

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-295

UNION COUNTY REGIONAL HIGH
SCHOOL TEACHERS ASSOCIATION,
INC.,

Charging Party.

CRANFORD BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-296

CRANFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Executive Director, acting on behalf of the Commission, issues an interlocutory order in a consolidated show cause proceeding based upon requests for interim relief filed during the pendency of two unfair practice cases. The teachers' organizations charged that the boards of education decided to reduce the size of their teaching staffs effective as of the end of the 1975-76 school year, but refused to negotiate the impact of such reductions upon employees' terms and conditions of employment. The Executive Director finds that, except for selections based upon the exercise of the Boards' educational policy judgments, the Boards are required to negotiate upon demand concerning the method for selecting specific employees to be terminated from among the remaining pool of non-tenured teachers. Taking administrative notice of the severe job market for teachers due to the current school funding crisis, and in view of the need to finalize the selection process prior to the commencement of the next school year, the Executive Director orders the Boards, upon demand, to commence such negotiations forthwith. While recognizing that Boards are also generally required to negotiate concerning the possible impact of RIFs on the workload of remaining teachers, the Executive Director does not order such negotiations on an interim basis since the Boards have raised a significant factual issue concerning whether such impact has not already been raised in current negotiations for successor

agreements. Furthermore, a doubt exists as to whether there would be irreparable harm if negotiations were to await final disposition of the cases. Finally, the Executive Director deals with the impact on the terminated teachers. He finds that economic demands, such as severance pay, are required subjects for negotiations but that there is no irreparable harm concerning monetary matters if negotiations were to await final disposition of the cases. As to demands concerning reemployment rights, the Executive Director finds that if the current State aid crisis is resolved and the Boards thereafter decide to rehire employees due to the receipt of greater funds, the failure to have negotiated reemployment rights for the terminated employees would constitute irreparable harm. Accordingly, if the Boards decide to hire employees for the next school year to fill positions currently abolished, the Boards are ordered to immediately notify the teachers' associations and, upon demand, forthwith commence negotiations concerning reemployment rights.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-295

UNION COUNTY REGIONAL HIGH
SCHOOL TEACHERS ASSOCIATION,
INC.,

Charging Party.

CRANFORD BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-296

CRANFORD EDUCATION ASSOCIATION,

Charging Party.

1/
Appearances:

For Respondents, Weinberg, Manoff & Dietz, Esqs.
(Mr. Irwin Weinberg, of Counsel)

For Charging Parties, Goldberg, Simon & Selikoff, Esqs.
(Mr. Louis Bucceri, of Counsel)

For Intervenor, New Jersey School Boards Association
(Mr. John Barbour, of Counsel)

INTERLOCUTORY DECISION AND ORDER

On May 6, 1976 the Cranford Education Association (the
"C.E.A.") and the Union County Regional High School Teachers

1/ Both Associations were represented by the same attorneys as were
both Boards of Education. In the body of this decision the Boards
of Education will be referred to collectively as the "Boards" and
the two Associations collectively will be referred to as the
"Associations".

The New Jersey School Boards Association moved to intervene
in both the interim relief proceeding and in any further proceed-
ings on the merits of the Unfair Practice Charges. This motion
was unopposed and was granted. The School Boards Association
argued orally at the interim relief hearing but has not
submitted any brief or other documents in this matter.

Association, Inc. (the "Teachers Association") filed Unfair Practice Charges with the Public Employment Relations Commission (the "Commission") against their respective employers, the Cranford Board of Education (the "Cranford Board") and the Union County Regional High School Board of Education (the "Union County Board"), alleging that the said Boards of Education had engaged in 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"). Both Charges allege that the two Associations are the exclusive representatives of the professional non-supervisory employees of the respective Boards of Education; that these Boards of Education have determined that a reduction in force (a "RIF") must be accomplished for the 1976-77 school year; that individual teachers have been notified that their employment will be terminated in connection with that reduction in force; that demands have been made upon the respective Boards of Education that they negotiate with the Associations concerning the impact on terms and conditions of employment of the Boards' decisions to RIF teachers; and that the Boards have refused to so negotiate. They further allege that these refusals to negotiate the impact of the decisions are unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5).^{2/}

2/ N.J.S.A. 34:13A-5.4(a)(1) and (5) provide:

a. Employers, their representatives or agents are prohibited 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.

