. The Association charges, inter alia, that the Board has refused to consummate the agreement. That agreement, as well, encompassed an understanding to continue negotiations. The Association also in its charge requested that the Board be directed to effectuate the agreement. I find that the Respondent's conduct on November 17 in refusing to negotiate these items is part and parcel of its overall conduct and is encompassed by the charge and complaint. Appropriate relief here would be a direction to the Board to continue negotiations with respect to the open items.

I conclude that this defense lacks merit.

6. The Association refused to negotiate in good faith in November by refusing to discuss the matters of a wage offer.

From what has been previously stated herein, it is clear that the Respondent, and not the Association, engaged in the refusal to negotiate in the November meeting. The Association was justified in refusing to discuss or deal in any way with the salary matters which had been previously concluded at the October 8 - 9 session.

7. The Association's charge, because it recited the wrong subsections of the Act, is improper and no findings can be based upon it.

Respondent waited until the filing of its brief in this matter, a month and one-half following the close of the hearing and two and one-half months after complaint issued to assert this defense. No prejudice is claimed. Respondent's answer clearly acknowledges the substance and the nature of its conduct alleged violative in the charge and complaint. Respondent at the hearing fully recognized the substance and nature of the unfair practices alleged by the Association in the charge and complaint. It would make a mockery of this proceeding were I to recommend disposing of this case upon the basis of the Association's technical error in the framing of its charge in the absence of any prejudice or claim of prejudice. As noted by the Executive Director in Clearview Regional District Board of Education, E.D. No. 76-24 (March 8, 1976), a case involving a like question of a minor error in preparation of a Commission form, at page 3 of his Decision and Direction of Election:

> "Minor technical and procedural defects, in the absence of any or even claim of harm or prejudice, will not delay resort to the Act's provisions."

Finally, while I believe I may not take administrative notice of the Commission's own formal file in this proceeding, particularly where there is no proof that any document contained therein was served upon the Respondent, the formal file contains a letter from the Attorney for the Association dated December 9, 1975, more than one week prior to the issuance of the complaint herein, addressed to the Commission, which states "I notice that the sections of the Act allegedly infringed upon were designated under 5.4(b) when that should have been designated under 5.4(a). Would you please consider this as an amendment thereto." The letter notes that a copy was forwarded to Robert W. Taylor, Esq., the Board's attorney.

D. The Allegations of the Charge and Complaint

Treating the Association's charge and the complaint as allegations of violation of N.J.S.A. 34:13A-5.4(a), the Association has alleged violations of five subsections, (1), (2), (3), (4) and (5). They read as follows:

> "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.
>
> "(2) Dominating or interfering with the formation, existence or administration of any employee organization.
>
> "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
>
> "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.
>
> "(5) Refusing to negotiate in good faith with a majority representative of employees in any appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

As to subsection (1), I conclude that Respondent's conduct in refusing to negotiate by reneging on its salary settlement agreements, insisting to impasse upon opening salary discussions and refusing to negotiate previously agreed items constitutes not only a violation of subsection (5), but is a derivative violation of section (1) as well. (Englewood Board of Education and Englewood Teachers Association, E. D. No. 76-34, (5/11/76) at p. 3, footnote 4 of the Director's Decision.) The charge and complaint do not purport to allege independent (a)(1) violations.

The Association has failed to adduce any evidence in support of its charge alleging violation of (a)(2) (domination or interference with its formation, existence or administration). I will accordingly recommend its dismissal. Likewise, the Association has failed to introduce any evidence in support of its allegation under (a)(3) (that the Respondent has discriminated in employment to discourage employee exercise of guaranteed rights). Traditionally, evidence of this allegation requires actual change in employment relationship motivated by anti-union conduct. The Respondent's conduct

does not support such a claim and dismissal of this allegation will also be recommended. Further, none of the evidence relates to any violation of (a)(4) (relating to discrimination against an employee for signing or filing an affidavit, complaint or testifying under the Act). This allegation shall also be dismissed.

