P.E.R.C. NO. 86-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLINGSWOOD BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-84-165-108

COLLINGSWOOD PRINCIPALS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Collingswood Board of Education violated the New Jersey Employer-Employee Relations Act when it lowered the evaluation scores of certain principals in order to avoid paying salary increases it had negotiated with the Collingswood Principals Association. The Commission orders the Board to pay the salary increases the principals lost, together with 12% simple interest.

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Appearances:

For the Respondent, Brown, Connery, Kulp, Willie, Purnell & Green, Esqs. (Joseph F. Green, Jr., of Counsel)

For the Charging Party, Wayne J. Oppito, Esq.
New Jersey Principals & Supervisors Association

DECISION AND ORDER

On December 20 and 30, 1983, respectively, the Collingswood Principals Association ("Association") filed an unfair practice charge and an amended charge against the Collingswood Board of Education ("Board"). Count I of the charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1),(3),(5) and (7)[1/] when its superintendent, instead of giving evaluations

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,
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truly indicating the alleged commendable performance of the principals and assistant principals, gave them satisfactory evaluations allegedly in order to avoid paying them a negotiated 8% salary increase. Count II alleges that the Board illegally denied two administrators negotiated salary increases for longevity. Count III alleges that the Board illegally denied certain administrators tuition reimbursement.

On March 1, 1984, a Complaint and Notice of Hearing issued. The Board then filed an Answer. With respect to Count I, the Board denied that the Association was the exclusive representative of the principals and assistant principals; that it had entered a collective negotiations agreement with the Association entitling these employees to salary increases; that these employees had always received "commendable" evaluations before the 1982-83 school year; and that the superintendent lowered the evaluations in order to avoid paying 8% salary increases. With respect to Counts II and III, the Board incorporated its denials of Count I's

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restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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; (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; and (7) Violating any of the rules and regulations established by the commission."

allegations and denied that the two administrators in question were contractually entitled to the claimed salary increases for longevity and to tuition reimbursement. The Board also pleaded several affirmative defenses. It asserted that the Commission lacked jurisdiction since this dispute allegedly did not arise in a collective negotiations context, since it allegedly fell within the Board's managerial prerogatives and since it questioned the accuracy of evaluations. The Board further asserted as separate defenses that the parties never negotiated an agreement entitling these employees to longevity raises or tuition reimbursement and that the statute of limitations and laches barred the Association's claims.

On August 29, and December 10 and 11, 1984, hearings were held.[2/] The parties examined witnesses and introduced exhibits. They also deposed the Board's Business Administrator/Secretary.[3/] The parties filed post-hearing briefs, and the Board filed a reply brief on March 4, 1985.

On June 28, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 85-53, __ NJPER ___ (¶_____ 1985) (copy attached). With respect to Count I, he found that the Board

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2/ Hearing Examiner Charles A. Tadduni conducted the first hearing. Pursuant to N.J.A.C. 19:14-6.4, Hearing Examiner Arnold H. Zudick conducted the remaining hearings and issued a recommended decision.

3/ The Hearing Examiner informed the parties he would not make a credibility determination if he did not see this witness testify, but the parties responded that they did not expect his testimony to raise credibility issues. It did not.

had entered a collective negotiations relationship and agreement with the Association and that the superintendent had lowered the evaluations of the principals so that the Board could evade its obligation to pay these employees negotiated salary increases of 8% for commendable performance. He concluded, therefore, that the Board had violated subsections 5.4(a)(1),(3) and (5) and he recommended an order requiring the Board to revise the evaluations, pay the employees the compensation they lost plus 12% interest, and post a notice of its violation and remedial actions. With respect to Counts II and III, the Hearing Examiner found that the Association had failed to prove by a preponderance of the evidence that the employees were entitled to the claimed longevity increases and tuition reimbursement. Accordingly, he recommended dismissal of these counts.

On July 15, the Board filed exceptions.[4/] With respect to liability issues, it asserts that the Hearing Examiner erred in assuming jurisdiction; finding that the Association had been a public employee representative before it received formal Board recognition on August 22, 1983; allegedly misstating Count I so as to place the burden of proving that the evaluations were justified

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4/ The Board also requested oral argument. We deny that request; the issues have been thoroughly briefed by the parties.

on the Board;[5/] finding (no. 5) that the evaluations did not accurately reflect performance for that year and requiring the Board to prove they were educationally justified; finding (no.6) that the superintendent acceded to pressure to keep the evaluations low; and concluding that the evaluations were illegally motivated. With respect to remedial issues, it asserts that the Hearing Examiner erred in recommending that the Board be ordered to reevaluate the principals and assistant principals for the 1982-83 school year, pay any compensation lost for the 1984-1985 school year as a result of the illegal evaluations, and pay interest on the award.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-18) are accurate. We adopt and incorporate them here with the following additions and observations.

