

P.E.R.C. NO. 91-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-365

ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Orange Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally changed the amount of pay for home instructors when a student fails to appear. The Complaint was based on an unfair practice charge filed by the Orange Education Association.

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ORANGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Ashley & Charles, attorneys
(Ronald C. Hunt, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On June 9, 1989, the Orange Education Association filed an unfair practice charge against the Orange Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} by unilaterally changing the amount and manner in which it pays home instructors.

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

On December 16, 1988, the Board's superintendent announced that home instructors should wait 15 minutes for a student to arrive. If the student does not arrive after 15 minutes, the instructor is released and paid for 15 minutes. The Association argues that this policy changed an existing practice of instructors waiting a reasonable period of time for a student to arrive and then getting paid for an entire hour.^{2/}

On December 11, 1989, a Complaint and Notice of Hearing issued. On December 27, the Board filed its Answer denying it violated the Act. The Board claims that before implementing its new payment policy for home instructors, it met at least once with Association representatives to discuss the matter. It further claims that at the meeting it was understood that instructors would be compensated for an entire hour only if they had actually taught. This change admittedly modified the previous policy of paying the instructor for an entire hour whether the pupil appeared or not.

On April 5, 1990, Hearing Examiner Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. The Board argued orally and both parties filed post-hearing briefs.

^{2/} Attached to the charge was a letter from the Association to the Board grieving the change in payment to home instructors. It appears that this dispute might have been deferred to the parties' negotiated grievance procedure. We will not defer at this late date but where there is a pending grievance alleging a change in working conditions and the grievance procedure ends in binding arbitration, deferral of any unfair practice charge contesting the change should be explored.

On May 4, 1990, the Hearing Examiner resigned from our staff. Pursuant to N.J.A.C. 19:14-6.4, the case was transferred to Hearing Examiner Edmund G. Gerber.

On December 7, 1990, Hearing Examiner Gerber found that the Board had a managerial prerogative to set a reasonable waiting time for students to arrive, but that it violated the Act when it failed to negotiate the level of compensation for home instructors who must wait the 15 minutes. He recommended an order requiring the Board to restore the former practice of paying teachers for the extra hour.

On December 26, 1990, the Board filed exceptions.^{3/} The Board claims that: the Hearing Examiner erred in finding a legitimate practice of paying teachers for an entire hour regardless of the length of their teaching effort; its Director of Personnel testified that if a student was unable to receive instruction for a full hour, the session was either rescheduled or the teacher was credited for only the portion of the session taught; there was no clear policy requiring instructors to wait if no one was home or concerning payment for waiting; the Association understood that the \$21 hourly rate was for actual teaching time only; and the decision to pay 1/4 of the \$21 fee to instructors when they arrived at a student's home and the student did not appear was a logical and practical extension of its December 1988 agreement with the Association to pay \$21 per hour. The Board argues that since the

^{3/} The exceptions were inadvertently filed with the Commissioner of Education on December 20.

Hearing Examiner found no clear practice, it is unreasonable to find that there was a change. It further argues that the partial payment policy was only an extension of its December 1988 agreement with the Association. The Board urges that we reject the Hearing Examiner's recommendation or remand the case for more testimony about the December 1988 meeting.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-8) are generally accurate. We incorporate them with these modifications.

We modify finding no. 6 to indicate that Baskerville was a home instructor during the 1970's (T31).

We reject finding no. 7's statement that home instruction is normally performed at the Board office. We modify finding no. 7 to indicate that Baskerville was testifying about her own experience as a home instructor and was not generalizing that experience to all teachers. We clarify the report of Mitchell's testimony to show that she agreed that there was no way that anyone would know if she stopped teaching after 45 minutes. She did not testify that she had credited herself with one hour after teaching only 45 minutes. We clarify that before December 16, 1988, there was no policy requiring teachers to wait or concerning payment for waiting.

We reject finding no. 8's statement that administrators checked the roster of student names against the home instruction roster. We modify the finding to state that Mitchell testified that there had been no policy requiring a teacher to wait a set time if a student did not show up (T13). We also modify this finding to state

that Baskerville was involved at the end of negotiations for the teachers' contract (T35). We clarify that "administratively like" referred to the Board's administrative action, not the nature of the teachers' services (T42).