The Charges were accompanied by applications for Orders requiring the Boards to Show Cause why interim relief should not be granted pending the disposition of the unfair practice proceedings,^{3/} with supporting briefs. The interim relief requested by the Associations consists of interlocutory orders directing the Boards to cease and desist further actions to implement the reductions in force without negotiations and directing the Boards to negotiate the procedures and effects of the reductions in force pending the final administrative determinations by the Commission. The undersigned has been delegated the authority to act on these requests on behalf of the Commission and, pursuant to that authority, executed two Orders to Show Cause on May 6, 1976 returnable on May 13, 1976.^{4/} Neither Order included any temporary restraints.

^{3/} These applications for interim relief were made pursuant to N.J.A.C. 19:14-9.1 et seq. See also Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

^{4/} Originally the attorneys for the Associations contacted the Commission on May 4, 1976 and asked if they could appear on Thursday, May 6, 1976 on these matters. It was indicated to them that such an appearance would be permitted only if the Boards' attorneys were willing and able to appear on such short and informal notice. Telephonic communications between the attorneys for the Associations, the attorneys for the Boards and Commission staff members on May 4, 1976 established that this was impossible. Therefore on May 6, 1976 the Associations filed the within Unfair Practice Charges, and Orders to Show Cause and supporting briefs. The undersigned executed the Orders and caused them to be mailed on that day to the attorneys for the parties. The certified mail return receipt indicates that the Boards' attorneys received their copies on May 8, 1976. Additionally attorneys for both parties were advised telephonically by a Commission staff member on May 6, 1976 that the Orders had been signed. The Orders themselves, as well as the telephone communications, directed the attorneys for the Associations also to effectuate service in the manner prescribed by N.J.A.C. 19:17-1.3.

Pursuant to the two Orders the parties appeared on May 13, 1976. The Respondent Boards filed on that date Answers to the Unfair Practice Charges, Memoranda of Law and, in the Union County case, Affidavits in Support of the Answer. Since both Associations were represented by the same attorneys as were both Boards of Education, it was agreed that the matters would be consolidated for the purposes of the interlocutory proceedings. The undersigned has considered the allegations contained in the certified Unfair Practice Charges, the Answers thereto, the affidavits and exhibits submitted, and the arguments of counsel both in their briefs and at the hearing^{5/} and on the basis of that record makes the following determinations.

Both the Cranford Board and the Union County Board have decided to reduce their teaching staffs for the 1976-77 school year. At its April 19, 1976 public meeting the Cranford Board adopted a resolution which, among other things, terminated the services of thirty-one (31) full-time teaching personnel. Of these terminations, twenty-seven (27) non-tenured teachers were not re-hired due to various economic reasons and declining enrollment, one (1) teacher was terminated due to poor evaluations, two (2) were terminated because they had been temporarily hired and are being replaced by tenured teachers returning from leaves of absence, and one (1) tenured teacher was terminated.^{6/} Similarly, the Union

^{5/} The transcript of the oral argument was not received until June 3, 1976 which has delayed the issuance of this Interlocutory Decision and Order.

^{6/} No reason appears in the record for the termination of the tenured teacher. However none of the parties has contested the applicability of N.J.S.A. 18A:28-9 through 28-14, which

County Board adopted a resolution at its April 20, 1976 meeting which had the effect of terminating the services of seven (7) non-tenured teachers in connection with a reduction in force.^{7/}

The Boards in their briefs and at the hearing cite numerous sections of Title 18A which grant boards of education broad powers in the management of their school districts, including the authority to hire and dismiss personnel. N.J.S.A. 18A:10-1, 11-1, 16-1, 27-4, 27-10 and 28-9.^{8/}

6/ (continued)

establishes the procedures for and effects of a reduction in force upon tenured teachers. Essentially these sections provide that a board has the right to reduce the number of tenured teaching staff members for reasons of economy, reduction in pupil population or for other good cause. N.J.S.A. 18A:28-9. Such reductions in tenured teaching staff will be done on the basis of seniority, N.J.S.A. 18A:28-11, and a preferred re-employment list shall be established on the basis of seniority of the tenured teachers terminated. N.J.S.A. 18A:28-12. The Associations have not suggested that any procedure applies to tenured teachers other than these provisions of Title 18A.

7/ In the Union County Regional case it appears that seventeen positions were actually abolished, but the elimination of ten of these was accomplished through attrition; only seven teachers actually had to be terminated.