We supplement finding of fact no. 3, p. 4, to state that assistant principals Ridinger and Snyder were evaluated by their building principals as well as the superintendent and their overall evaluations were derived by averaging the two different evaluations. The superintendent gave Ridinger the same satisfactory (below 6.5) rating he gave the building principals (besides Rickerhauser), but the high rating given by the building principals lifted Ridinger's overall evaluation to the commendable range. The superintendent gave Snyder a commendable (6.88) rating.

5/ In the first paragraph of this opinion, we have reworded the Hearing Examiner's descripton of Count I to match the wording of Count I. We do not, however, agree that the Hearing Examiner's wording placed the burden of proof on the Board.

We supplement finding of fact no. 3, p. 7, to reflect that the Association submitted its proposed administrative compensation plan (Exhibit P-7) in a document headed Collingswood Principals' Association. We also add that it was the Chairman of the Board's Personnel Committee who wrote the language in the 1982-84 compensation (p. 13) stating that "...the parties will make a reasonable and good faith effort to conclude a successor agreement by 2/28/84."

We supplement finding of fact no. 4, p.10 to add that before the 1982-83 school year, principals and assistant principals had received their evaluations in March. That year, however, the evaluations were not received until June 29. Sometime before May 23, 1983, the principals contacted a state-wide Association representing administrative personnel and that organization advised them to "refile" for recognition.[6/] The principals apparently thought it was necessary to "refile" for recognition if they wanted to use the services of a professional negotiator; they had heard that the Board wanted to use one. Thus, the Association submitted its May 23, 1983 letter requesting recognition. The Board had a meeting that night at which this letter was read into the minutes and the Board postponed action on the principals' 1983-84 salaries until its June 27, 1983 meeting. After that meeting and the fixing

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6/ One principal testified that another principal, now retired, had orally requested recognition from the Board's Personnel Committee in 1972.

of the principals' salaries, the superintendent delivered the principals' evaluations.

We further supplement finding of fact no. 4 to explain why the Board increased salaries on September 26, 1983. The Board had mistakenly used the compensation plan effective from 1979-1982 in order to determine the salary increases due for satisfactory (5%) and commendable performances (7%). When the Association challenged these amounts, the Board used the amounts (6% and 8%) listed in the 1982-1984 compensation plan.

We specifically reject the Board's exceptions to findings of fact no. 5 and 6. The Hearing Examiner accurately described the marked contrast in the evaluations received in the years before the 1982-83 school year and those received in that year. He further accurately described the testimony that the superintendent -- by his own admission -- was pressured by certain Board members to lower the principals' evaluations in order to reduce the number of salary increases for commendable performance. Board member Albert Profico testified credibly that the superintendent explained to the Personnel Committee that he prepared the evaluations the way he did because of this pressure (Tr. II, pp. 47-48). Board member Elizabeth Busch testified credibly that the superintendent, when questioned about the discrepancies in past and present evaluations, responded that he had been pressured by Board members to lower the principals' salaries by a large amount (Tr. II, p. 13). Given the facts accurately found by the Hearing Examiner and this testimony,

we reject the Board's assertion that there was no proof that the evaluations were not true indications of job performance or that the pressure on the superintendent motivated the 1982-83 evaluations. The Hearing Examiner also properly found that the superintendent did not offer any educational justification for Cochran's lower evaluation scores and that the superintendent's testimony that Sandall's, Kirkian's and McDonnell's performance had deteriorated was unsupported and not credible.

The Board contends that this Commission lacks jurisdiction to consider the Association's unfair practice charge. It asserts that the New Jersey Employer-Employee Relations Act does not confer jurisdiction because allegedly, there was no signed labor contract emanating from any negotiations between the Board and any recognized bargaining representative of any existing bargaining unit; because the Board instead has merely complied with educational statutes and regulations concerning pay schedules and evaluations; and because a breach of a labor contract (if found) may never be an unfair labor practice. We disagree and will lay out the basis for our jurisdiction.