We modify finding no. 9 to state that some teachers wanted \$21 per hour for extracurricular activities (T38). Also, Baskerville testified that the Board made clear that the \$21 was for "total absolute teaching time" as opposed to non-teaching activities such as guitar or aerobics. She did not testify that the Association clearly understood the Board's position (T38).

We reject the Board's request that we remand the matter for additional testimony which presumably will show that the change was either agreed or acquiesced to by the Association at the December 1988 meeting. The Board had an opportunity to present such testimony and is not entitled to another.

We now address the merits. The Hearing Examiner found that the Board had a managerial prerogative to set a reasonable waiting period for students. We agree that the Board had a right to establish that requirement for teachers who volunteered to participate in the home instruction program.

The Board's Answer admitted that it modified the previous policy of paying the instructor for the entire hour whether the pupil appeared or not.^{4/} And the Board's only witness admitted that the Board did not negotiate before modifying that practice.

^{4/} Mitchell's testimony supports that admission. Baskerville's testimony concerned her personal experience in the 1970's.

The Board now argues that paying for an entire hour regardless of the length of home instruction is not "legitimate" and that the new policy is a logical extension of its agreement to pay \$21 per hour. Our role, however, is not to evaluate the worth of an existing practice. We simply enforce the statutory requirement that:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. [N.J.S.A. 34:13A-5.3]

Here, the Board unilaterally determined that instructors would be paid only \$5.25 if a student failed to show-up for home instruction. That action violated subsection 5.4(a)(5) and, derivatively, subsection 5.4(a)(1).

ORDER

The Orange Board of Education is ordered to

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the amount of pay for home instructors when a student fails to appear.

2. Refusing to negotiate in good faith with the Orange Education Association concerning the amount of pay for home instructors when a student fails to appear.

B. Take this action:

1. Resume paying instructors for the entire hour when students fail to appear.


2. Make instructors whole for any losses sustained due to the change, plus interest pursuant to R. 4:42-11(a)(ii).

3. Negotiate in good faith before changing the amount of pay for home instructors when a student fails to appear.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991



NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the amount of pay for home instructors when a student fails to appear.

WE WILL NOT refuse to negotiate in good faith with the Orange Education Association concerning the amount of pay for home instructors when a student fails to appear.

WE WILL resume paying instructors for the entire hour when students fail to appear.

WE WILL make instructors whole for any losses sustained due to the change, plus interest pursuant to R. 4:42-11(a)(ii).

WE WILL negotiate in good faith before changing the amount of pay for home instructors when a student fails to appear.

Docket No. CO-H-89-365

ORANGE BOARD OF EDUCATION

(Public Employer)

Dated: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-15

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

In the Matter of

ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-365

ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Orange Board of Education committed an unfair practice when it unilaterally altered the established practice of paying home instructors when a student failed to appear.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-15

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

In the Matter of

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Docket No. CO-H-89-365

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Appearances:

For the Respondent
Ashley & Charles, attorneys
(Ronald C. Hunt, of counsel)

For the Charging Party
Balk, Oxfeld, Mandell & Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 9, 1989, the Orange Education Association ("Association") filed an unfair practice charge against the Orange Board of Education ("Board"). The charge alleges that the Board violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")^{1/} when on or about December 16, 1988, the Board

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to

unilaterally changed the amount and manner in which it paid home instructors.

On December 11, 1989, a Complaint and Notice of Hearing issued (C-1). On December 27, 1989, the Board filed its Answer (C-2). The Board claims its representatives met with the Association prior to implementing a new payment policy for home instructors. The Board further asserts that an understanding was reached that home instructors would be compensated for the entire hour only if the home instructor actually taught the pupil. This change modified the previous policy of paying a home instructor for the entire hour whether the pupil was there or not. Therefore, the Board denied the charge of committing an unfair practice.

A hearing was conducted on April 5, 1990, by Hearing Examiner Joyce M. Klein. The parties were given an opportunity to file briefs which were received by May 21, 1990. Ms. Klein resigned from the Commission in May and I have retained this matter to render a recommended decision.

Upon the entire record, the Hearing Examiner makes the following:

1/ Footnote Continued From Previous Page

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."