8/ The grant of such authority does not automatically imply that the power is unlimited. The statutory delegation of authority is frequently limited by Title 18A itself or by laws outside Title 18A. The strict procedures for the selection of tenured teachers to be terminated when a reduction in force occurs and for their reemployment, as mentioned in footnote 6, supra, is one example. The requirement that non-tenured teachers be noticed of their non-reemployment by April 30th of each year or they are deemed to have been offered a contract is another. See N.J.S.A. 18A:27-10 and 27-11. The decision of the New Jersey Supreme Court in Donaldson v. Board of Education of City of North Wildwood, 65 N.J. 236 (1974) that a non-tenured teacher is entitled, upon request, to receive a statement of reasons for non-retention and to an informal appearance before the board of education is one example of a limitation on the Boards' authority which stems from a source outside Title 18A although this decision has now been formalized in a statute P.L. 1975, c. 132, now N.J.S.A. 18A:27-3.1 to 3.3; and regulations, N.J.A.C. 6:3-1.20.

(continued)

Neither Association contests the unilateral authority of the Boards to determine that the reductions in force were required.^{9/} The Associations argue instead that those decisions necessarily have an impact on the terms and conditions of employment of the teachers; obviously a very large impact on the teachers terminated but also an impact on the teachers remaining. It is with regard to this impact that the Associations have demanded to negotiate and which the Boards have alledgedly refused to negotiate.^{10/}

8/ (continued)

In an analogous manner N.J.S.A. 34:13A-1 et seq. provides a limitation on the unfettered discretion of a board of education in the exercise of the power granted by Title 18A. N.J.S.A. 34:13A-5.3 states that public employees have the right to organize and join employee organizations and that public employers, including boards of education, must negotiate with the majority representative selected by those employees with respect to their grievances and terms and conditions of employment.

9/ The Commission has determined in several decisions that the number of employees needed to carry out the employer's function is a basic managerial decision which need not be negotiated with the employee representative. In re Rutgers, The State University, P.E.R.C. No. 76-13, at 19-21, 2 NJPER 13 at 17-18 (1975); In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER ____ (1976); In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40, 2 NJPER ____ (1976).

10/ In the Cranford case, the C.E.A. in its certified Charge alleges that it made demand upon the Board to negotiate concerning the procedures and effects of the contemplated reduction in force on April 14, 1976, five days prior to the meeting at which the Board adopted the resolution. At the hearing, the Association introduced into evidence a letter dated April 14, 1976 from the President of the Association, the same person who certified the allegations of the Charge, to the Board President requesting the commencement of negotiations concerning the Board's announced proposal for a reduction in staff for the 1976-77 school year. It also introduced a letter from the Board President to the Association President dated April 21, 1976 acknowledging receipt of the April 14th letter requesting the legal basis for such a request and stating that, due to legal requirements, the Board had no intention of delaying its action. The Board argues that this demand was only made to delay the termination notices beyond the date established by the agreement between the parties for such notices. Even if this motive were true, the fact remains that demand was made and that the Board refused to meet in response to it.

(continued)

The undersigned is convinced that the Commission will find that the impact upon terms and conditions of employment of a decision to RIF employees is a mandatory subject for negotiations. A review of recent Commission decisions is illustrative. In Rutgers, supra, note 8, while holding that the number of employees was a managerial prerogative, the Commission also found that the impact of such a decision on terms and conditions of employment was a required subject for negotiations. The Commission illustrated its holding with the following hypothetical:

"If, for example, the University decides that there will be 100 fewer teaching positions next year, it must negotiate the impact of that decision but not the decision itself. That decision will impact in two major ways in all likelihood: upon the 100 employees who are not retained (assuming not all of the reduction is achieved through attrition) and upon the workload of those remaining (assuming a less than proportionate decline in enrollment.) To the extent that the stated assumptions are valid,

10/ (continued)

In the Union County situation, the certified Charge states that a demand to negotiate was made on April 15, 1976, also five days prior to the Board's action. The Board's answer denies that such a demand was made, and attaches affidavits in support of this denial. In one, by the Board secretary, he avers that he received no "letter or any other form of communication" directed to the Board President requesting or demanding negotiations concerning RIF. In another, the Board President avers that he never received any "letter" requesting or demanding negotiations on RIF. At the hearing the Association introduced into evidence a confirmation copy of a Western Union Mailgram from the President of the Teachers Association, the person who certified the allegations of the Charge, to the Board President dated April 15, 1976 which states that the Association has become aware of the possibility of a reduction in force and requests that if such action is contemplated that they meet immediately to begin negotiations. The Board objected to the introduction of the mailgram on the ground that the certified Charge, while mentioning a demand made on April 15, 1976, does not specifically mention a mailgram.