E. Concluding Findings

As I have already indicated during the course of my analysis and discussion of Respondent's various defenses, particularly its defense of lack of mutuality, the memorandum of agreement constitutes a valid subsisting agreement, which, together with the contemporaneous oral agreements, comprises a successor labor agreement for the period September 1, 1975 to June 30, 1978. Respondent's failure and refusal to consummate the agreement,[47/] reduce the agreement to writing or to execute it constitutes a refusal to negotiate in good faith with a majority representative in an appropriate unit concerning terms and conditions of employment, in violation of 13A-5.4(a)(5) and (1) of the Act.[48/]

Furthermore, Respondent's insistence on re-negotiating salary and refusing to negotiate make-up days and additional compensation areas, as previously discussed, constitute independent violations of its negotiating duty under 13A-5.4(a)(5) and (1) of the Act.[49/]

47/ While the subject of no layoffs except as dictated by changes in student enrollment, one of the oral understandings comprising the October 9 agreements, the Commission has determined is permissive, and not mandatory (Rutgers, the State University and Rutgers Council of University Professors Chapters, P.E.R.C. No. 76-13, 2 NJPER ____; See also the Board of Education of the City of Englewood and Englewood Teachers' Association, P.E.R.C. No. 76-23, 2 NJPER _____), in this instance the Respondent voluntarily agreed to this provision governing layoffs, and thus, may be compelled to comply therewith (City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58, at page 59; Fairlawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 at 49 (footnote 9); Board of Education of City of Trenton, E.D. No. 76-11 (footnote 1 at pages 3 and 4.) See Susquehanna Valley Central School District at Conklin vs. Susquehanna Valley Teachers' Association, _____ N.Y.2d _____, (N.Y. Ct. of Appeals), 8 PERB 7561.

48/ Such conduct, additionally, violates 13A-5.4(a)(6) in haec verba but the Association has failed to allege a violation of this subsection and, thus, no finding can be made thereunder.

49/ See cases cited at page 11, infra.

II. THE REMEDY

Having found that Respondent has engaged in certain unfair practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to remedy and remove the effects of the unfair practices and to effectuate the policies of the Act.

Affirmatively, I shall recommend that Respondent forthwith, in cooperation with the Association, reduce the agreements arrived at on October 8 - 9 to writing, incorporating them in a successor collective negotiations agreement covering the period September 1975 through June 1978, sign the renewal collective negotiations agreement so prepared, and give retroactive effect to the terms and conditions of that agreement.50/ and 51/

I shall further recommend that the Respondent, upon demand made by the Association, negotiate in good faith with respect to the two subject matters I have earlier described which the parties agreed to negotiate 30 days after October 9, relating to "make-up days" for the employees, and additional compensation areas" for the school years 1976-77 and 1977-78 in such areas as coaches, department heads, etc., and negotiations with respect to the first item to be retroactive to September 1, 1975, by agreement.

50/ As earlier noted, the crucial $400 salary increase described in paragraph 3 of the October 9 memorandum does not take effect until the commencement and during the school year 1976-77.

51/ I conclude that this remedy may appropriately be provided by the Commission in the absence of a charge alleging an (a)(6) violation where, as in this case, the refusal to reduce an agreement to writing, and to execute the same is so basic to the more encompassing charge alleging violation of subsection (a)(5). Also, as I earlier noted, I do not find, as requested by the Association in its charge, that any ratification by the Board is required in order for the remedies I have already recommended to be properly effectuated under the Act. (Bergenfield Board of Education and Bergenfield Teachers Association, P.E.R.C. No. 90, 1 NJPER 44).

CONCLUSIONS OF LAW[52/]

A. By unlawfully refusing to reduce the agreements of October 9 to writing and to execute a renewal collective agreement incorporating the terms so agreed on October 9, 1975, as found herein, Respondent engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and (1).