FINDINGS OF FACT

1. The Orange Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Orange Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. The Board and the Association are parties to a collective bargaining/personnel agreement (CP-1) for 1988-1991 (T40). Home bound instruction is listed in Schedule B "Stipends" of the contract. In 1988-89, Homebound Instructors receive \$21 per hour (T20).^{2/}

4. Yvonne Mitchell has been employed as an elementary and central school teacher for the Board for eight years (T8). She was a building representative for the Association for four years and has held the position of Association Grievance Chairperson for the past year (T8-T9).

5. In 1986, Mitchell served as a home instructor for a child from her school. The instruction was provided at the child's home (T10). This was the only time she was a home instructor (T19).

6. Ruth Baskerville has been employed since 1974 by the Board. When this dispute arose, she served as Director of Personnel.

^{2/} This stipend was increased in 1989 although the new rate does not appear in the record.

She was formerly a teacher and was a home instructor in 1975, 1976 and 1977 (T31). As a Board administrator, she monitored the home instruction program (T31-T32).

7. Home instruction is provided by the Board to pupils unable to participate in regular classroom instruction. Regular teachers voluntarily participate in the program. Home instruction is normally performed at the Board office. However if the child is not able to travel, it is performed at the child's home. Teachers are responsible for their own transportation to either home or instruction site (T10; T11; T19).

The Pupil Personnel Office provides a narrative to the home instructor indicating the number of hours and the subjects that the pupil should be taught. Generally, the home instruction schedule is one hour per day, five days per week. Instructors make their own schedule in accordance with the pupil's home schedule or at the convenience of the instructor (T12; T17; T20; T32). A home instructor may not provide more instruction than is allotted by the Pupil Personnel Office. Teachers can schedule longer, more infrequent sessions at a student's home if desired, as long as they do not teach more than the total number of hours allotted (T24).

Baskerville testified that if a teacher arrives at a home but the child is unable to receive instruction for any reason, the one hour teaching session is cancelled and is rescheduled for a later date. If for some reason, the hour of teaching is reduced to one-half hour, the teacher is only credited for teaching one-half

hour (T32). Mitchell testified that if she worked for 45 minutes, she credited herself with one hour taught (T18). However, she was always able to make up missed teaching time (T14; T15) and so, she ultimately was paid only for hours actually taught.

There is no policy either requiring the teachers to wait if no one is at home or for payment for waiting (T16; T32).

Instruction hours are recorded on a time sheet which the teacher reviews with the pupil's parent or guardian. Once they agree on the hours of instruction provided to the pupil, the teacher submits the time sheet to the Board's office on a monthly basis (T12; T34). The Board never challenged the hours claimed for instructing at a child's home (T23; T34). Teachers are paid during the next pay period.

8. When home instruction is provided at the Board office, the number of subjects and hours of teaching instruction per pupil is allotted by the Pupil Personnel Office (T12; T32). Mitchell never performed home instruction at the Board office and had no actual knowledge of procedure (T17).

Baskerville, as an administrator, is familiar with the home instruction program (T32). Home instruction at the Board office was more formally monitored than instruction at home. An administrator checks that the roster of student names in attendance equalled the home instruction roster. The administrator would also sign off on a time sheet which recorded that the teacher was present for home instruction (T17; T34). Baskerville testified that the Board had no

policy requiring the teacher to wait a set time period if a student did not show up for instruction (T13).

Baskerville was involved in the negotiations for the teachers contract (T35). Mitchell was not (T25). Category C in the contract covers Summer School Instructors as well as home instruction and sets the same rate of \$21 per hour (T42). Baskerville testified that this category has been extended to cover teachers providing "administratively like services" such as after school tutorials with the same \$21 per hour rate of pay (T33; T42).

9. Ms. Baskerville testified that the parties agreed during negotiations that teaching meant teaching contact time and that "you had to work to earn it", in contrast to non-teaching and extracurricular activities (T36; T38).

In December 1988, a meeting was initiated by Superintendent Pelosi. Baskerville, OEA President Richburg and OEA Grievance Chairperson Williams (T38) were in attendance. Teachers wanted \$21 per hour payment for extracurricular activities which were not considered teaching. The parties clarified that \$21 per hour would be paid for absolute teaching time (T38). Baskerville prepared a memo to Dr. Charles Williams, the Director of Pupil Personnel Services, dated November 15, 1988 (C-2A) informing him that at a meeting with the OEA leadership, it was agreed that \$21 per hour would be the stipend paid "for all staff in a teacher-student TEACHING effort." She put teaching in block letters because it specifically meant teaching (T36; T38) as opposed to

extra-curricular activities. The letter also requests a list of staff members engaged in home instruction, summer school teaching and after school, evening and/or Saturday tutorial programs so that their retroactive salary adjustments could be made.