the University would be required to negotiate the impact of that decision on the terms and conditions of employment of affected employees." Id., P.E.R.C. No. 76-13 at p. 20, 2 NJPER 13 at p. 18. See also In re Newark Firemen's Union, supra note 8

Similarly, in In re Council of New Jersey State College Locals, P.E.R.C. No. 76-33, 2 NJPER ____ (1976), the Commission held that the College's decision to regulate the proportion of tenured to non-tenured faculty members was not a required subject of negotiations. However the Commission also stated that the impact of the Tenure Plan upon the terms and conditions of employment of faculty members was a mandatory subject of negotiations. The Commission's choice of illustrations is especially relevant to the within discussion. It stated:

"The Tenure Plan may impact upon faculty terms and conditions of employment in various ways. As attrition may not reduce faculty in sufficient numbers to avoid the necessity for termination of faculty under the Plan, the Council may wish to negotiate the following matters, among others: The procedures for selection of teachers to be eliminated in future years under the Plan; provision for notice and hearing for those faculty members selected for termination; placement on a preferential hiring list for reemployment of those faculty members who are terminated pursuant to the Plan; and severance pay or other benefits including continued coverage in various fringe benefit programs for a period of time coextensive with their placement on a preferential hiring list, for faculty terminated pursuant to the Plan." Id., P.E.R.C. No. 76-33, at p. 14, 2 NJPER at p. ____ (footnotes omitted).

Other Commission decisions also support the conclusion that the impact of a decision to RIF upon the terms and conditions of employment of the employees is a required subject of negotiations. 11/

11/ Fair dismissal procedures for teachers, as opposed to the merits of the educational judgments relied upon in making the decision to dismiss, have been held to be a required subject of negotiations, as have the procedures utilized in evaluating teacher performance. In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), (continued)

An analysis of the decisions cited above demonstrates not only that the decision to RIF employees impacts upon terms and conditions of employment of unit members, but that it impacts in three general ways. First, there is the effect on those teachers who have not been terminated. This will generally impact on or affect workload. See In re Rutgers, The State University, supra. Second, there is the effect on the terms and conditions of employment of the teachers actually terminated, leading to negotiations on items such as reemployment rights, fringe benefits, severance pay and other similar items which the majority representative might propose. See In re Council of New Jersey State College Locals, supra, and cases cited in footnote 11, supra. Third, within the limitations to be discussed below, there are the procedures for identifying the unit members who will be terminated from among the group of employees

11/ (continued)

appeal pending. The procedures utilized in selecting persons to fill certain positions which are within the unit from among applicants who are also unit members, but not the establishment of the qualifications for such positions, were held to be mandatorily negotiable in In re Byram Township Board of Education, P.E.R.C. No. 76-27, at pps. 13-14, 2 NJPER ___ at p. ___ (1976). The Commission has reiterated this distinction between qualifications and procedures for selection in two recent cases dealing with promotions from among unit members. In both In re Borough of Roselle, supra, and In re Plainfield PBA Local No. 19, P.E.R.C. No. 76-42, 2 NJPER ___ (1976), the Commission held that the establishment of the qualifications, prerequisites for promotion, are permissive, but not mandatory subjects of negotiation; however, the procedures whereby specific employees are selected for promotion from among the pool of employees meeting the qualifications do constitute terms and conditions of employment. These cases all lead to the conclusion that the procedures and effects of the decision to RIF employees on terms and conditions of employment of unit members are mandatorily negotiable.

that meets the qualifications for consideration.^{12/} See In re Council of New Jersey State College Locals, supra; In re Englewood Board of Education, supra; and In re Byram Township, supra; see also In re Plainfield P.B.A., supra; and In re Borough of Roselle, supra.

The Associations herein seek an interim order compelling the Boards to negotiate in all three of the areas outlined above. However, the conclusion that all three represent terms and conditions of employment and are within the scope of negotiations does not necessarily lead to the issuance of such an order.^{13/} In In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975), an

^{12/} It is important to note at this juncture the very important distinction between the obligation to negotiate and the absence of any obligation to agree. The fact that a particular subject is a term and condition of employment means that it must be negotiated when proposed but neither the employer nor majority representative is obligated to agree to such a proposal. Hard bargaining is not inconsistent with a good faith desire to reach agreement. See State of New Jersey and Council of New Jersey State College Locals, E.D. No. 79, 1 NJPER 29, affirmed P.E.R.C. No. 76-8, affirmed for the reasons stated in the Executive Director's decision, Appellate Division Docket No. A-531-75, decided May 17, 1976.