> N.J.S.A. 34:13A-5.3 provides, in part:
>
> Representatives[7/] designated or selected by public employees for the purpose of collective

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7/ N.J.S.A. 34:13A-3(e) defines "representative" as including "any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or

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> negotiation by the majority of employees in a unit appropriate for such purposes...shall be the exclusive representative for collective negotiations concerning the terms and conditions of employment of employees in such unit.

That section further provides:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and negotiate agreements covering all employees in the unit....

N.J.S.A. 34:13A-5.4(a)(1) makes it an unfair practice for a public employer to interfere with, restrain or coerce employees in the exercise of their rights, including representation by their designated representative, guaranteed to them by this Act. N.J.S.A. 34:13A-5.4(a)(3) makes it an unfair practice for a public employer to discriminate in regard to terms and conditions of employment, including compensation, in order to discourage employees in the exercise of their rights under the Act, again including the right to representation by a representative of their own choosing. N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative in an appropriate unit concerning terms and conditions of employment. With regards to this last subsection, a bad faith repudiation of a negotiated agreement violates that last subsection, but a good faith disagreement on contractual interpretation may

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public employee association to act on its behalf and represent it to them."

not. Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) ("Human Services").

N.J.S.A. 34:13A-5.4(c) provides:

> The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the Commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.8/

Thus, so long as an employee representative's charge alleges potential violations of the portions of subsection 5.4(a) just described, we have jurisdiction. See also City of Hackensack v. Winner, 82 N.J. 1 (1980); cf Union County Welfare Board, P.E.R.C. No. 82-83, 8 NJPER 209 (¶13088 1982).

This unfair practice charge alleges, essentially, that the Association was the majority representative of the principals and assistant principals; that the Association and the Board negotiated the 1982-1984 compensation plan (P-13) covering principals and

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8/ The Board's Answer asserts that the Association's charge was untimely, but it was filed within six months of the Board's action fixing the 1983-1984 salaries.

assistant principals and that the superintendent subsequently lowered the evaluations for the 1982-83 school year because of pressure from Board members who wished to evade the negotiated salary increases for commendable performance. These allegations, if proved, would clearly establish violations of the text and spirit of our Act. The Board's jurisdictional arguments are in reality its answer to the merits of the charge -- it asserts that there was no collective negotiations agreement or relationship and instead there was only a relationship mandated by education law. If that is true, then no unfair practice has been committed. Nevertheless, we have jurisdiction to hear the Association's allegations and the Board's defenses and to determine whether the Association has established by a preponderance of the evidence that the Board has committed an unfair practice.9/

We now turn to the merits and specifically the Hearing Examiner's determination that the Board violated subsection 5.4(a)(1),(3) and (5) when it refused to honor its negotiated compensation agreement by intentionally lowering the evaluations of four employees to deny them earned salary increases. Analysis of this question may be divided into two subparts. First, has the Association established by a preponderance of the evidence that the

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9/ We specifically reject the Board's reliance on Human Services. The Association has alleged far more than a mere breach of contract centering on a good faith dispute over ambiguous contract terms; it has alleged, in effect, a subversion of a contract's compensation provisions.

Board recognized and negotiated with it in reaching the 1982-84 compensation plan so that a repudiation of that plan would constitute a refusal to negotiate in good faith with the employees' representative, an interference with the employees' right to be represented by the representative of their own choosing, and a form of discrimination in regards to terms and conditions of employment to discourage such a right? Second, if so, has the Association established by a preponderance of the evidence that the Board repudiated its agreement with the Association by intentionally lowering the 1982-83 evaluations?

We start our analysis of the first question by agreeing with the Hearing Examiner that a negotiations relationship protected under our Act may arise even in the absence of a certification of election results or a formal recognition pursuant to N.J.A.C. 19:11-3.1. Certification or full compliance with N.J.A.C. 19:11-3.1 provides a majority representative with certain benefits, including insulation for 12 months from another group's representation petition or an employer's revocation of recognition. N.J.A.C. 19:11-2.8(b). But the absence of entitlement to such benefits does not expose an organization to unfair practices if a negotiations relationship otherwise exists. We so held in Salem City Bd. of Ed., P.E.R.C. No. 81-6, 6 NJPER 371 (¶11190 1980):

> These same preconditions [N.J.A.C. 19:11-3.1] do not necessarily have to be met before a negotiations obligation arises between a public employer and an employee organization which does represent a majority of the employees in an appropriate unit. Such an organization may have

> the right to negotiate but only so long as it can satisfy the employer that it represents a majority of the employees in the unit.