Sometime after this letter was sent, the Personnel office was notified that teachers were submitting payroll sheets on which they recorded their hours present for home instruction, and the sheets from some teachers were reflecting hours when students were not present (T32-T33; T35).

Baskerville met with Superintendent Pelosi and discussed this "abuse" (T33; T35). They initiated a policy requiring home instructors to wait 15 minutes for a pupil to show up and if no one appeared, then the teacher would be paid for 15 minutes (T28; T35).

This policy was not negotiated with representatives of the OEA (T40). Baskerville thought that the OEA clearly understood home instructors were paid for actual teaching time (T38). The \$21 per hour stipend was not changed (T27; T39). This policy was conveyed to Dr. Charles Williams from Superintendent Pelosi in a December 16, 1988 letter (C-1A; T28-T29). Employees were notified of this policy when they came to the Pupil Personnel Services office to participate in the home instruction program (T28; T39).

Baskerville believed the implementation of this policy did not need to be negotiated and could be handled administratively (T36-T37).

10. However, the Association, through officers Curtis Richly and James Williams, filed a grievance charging that the policy changed the hourly stipend negotiated for home instructors since they were now required to wait 15 minutes for a pupil to arrive and would only be paid for a 15 minute portion of an hour for waiting, rather than receiving a full hour of pay (T24). Mitchell, the Association's only witness was not an officer of the Association when the Board unilaterally implemented its policy, was not part of discussions with the Board prior to the filing of the grievance and did not help file the grievance.

ANALYSIS

The Association alleged that the Board changed the previous practice of paying for home instruction for an hour whether the employee was there or not.

In Barneгат Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER _____, (¶ 1990), the Commission found that where there is an established practice, the employer must negotiate with the Association before it can change such a practice.

Although no evidence was adduced as to either the extent or duration of the practice of paying for home instruction (Mitchell's testimony that it was her understanding that this practice existed was the extent of the Association's testimony as to the prior practice), the Board in its answer admits that there was a previous policy which was modified by the Board. See Borough of Glassboro, 12 NJPER 517 (¶17193 1986) at footnote 2.

However, as Baskerville testified, the \$21 per hour negotiated rate was negotiated exclusively for time engaged in teaching. The parties never negotiated a rate of pay for when a student failed to appear. Such a fee had to be negotiated with the Association before it could be implemented. Elizabeth v. Local 2040, IAFF, 11 NJPER 175 (¶16076 1985).

The Board does have a non-negotiable managerial right to set a reasonable waiting time for students to ensure the proper supervision of those students. See Union Tp. Bd. of Ed., P.E.R.C. No. 89-50, 14 NJPER 692 (¶19295 1988); Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987); North Bergen Bd. of Ed., P.E.R.C. No. 82-126, 8 NJPER 397 (¶13181 1982). The rate of pay is severable from the issue of the waiting period

The Board had an obligation to negotiate the level of compensation for waiting 15 minutes when a student is absent from home instruction before it could alter the established practice. Accordingly, I recommend that the Commission find that the Orange Board of Education committed an unfair practice when it failed to negotiate the level of compensation for instructors who must wait 15 minutes for students who are absent from scheduled home instruction sessions and order that the prior rate of compensation of one hours pay be reinstated pending negotiations.

RECOMMENDED ORDER

The Orange Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with teachers employed as home instructors in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by unilaterally altering the amount of pay for home instruction when a scheduled student is absent.

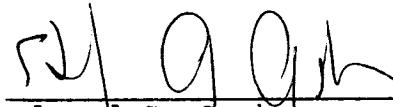
2. Refusing to negotiate with the Orange Education Association before unilaterally altering the amount of pay for home instruction when a scheduled student is absent.

B. Take these actions:

1. Immediately restore the established payment of one hour salary to home instructors when a scheduled student is absent.

2. Notify each employee affected that their records have been adjusted.

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



Edmund G. Gerber
Hearing Examiner

DATED: December 7, 1990
Trenton, New Jersey