^{13/} Several other requests for interim relief in RIF cases have been received by the Commission. In one such case, an Order granting such relief was entered, In re New Providence Board of Education, P.E.R.C. No. 76-36, 2 NJPER ____ (April 28, 1976), but no written decision accompanied it. The Charge and application for relief arose prior to April 30, 1976, the deadline for notice to non-tenured teachers of their termination pursuant to N.J.S.A. 18A:27-10. In an effort to reduce the potential financial damages to the Board if negotiations resulted in the selection of different employees to be RIFed from those already noticed, the undersigned accompanied his Order to negotiate procedures for the selection of the employees with a further order to give all non-tenured teachers notice of termination. This order appeared reasonable under the facts as developed at that hearing since the parties indicated that there were only six additional teachers who had not been noticed at that time.

In the other RIF cases in which interim relief has been sought, the parties have been able to reach an amicable resolution of the matter in informal discussions prior to the

(continued)

early decision on interim relief in unfair practice proceedings, the undersigned discussed the circumstances and standards involved in deciding whether to grant such extraordinary relief. It was pointed out that such relief would only be granted in the most clear and compelling circumstances after an evaluation of the specific facts of each case. While it was deemed to be inappropriate, in the absence of substantial experience, to attempt to denominate the particular standards that would be utilized in deciding if interim relief was appropriate, in all situations, certain elements, taken largely from the private sector and civil litigation, were discussed. In deciding that case, primary reliance was placed upon the irreparable nature of the harm that would follow from a failure to grant the requested relief. It was determined that the Commission possessed sufficient powers^{14/} to fully remedy the conduct alleged to violate the Act at the conclusion of the case, if such a violation was ultimately proven, and the requested order was denied.

In subsequent cases, two general criteria have been enunciated. One is the standard used in Little Egg Harbor, i.e., irreparable harm: can the matter be fully remedied at the conclusion of the case. The other concerns the likelihood of success on the legal and

13/ (continued)

hearing, or the undersigned has not been convinced that the facts as developed warranted interim relief. While some of these cases have resulted in consent orders, this is the first case which has resulted in a written decision setting forth the rationale for these determinations.

14/ See N.J.S.A. 34:13A-5.4(c).

factual issues in the final Commission decision.^{15/} These two broad standards actually encompass other elements discussed in the Little Egg Harbor decision, supra: the need to preserve the status quo the motivation and good faith of the parties, and other general equity considerations such as furtherance of the rights and policies set forth in the Act.

It now remains to apply these standards in the instant matter. We have already discussed the legal issue regarding the duty to negotiate the three areas of impact discussed above, at least as an abstract duty. Now the facts must be examined as they appear at this interim stage of the proceedings. Both in Cranford and Union County Regional, current collective negotiations agreements will expire prior to the beginning of the 1976-77 school year. In Union County Regional, the current agreement covers the period from September 1, 1974 to August 31, 1976 and in Cranford, the term of the agreement is from July 1, 1974 to June 30, 1976. In both, the parties are presently engaged in negotiations for successor agreements and are at various stages of the Commission's impasse procedures.^{16/}

^{15/} See In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975) (relief denied) and In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975) (relief granted). These standards have been applied in numerous decisions and discussions concerning applications for interim relief in unfair practice cases which have not resulted in written decisions.

^{16/} See N.J.S.A. 34:13A-6(b) and N.J.A.C. 19:12-1.1 et seq. In Union County Regional, the parties are presently engaged in mediation with another mediation session scheduled. In Cranford, the parties have just completed mediation and are about to commence fact-finding.