See also New Jersey Transit Bus Operations, Inc., P.E.R.C. No. _____, 11 NJPER ___ (¶_____ 1985); Atlantic County Sewerage Authority, P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981). Additionally, in PBA Local 53 v. Town of Montclair, 131 N.J. Super. 505 (App. Div. 1974), vacated and remanded 70 N.J. 130 (1976), the Appellate Division of the Superior Court held that an employee group could gain de facto status as a majority representative.[10/] The holding of these cases further accords with the holding of cases under the Labor-Management Relations Act, 29 U.S.C. §141 et seq. ("LMRA") that recognition need not be formal and may be inferred from conduct and circumstances.[11/] See Morris, Developing Labor Law, (2nd Ed. 1983) at 507 (American Bar Association, Section of Labor and Employment Law); Employment Co-ordinator, ¶LR-26,604 (RNA); Laclede Cab Co., 236 NLRB 206, 98 LRRM 1426 (1978).

10/ The Supreme Court vacated and remanded that decision so that this Commission could exercise its jurisdiction over that question; but we never did because the case settled. The Supreme Court did not disagree with the Superior Court's analysis, but instead held that the issue was within our jurisdiction and expertise. While Montclair therefore does not bind us, we agree with its reasoning and elect to follow it here.

11/ The Supreme Court has held that the experiences and adjudications under the LMRA are appropriate guides in determining unfair practice cases because the language, content and purposes of the Act and the LMRA are substantially the same. In re Bridgewater Tp., 95 N.J 235, 240-41 (1984) ("Bridgewater"); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educ. Sec., 78 N.J. 1, 9 (1978); Lullo v. IAFF, 55 N.J. 409, 424 (1970).

The Board asserts that even if a de facto negotiations relationship could arise in other contexts, we may not find one here because in meeting with the principals and adopting the 1982-84 compensation plan, it was merely following the mandates of the education code. It contends that N.J.S.A. 18A:29-4.3 obligated it to adopt a salary schedule for these employees and that N.J.A.C. 6:3-1.21 mandated that it consult with the principals concerning evaluation procedures. It concludes that the Hearing Examiner erred in finding that it voluntarily negotiated with the Association rather than merely complied with its obligations under education law. We disagree.

N.J.S.A. 18A:29-4.3 requires a school board to adopt a salary schedule for teaching staff members having full-time supervisory or administrative personnel. These schedules bind a school board for two years. N.J.S.A. 18A:29-4.1. Mercer County Vocational-Technical Schools Bd. of Ed., P.E.R.C. No. 85-90, 11 NJPER 142 (¶16063 1985). Nothing in N.J.S.A. 18A:29-4.3 requires a school board to negotiate or even consult with its principals before adopting such a schedule.

N.J.A.C. 6:3-1.21 is entitled Evaluation of Tenured Teaching Staff Members. It requires each district's chief school administrator, in consultation with tenured teaching staff members,[12/] to develop policies and procedures for their

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12/ Teaching staff members includes administrative personnel. N.J.S.A. 18A:1-1.

evaluations.[13/] This regulation, however, neither compels nor forbids negotiation over evaluation procedures. Bethlehem Twp. Bd. of Ed v. Bethlehem Twp. Ed. Ass'n, 92 N.J. (1982). If a school board chooses to negotiate over evaluation procedures[14/] with an employee organization absent formal recognition or certification, it does so voluntarily. In any event, the dispute here is whether the compensation plan, not evaluation procedures, was the subject of collective negotiations.

In sum, nothing in the education code compelled the school board to negotiate with the Association before adopting the compensation plan and committing itself to pay 8% salary increases for commendable performance. If it engaged in collective negotiations over that plan, it did so voluntarily.

Accordingly, given that a de facto negotiations relationship could have arisen in this context even absent formal recognition or certification, the question before us is whether one in fact did. We focus on whether there was:

> ...an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement.

13/ Compare N.J.A.C. 6:3-1.19, regulating the observation and evaluation of nontenured teaching staff members, which does not require consultation in developing policies and procedures.

14/ Evaluation criteria are not legally negotiable under section 5.3 and Bethlehem.