B. By unlawfully insisting to the point of impasse upon negotiations of the salary matters which had been concluded in the memorandum agreement of October 9, 1975, as found herein, Respondent engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and (1).

C. By refusing to negotiate the remaining open subject matters pertaining to make-up days and additional compensation areas, as found herein, Respondent engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and (1).

D. The Respondent, by the above described acts, has not dominated or interfered with the formation, existence or administration of any employee organization; has not discriminated in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights granted to them by the Act; and has not discharged or otherwise discriminated against any employee because he had signed or filed an affidavit, petition, or complaint or given any information or testimony under the Act; and has not thereby engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2), (3) and (4) of the Act.

RECOMMENDED ORDER

Respondent, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Failing or refusing to reduce to writing in cooperation with the Hoboken Teachers Association and to sign a renewal collective negotiation agreement incorporating the terms agreed to orally and in writingon October 9, 1975, with the Hoboken Teachers Association.

2. Unlawfully insisting to the point of impasse that the salary matters concluded in a memorandum agreement of October 9, 1975 be renegotiated or opened for further negotiations with the Hoboken Teachers Association.

52/ Respondent's proposed conclusions of law, as well as its proposed findings of fact, with the exception of the first two relating to the status of the Board and Association under the Act, are rejected.

3. Failing or refusing to negotiate collectively in good faith with the Hoboken Teachers Association as the majority representative in the unit described below, the subjects concerning make-up days for employees in the unit and additional compensation areas for coaches, department heads, etc. as agreed in the memorandum of agreement of October 9, 1975 with the Hoboken Teachers Association:

> All certified personnel, excluding all certified personnel whose salaries are determined by a ratio and including Superintendent of Schools, Assistant to the Superintendent, Administrative Assistant, Principals, Vice Principals, Supervisors and Directors.

B. Take the following affirmative action:

1. Reduce to writing forthwith, in cooperation with the Hoboken Teachers Association and sign the renewal agreement described above.

2. Upon the execution of the aforesaid agreement, give retroactive effect to the provisions thereof.

3. Upon request, negotiate with the Hoboken Teachers Association as the majority representative of the employees in the aforesaid appropriate unit, concerning the terms and conditions of employment enumerated above, and, if an understanding is reached, embody it in a signed agreement with said employee organization.

4. Post in its central office in the City of Hoboken and other locations, copies of the attached notice marked "Appendix A". Copies of said notice, on forms provided by the Commission shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

5. Notify the Executive Director, in writing, within 20 days from the date of receipt of this Recommended Report and Decision what

steps have been taken to comply herewith, 53/ and it is further recommended that the Commission dismiss so much of the complaint as alleges that the Respondent engaged in violations arising under N.J.S.A. 34:13A-5.4(2), (3) and (4).

Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
May 18, 1976

53/ In the event that this Recommended Report and Decision is adopted by the Board, this provision shall be modified to read: "Notify said Executive Director in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith."

NOTICE TO ALL EMPLOYEES

PURSUANT TO

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

we hereby notify our employees that:

WE WILL reduce to writing in cooperation with the Hoboken Teachers Association and sign a renewal collective negotiations agreement incorporating the terms agreed to orally and in writing on October 9, 1975 with the said Association.

WE WILL give retroactive effect to the terms and conditions of said agreement.

WE WILL NOT fail or refuse to negotiate collectively in good faith with Hoboken Teachers Association, as the majority representative of the employees in the unit described below, concerning the subjects of make up days and additional compensation areas for coaches, department heads and the like:

> All certified personnel, excluding all certified personnel whose salaries are determined by a ratio and including Superintendent of Schools, Assistant to the Superintendent, Administrative Assistant, Principals, Vice Principals, Supervisors and Directors.

HOBOKEN BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Executive Director of the Public Employment Relations Commission. Labor & Industry Building, P. O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780