The Cranford Board and the Union County Board both allege that proposals concerning RIF were included in the Associations' negotiating demands for these successor agreements. In Union County, the Board alleges that during the course of negotiations the Teachers Association actually withdrew its proposal on RIF, assumedly in return for some concession by the Board on another demand. It supports this allegation by asserting that when the parties submitted a list of "open items" to the mediator assigned by PERC, the Teachers Association did not include their proposals on reduction in force. In Cranford, the Board alleges that the C.E.A.'s demand is still on the table and is a live issue before the fact-finder.^{17/} Therefore, in both cases the Boards allege that with regard to the 1976-77 school year they have negotiated and are negotiating the impact of reductions in force, and they thus deny that they have committed any unfair practice even if these items are found to be required subjects of negotiations.^{18/}

^{17/} The Board's brief in the Cranford case sets forth the text of the alleged demand on RIF submitted by the C.E.A. for the successor contract. It proposes that no reductions of personnel will take place during the term of the agreement except for good cause, reductions in enrollment, and reductions in finances. It also proposes that if such reductions do take place that the Association get 90 days notice of the terminations, procedures for determining who would be laid off and several items such as reemployment rights and other benefits for those who are laid off.

It should be noted that neither Board has objected to the negotiability of these demands in this context by either Association, but rather has only refused to accede to the merits of the proposals.

^{18/} At the hearing neither Association disputed the Boards' allegations with regard to the status, or even the existence, of these negotiation proposals. However even if these allegations were denied a factual dispute would exist which would more appropriately be resolved by the ultimate evidentiary hearing on the matters.

With regard to the impact of the reduction in force upon the terms and conditions of employment of the remaining teachers, the Boards' arguments do raise significant doubts as to the Associations' likelihood of success on the merits. All the terminations are with regard to the non-renewal of teaching contracts for the 1976-77 school year. If these reductions do increase the workload on remaining teachers, the Boards argue that it is being dealt with or could be dealt with in the context of the on-going collective negotiations. It is not the function of an interim relief proceeding to decide whether the Boards' allegations are factually or legally accurate. While the impact on the workload of the teachers not terminated seems clearly to be a term and condition of employment (see the discussion on this point, supra), it is not as clear on the facts as they **appear** at this stage that negotiations have not taken place or that the Boards would refuse to consider such a demand in the on-going negotiations for the successor agreement that would cover the 1976-77 school year.^{19/}

A different situation exists concerning the effect on terms and conditions of employment of the teachers terminated and the procedures for selecting the people who are to be terminated. The cessation of employment which is associated with the RIF involved in the within Charges becomes effective at the end of the current school year. In fact, with regard to the procedures for selecting the persons to be RIFed, the Boards already unilaterally implemented

^{19/} It should also be pointed out that a real doubt exists as to whether the harm would be irreparable.

their own procedures when they gave notice to specific individuals. The negotiations for the successor agreements do not pertain to teachers who will not be employed during the term of such agreements. At the conclusion of the current school year when their employment ceases, the teachers terminated will not even be included in the unit. Benefits granted by agreements whose terms commence either July 1, 1976 or September 1, 1976 may not affect them. Therefore, the Boards' arguments that they have already negotiated RIF and have thus committed no unfair practices, relates to unit members covered by the successor agreements, not the employees who have already been terminated.^{20/}

The Boards also argue that there is no irreparable harm that will result from their actions, as the Commission could remedy the matter at the conclusion of the case. They argue this especially with regard to the impact of their decision to RIF on those teachers who are terminated. Under normal conditions their arguments might be persuasive. Fringe benefits such as severance pay, accrued seniority, credit on the salary guide if reemployed, and other similar items involve primarily monetary items and to that extent damages incurred could be remedied by an appropriate order at the end of the case.

^{20/} The Associations alleged in the certified Charges that the reductions in force were not included in the existing agreements nor were they part of the negotiations leading to those agreements. The obligation to negotiate set forth in N.J.S.A. 34:13A-5.3 includes the duty to negotiate terms and conditions of employment of unit members that were not envisioned by the parties during negotiations and which modify their existing working conditions.

However, these are not normal times.^{21/}

The Boards in their submissions indicate that these reductions in force were necessitated by reductions in student enrollment, and reductions and uncertainties surrounding the amount of State aid they would receive.^{22/} To the extent that these reductions were necessitated by the loss of State aid, a real possibility exists that the positions could be reestablished if and when the current crisis is resolved.