West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), modified, P.E.R.C. No. 79 (1973).To determine, in turn, whether negotiations has occurred, we focus on whether there was "...the give and take of a bilateral relationship, through proposal and counterproposal directed towards consummation of a mutually acceptable agreement. See Henry Hudson Reg. Bd. of Ed., E.D. No. 12 (1970); Township of Teaneck, E.D. No. 23 (1971).[15/]

The following evidence supports a finding that there was a negotiations relationship between the Board and the principals and assistant principals as an organized group and that the 1982-84 compensation plan (p-13) covering these employees was in fact

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15/ All the cases cited in this paragraph of text address the issue of whether there was an established pre-Act negotiations relationship dictating the continued inclusion of supervisors and non-supervisors in the same unit despite the Act's general prohibition of such a mixed unit. N.J.S.A. 34:13A-5.3. Given the Legislature's preference for separate units of supervisors and non-supervisors, we have construed this exception narrowly. This case, however, arises in a different context since the central issue is whether a sufficient negotiations relationship existed so that a group of employees may receive the protection of our Act against the alleged repudiation of their employer's contractual promises to them. In such a context, no legislative policy against mixed units is implicated and there is no presumption to overcome in order to find a negotiations relationship; indeed enforcement of an employer's promises to its employees may be preferred. Compare Wooley v. Hoffman LaRoche, discussed infra.

collectively negotiated.[16/] On September 10, 1981, Superintendent Walter Ande sent Principal Edward L. Sandall a memorandum entitled Negotiation Meeting; five other principals were given "information copies" of this memorandum. The memorandum stated that the Board's Personnel Committee, after it had done some preliminary planning, wanted to schedule a meeting with the principal's representatives.[17/] In early November, 1981, the Collingswood Principals Association presented a proposed administrative compensation plan detailing several different features to the Board's Personnel Committee. The proposal also asked that "...there be continuous maintenance of current fringe benefits and the inclusion of principals in future benefits awarded to other bargaining groups." On November 16, 1981, the Association's negotiations committee met with the Board's Personnel Committee and submitted a pricing sample for the proposed salaries of the principals and assistant principals. The next day two

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16/ We focus on the 1982-84 compensation plan because that is the "agreement" the Association claims the Board dishonored. We do not determine whether the parties "negotiated" the 1979-82 Administrative Salary Guide (P-2). We note that there is some evidence suggesting they did (finding of fact no. 3, pp. 3-4) and that the Board's assistant superintendent had scheduled an "Administrative Negotiation Meeting" for that purpose. Interestingly, the 1979-82 plan, unlike the 1982-84 one, invested the Superintendent with the final decision on pay raises.

17/ The superintendent testified that the memorandum was meant to set up a "preliminary planning meeting," not a "negotiations session." The Hearing Examiner, however, discredited this explanation. So do we.

members of the Association's negotiations committee sent the Chairman of the Personnel Committee a memorandum entitled Negotiation Meeting and thanking her for the committee's positive and responsive manner the night before. The next week these two members of the Association's negotiations committee submitted a new administrative compensation proposal (P-10) addressing the concern of the Personnel Committee that the first proposal did not fit all people when initially placed on the formula. On January 27, 1982, the Association's lead representative sent a memorandum entitled Negotiations to the chairman of the Personnel Committee and a copy to the superintendent; that memorandum confirmed that the Personnel Committee would meet in February with the principals' negotiations committee pertaining to the 1982-83 school year contract. The Association then submitted a revised salary proposal in response to the Personnel Committee's request that further adjustments be made; that proposal listed recommended salaries for 1982-83 based upon commendable evaluations. In March, 1982, the new chairman of the Personnel Committee met with a member of the Association's negotiations committee and the superintendent and they made final adjustments to the principals' compensation plan. That plan included a base rate, position ratios, a longevity plan, a merit compensation plan, and a compensation formula and was made effective from July 1, 1982 - June 30, 1984. It also contained a provision which stated that initial placement on the salary guide would be negotiated between the candidate and the Board in consultation with

the Collingswood Principals' Association. The chairman of the Personnel Committee added a provision stating:

> Parties to this agreement will make a reasonable and good faith effort to conclude a successor agreement by February 28, 1984.