At present the Boards do not know how much money they will receive from the State. Robinson v. Cahill VI, supra note 21, may bring the matter to a head by July 1, 1976. Speculation on this eventuality is not within the province of the undersigned. However, a possibility does exist that additional State aid could be forthcoming before commencement of the 1976-77 school year. If positions previously eliminated were to be reestablished, the failure to have negotiated reemployment rights for the employees terminated would mean that the Boards would be free to hire persons other than those terminated. The permanent loss of such an opportunity for reemployment is irreparable harm sufficient to warrant interim relief. Even

^{21/} The undersigned takes notice of the funding crisis confronting the public educational system in New Jersey and its implications for school boards throughout the State. As reported in Robinson v. Cahill 118 N.J. Super 223 (Law Div. 1972) supplemented 119 N.J. Super 40 (Law Div. 1972) affirmed 62 N.J. 473 (1973) (Robinson I); Robinson II 63 N.J. 196 (1973); Robinson III 67 N.J. 35 (1975); Robinson IV 69 N.J. 133 (1975); Robinson V 69 N.J. 449 (1976) and Robinson VI N.J. (decided May 13, 1976) reported in 99 N.J.L.J. Index Page 457, May 27, 1976.

^{22/} In fact at the hearing one of the arguments made by counsel for the Boards was that given the situation that currently exists in New Jersey the parties had to be aware of the possibility of a reduction in force during their negotiations for the successor contract.

if the Commission were to later order that these people be reemployed pursuant to some procedure to be negotiated, the Boards would have to either terminate the people hired to fill the reestablished positions or compensate both persons while only one would be working. Either of these eventualities would create additional expense for the Board and personal hardship for the people involved and should be avoided if at all possible. Therefore, if it develops during the pendency of the within unfair practice proceedings that either of these Boards determines that they will hire teachers to fill the positions RIFed, they will be ordered to notify immediately the respective Association of this decision and to negotiate, upon demand, concerning reemployment rights for those teachers who were terminated.^{23/}

This leaves the third of the three areas in which these decisions to terminate teachers impacts on terms and conditions of employment: procedures for selection of the persons actually to be RIFed. At the hearing and in their briefs, the Boards objected strongly to having to negotiate these procedures, arguing that they are educational policy judgments. The undersigned agrees that at least some of the individuals may be RIFed as a result of educational policy decisions. The Boards are by no means precluded from exercising their policy making powers. However once they have applied

^{23/} Due to the fact that the Boards allege that part of the reason they terminated these employees is a reduction in student population, there is no certainty that anyone will be reemployed even if the funding crisis is resolved, which is an ongoing uncertainty. The undersigned is thus reluctant to order immediate negotiations absent a decision by the Board to rehire. However, that is not to say that the parties are not free to voluntarily enter into negotiations on all the effects of the RIF in light of the earlier discussion which found such subjects to be mandatorily negotiable.

these educational policy decisions and have terminated individuals pursuant thereto, they may be left with a group of teachers who for all intents and purposes are equals. At this juncture in the process the Boards have an obligation to negotiate with the respective Associations on the method of selecting the specific teachers to be terminated from among this remaining pool of non-tenured teachers.

The facts of the two cases herein can be used as hypotheticals to illustrate the application of this concept. In Cranford, the Board terminated 30 non-tenured teachers out of a possible pool of 57 non-tenured teachers in the district.^{24/} One of these was not rehired for reasons of competence. This decision is a managerial policy judgment and this teacher would be within the group not susceptible to the negotiated procedures.

In Union County Regional, seven non-tenured teachers out of a possible 92 non-tenured were actually terminated. It also developed at the hearing that in addition to the seven non-tenured teachers, the entire media department consisting of five persons was terminated. The Teachers Association, while representing the media department employees, cannot negotiate the procedures for selecting these persons. A decision by a Board that it will effectuate a reduction in force by eliminating a particular area of study or a program, thus abolishing these positions, is a major educational policy decision and only the impact on remaining teachers and on the terminated individuals, as discussed earlier, must be negotiated, not the selection of those people.

^{24/} One tenured teacher was laid off in Cranford but as previously stated, note 6, none of the parties disputes that the selection of tenured teachers is governed by seniority as set forth in N.J.S.A. 18A:28-9 through 28-14.

In a like manner, if a board determined to reduce the physical education department, for example, by three persons and there were only three non-tenured people in that department, there would be no need to negotiate procedures. However when the decision is to terminate seven teachers out of a pool of 92 and no identifiable reasons exist for distinguishing among the teachers on educational policy grounds, then an obligation to negotiate the method of selecting which persons are going to be terminated is created.^{25/}

A board is free to set the qualifications for its teachers and the prerequisites for retention, and is free to make policy decisions that will necessitate the selection of certain individuals to be laid off. But once that process has been completed and it develops that additional people must still be terminated, the board must negotiate

^{25/} Aside from alleging that these cuts were due to declining enrollments and loss of State aid, the Boards have thus far not divulged the reasons or procedures for selecting the 27 people in Cranford and seven in Union County. At one point in the hearing the attorney for the Boards did represent that in the Cranford situation the selections were based upon educational policy, but he never expanded upon this by saying what those policies were or how they resulted in the given terminations. The Associations, on the other hand, claimed ignorance of the methods used to select who would be terminated. They maintain that one reason they need immediate negotiations is to acquire that information. They stated that the acquisition of such information might significantly reduce the actual dispute between the parties since one of the upsetting elements in the entire situation for the teachers was the lack of knowledge concerning just what process was being used to so dramatically affect their lives.

Access to information has long been held to be an integral part of the negotiations process in both the public and private sectors, and will frequently help resolve controversies before they become disruptive. To the extent that the within disputes grow out of such a failure of the parties to exchange information and ideas on the impact of the decision to RIF employees, the very act of sitting down to negotiate in good faith and the discussions which will ensue may go far to expedite the resolution of these matters.

over how these remaining people will be selected from the pool of the remaining non-tenured teachers. No decision that a board makes can have a greater impact on the teachers' terms and conditions of employment. If a board has no major educational justifications for selecting the people terminated, the majority representative should at least be given an opportunity to participate, through negotiations, in deciding upon a method of selection. This will go far toward alleviating some of the bitterness inherent in what is an unfortunate, but necessary, situation.

The earlier discussion on the effects of the funding crisis and the loss of State aid by school districts throughout the State makes it imperative that negotiations begin immediately on the procedures for selecting the individuals to be RIFed. If the Commission agrees with the conclusions reached in this decision, and the undersigned is convinced it will, the parties would be obligated to negotiate such procedures. This could result in the selection of different individuals from those who have already been noticed. Such a result would obviously create significant problems and uncertainty for the Boards in the form of termination pay or back pay for the teachers who had been terminated previously, and for those who may be terminated if new procedures for selection are negotiated. All of the above creates irreparable harm sufficient to warrant interim relief.^{26/} The earlier this uncertainty can be resolved,

^{26/} The undersigned takes administrative notice of the very severe job market for teachers created by the present crisis in State aid. Therefore, the earlier each teacher knows if he or she has a job the better. An ultimate Commission decision resulting in different teachers being laid off in mid-year would make it almost impossible for those people to find new employment. While the results of this decision may create uncertainty now
(continued)

and perhaps avoided, the better for all concerned.

IT IS THEREFORE ORDERED pursuant to N.J.A.C. 19:14-9.4(a) that, within the limitations set forth in the above decision, the Cranford Board of Education, upon demand of the Cranford Education Association, forthwith commence negotiations concerning the procedures to be followed in selecting those unit employees who will not be reemployed for the 1976-77 school year as a result of the said Board's decision to reduce its staff, and

IT IS FURTHER ORDERED that, if the Cranford Board of Education decides to hire teachers for the 1976-77 school year to fill positions previously abolished, the said Board immediately notify the Cranford Education Association of such a decision, and forthwith commence negotiations, upon demand of the said Association, concerning the reemployment rights of the teachers previously terminated as a result of the decision to reduce staff, and

IT IS ALSO HEREBY ORDERED that, within the limitations set forth in the above decision, the Union County Regional High School Board of Education, upon demand of the Union County Regional Teachers Association, Inc., forthwith commence negotiations concerning the procedures to be followed in selecting those unit employees who will not be reemployed for the 1976-77 school year as a result

26/ (continued)

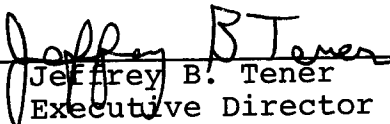
it is felt that it is better to begin efforts at resolving that immediately than to wait and possibly disrupt the school year by changes in personnel at that point.

The discussion in note 25, supra, also leads to the hope that these negotiations will go quickly. Once the Associations learn the reasons behind the selections made by the Boards, it is possible that the parties will have very little disagreement.

of the said Board's decision to reduce it staff, and

IT IS FURTHER ORDERED that, if the Union County Regional High School Board of Education decides to hire teachers for the 1976-77 school year to fill positions previously abolished, the said Board immediately notify the Union County Regional Teachers Association of such a decision, and forthwith commence negotiations, upon demand of the said Association, concerning the reemployment rights of the teachers previously terminated as a result of the decision to reduce staff.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
June 14, 1976