The chairman and the negotiations committee representative then initialed the agreement. The Board then adopted this plan at its next meeting. One Personnel Committee member, Betty Busch, testified that the Committee and the Association had engaged in negotiations in reaching this plan similar to negotiations with the other represented employees such as teachers; another member, Bernard Beals, testified they had not. The Hearing Examiner credited Busch. Finally, the Association represented all the principals and vice-principals, and the Board met with its negotiations committee because it did.

The following evidence supports a finding that there was not a negotiations relationship between the Board and the Association. The 1982-84 compensation plan covered the superintendent and assistant superintendent as well as the principals and assistant principals. The plan was also essentially limited to compensation and did not cover other terms and conditions of employment. After the Board adopted the plan, the plan was not printed as a formal collective negotiations agreement. The Association did not request official recognition from the Board until May 23, 1983; that request was accompanied by a letter advising the Board of the employees' "intention to organize as an official bargaining unit." The Board first granted the requested

recognition on August 22, 1983.[18/] At a November, 1983 meeting of the Personnel Committee to discuss the evaluations, one principal, speaking on behalf of the principals' organization, said: "As a matter of fact everyone with me tonight will tell you that we consistently resist the urging of others even to become an official bargaining unit."

Assessing all the circumstances of this case, we hold that the Association has proved by a clear preponderance of the evidence that it was a public employee representative of the principals and assistant principals beginning at least in 1981; that it and the Board had entered a collective negotiations relationship, and that the 1982-84 compensation plan was the fruit of their collective negotiations. In the words of West Paterson, the Association was an organization which regularly spoke on behalf of a well-defined group of employees, the principals and assistant principals;[19/] the Association sought improvement of employee conditions and resolution of differences concerning compensation; and the Board responded with the intent of reaching an agreement with the Association's

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18/ The request listed the group wishing to organize as the Collingswood Administrators' Association; subsequent communications, however, use the name of Collingswood Principals Association and that is the name of the group the Board recognized.

19/ The Association did not purport to represent the superintendent and assistant superintendent and the Board unilaterally determined their compensation.

negotiations committee. The superintendent set up a negotiations meeting with the principals' representatives, and the Association's negotiations committee and the Board thereafter engaged in a give and take over compensation proposals. The Association's representatives bargained hard and well and the parties agreed on a compensation plan. That agreement was then approved when representatives of both parties initialed it. Significantly, the Chairman of the Board's Committee wrote that the parties to this "agreement" would make a reasonable and good faith agreement to reach a successor agreement, thus implying that the parties had been treating as equals and would continue to treat as equals. A member of the Board's Personnel Committee credibly confirmed that the parties had negotiated the 1982-84 compensation plan.

This evidence of a collective negotiations relationship and agreement outweighs the Board's contrary evidence. The Board has essentially shown that the Association was not as sophisticated or formal as the other groups -- NJEA affiliates -- with which the Board had negotiated. But our Act's definition of representative is not limited to statewide organizations and affiliates; it covers homegrown employee organizations as well if a negotiations relationship in fact exists. While the agreement did not cover a broad range of terms and conditions of employment, compensation is the most important one. West Paterson Bd. of Ed., supra. Given that Association and Board representatives initialed the

compensation plan upon reaching agreement and given that the Association was a homegrown organization without outside resources, it is inconsequential that this plan was not later embodied in a printed collective negotiations agreement like that covering the teachers. The most significant evidence supporting the Board's position is that the Association did not demand official recognition until May 1983, more than a year after the 1982-84 compensation plan was established. Nevertheless, an Association official reasonably explained that this step was taken because the principals believed that it would be necessary to be formally recognized if they wanted to retain a professional negotiator, a step they thought might be advisable in light of the delay that spring in receiving their evaluations and the rumor the Board was going to retain a negotiator. While this may not have been a necessary step, it is an understandable one for a group not versed in the niceties of labor law and does not outweigh the hard evidence of negotiations leading to the 1982-84 compensation plan.[20/]

20/ The Board may prove too much when it points out that in November, 1983, one principal told the Personnel Committee that "...everyone with me tonight will tell you that we consistently resist the urging of others even to become an official bargaining unit." This statement came three months after the Board had formally recognized the Association. What it suggests, consistent with its letter earlier demanding recognition, is that the principals regretted the change to a more formalized, less amicable relationship with the Board in which it might be necessary to obtain outside help. Principal Cochrane so testified. We do not read this statement as an admission that there had not been a negotiation relationship.

In sum, the Board negotiated a collective agreement with the Association, and our Act protects the employees the Association represents against a bad faith repudiation of that agreement. Compare Wooley v. Hoffman-LaRoche, Inc., ___ N.J. ___ (1985). What the Court said in Wooley's concluding paragraph is apposite here: "All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises." Similarly, by concluding that the compensation plan was collectively negotiated, all that we are requiring of the Board is that it not renege on that agreement in bad faith.

Having held that the Board and the Association had collectively negotiated the 1982-84 compensation plan, we must now determine whether the Board violated subsections 5.4(a)(1), (3), and (5) as the Association alleges, by lowering the evaluation scores so that it could evade that agreement's obligation to pay 8% salary increases for commendable job performances.[21/] The answer to this

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21/ The Board argues that we cannot undertake this task because it would require us to review the substantive merits of the superintendent's evaluations. We disagree. A board of education may in good faith adopt criteria for commending performances as it sees fit. Hoboken Bd. of Ed., P.E.R.C. No. 84-139, 10 NJPER 353 (¶15164 1984). But just as a board may not rig evaluation scores to discriminate for reasons of race or sex, it may not do so to discriminate against supporters of an employee organization or to deny these employees their

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question obviously turns on motivation: were the evaluation scores motivated by a desire to evade negotiated agreements or were they a genuine, even if grudging, attempt to evaluate the employees on the merits of their job performances?

Bridgewater sets forth the standards for assessing whether a particular personnel action was illegally motivated in violation of subsection 5.4(a)(1) and (3). The charging party must first establish a prima facie case that his or her protected activity was a substantial or motivating factor in the disputed personnel decision. In some cases, that prima facie case may be made out by direct evidence of anti-union motivation for that disciplinary action; in others, that case may be made out by circumstantial evidence that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the protected activity. Id. at 246. If the charging party establishes a prima facie case, the employer must prove, as an affirmative defense and by a preponderance of the evidence, that the action occurred for legitimate business reasons, not in retaliation for the protected activity. Ultimately, the factfinder must resolve

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negotiated rights. Compare Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Assn, 78 N.J. 144 (1978 with In re Bridgewater Twp., supra (while transfers are not mandatorily negotiable, they are illegal if discriminatorily motivated). In short, we have jurisdiction to determine whether these evaluation scores were illegally motivated under our Act, and, if so, to remedy that illegality. If, however, we find that these scores were not illegally motivated, we must accept them even if we judge them otherwise unfair.

any conflicting proofs. While ordinarily we would not apply this test to allegations of a subsection 5.4(a)(5) violation, we do so here because the charge of a refusal to negotiate in good faith is so dependent upon a finding that the evaluation scores were deliberately lowered in order to evade the Board's negotiated contractual obligations.

Under all the circumstances of this case, the Association has clearly proved that the superintendent lowered the evaluation scores so that the Board would not have to fulfill its collectively negotiated agreement to pay 8% salary increases for commendable performance. The direct evidence is overwhelming. The superintendent admitted that he told the principals, when confronted with their protests, that certain members of the Board had pressured him and that it "would be his ass" if he did not lower some salaries by lowering their evaluations. Two Board members and two principals confirmed that the superintendent made this admission and one testified that the superintendent explained that this pressure was why he prepared the evaluations as he did. The Hearing Examiner credited all this testimony and so do we. Furthermore, the circumstantial evidence supports the Association's allegations. These principals and assistant principals in previous years had all received commendable ratings of 8 and 9 yet all of a sudden four of these employees had dropped into the satisfactory range below 6.5. This marked change in past evaluations suggests illegal motivation. Compare Ridgefield Park Bd of Ed., P.E.R.C. No. 85-93, 11 NJPER 202

(¶16083 1985), appeal pending App. Div. Dkt. No. A-3941-84T1. Given this direct and circumstantial evidence, the Association has proved that the evaluations were illegally motivated.22/

Bridgewater affords an employer an opportunity to rebut a prima facie case of illegal motivation by proving that it would have taken the same action absent the charging party's protected activity. Thus, the Board would prevail if it could show that the evaluations would have been satisfactory rather than commendable even if the Board had not pressured the superintendent to lower the scores. This the Board did not do. The superintendent testified, without elaboration, that the performance of some principals had declined, but the Hearing Examiner refused to credit that testimony and we have accepted that credibility determination. Given this finding of fact, the Board has not proved its defense. Accordingly, we hold that the Board has violated subsections 5.4(a)(1),(3) and (5).

We now consider how to remedy this violation. Pursuant to N.J.S.A. 34:13A-5.4(d), we are empowered, once we find an unfair

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22/ The Board argues that we should dismiss the Complaint absent testimony from each principal that his performance for the 1982-83 school year was commendable. We disagree. There is direct credible testimony that the superintendent lowered the evaluations because of the pressure to save money. Further, each principal submitted a written rebuttal asserting that his evaluation should have been commendable, not satisfactory. The superintendent admitted to one of the principals at a rebuttal conference that the evaluation scores were inaccurate and should have been higher. Given this

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practice, to issue:

> an order requiring such party to cease and desist from such unfair practice and to take such reasonable affirmative action as will effectuate the purposes of this act.

When an unfair practice causes employees to suffer economic losses, the public policy of our Act supports a monetary award making the aggrieved employees whole. Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn of Ed. Sec., 78 N.J. 1, 11 (1978) "Galloway"). Compare Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

In this case, some portions of the Hearing Examiner's recommended order are unchallenged. We therefore adopt his recommendation of a cease and desist order and a notice without further comment.

We have found that, but for the Board's illegal action, the four adversely affected employees would have received commendable evaluations for the 1982-83 school year, thus earning 8% salary increases for school year 1983-84.
We consider the Hearing Examiner's remaining recommendations with that finding in mind and with the purpose of making the employees whole.

The Board excepts to the Hearing Examiner's recommendation that it be ordered to change immediately the scores of the four

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evidence and the evidence discussed in the text, the burden shifts to the Board to prove that the evaluations were genuine reflections of satisfactory performance.

employees to reflect a score equivalent to their respective average scores prior to 1982-83. We agree that this portion of the order is unnecessary. It suffices to say that the illegally motivated 1982-83 evaluation scores should be removed from the evaluation files and a copy of this decision inserted instead.

We now consider the Hearing Examiner's monetary recommendations. The Board does not except to that portion of the recommended order which would require it to pay the monetary difference between the amounts the principals would have received had they received an 8% salary increase in 1983-84, and the amounts they were in fact paid in 1983-84. This remedy is warranted under Galloway and we adopt it here. The Board excepts instead to the recommended extrapolation of this order into future years and the recommended award of 12% simple interest.

The Hearing Examiner recommended that the back pay award include all money the employees would have received in 1984-85 had they been paid an 8% increase for 1983-84; thus, if salaries for 1984-85 were based upon a percentage of what the employees received in 1983-84, then the Board should be required to pay also the differences for 1984-85 based upon the higher salary for 1983-84, plus 12% interest on these amounts. The Board, however, has represented that no signed contract for the 1984-85 school year exists, and the Association has not disputed this representation. Assuming this is true, we need not decide whether that portion of the recommended remedy is appropriate. The Board, however, should

conduct future negotiations based on the 1983-84 salaries these employees would have received if they had been paid an 8% salary increase.

The Board finally excepts to the recommended award of 12% simple interest on the amount of money illegally withheld. The Board excepts to our power to award interest, the propriety of awarding interest, and the amount of interest.

We repeat that N.J.S.A. 34:13A-5.4(d) authorizes us to order such affirmative relief as will effectuate the purposes of the Act and that Galloway establishes that this power may be used to make employees whole. Prior to 1980, we had not awarded interest, but in Salem County Board for Vocational Education v. McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd App. Div. Dkt. No. A-3417-78 (Sept. 29, 1980), the Appellate Division of the Superior Court affirmed an unfair practice decision and added an award of interest at 8% per annum, the rate then prescribed by the New Jersey Civil Practice Rules. Our courts have since approved awards of interest in several unfair practice cases. Tp. of Bridgewater and Bridgewater Public Works Ass'n, P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), mot. for recond. den. P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981), affmd App. Div. Dkt. No. A-859-81T2, affmd 95 N.J. 235 (1984); Kramer and Bd. of Ed. of Town of Boonton and Boonton Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), direct certif. 99 N.J. 173 (1984), affmd as mod., sub. nom., Boonton Bd. of Ed. of the Town of Boonton v. Judith M. Kramer, ___ N.J. ___ (1985);

Logan Tp. Bd. of Ed. and Sandra C. Waldman, P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), affmd App. Div. No. A-696-84T2 (10/4/83); PERC and Frances Nelson v. Local #3, AFL-CIO, Cooks, Bartenders, and Cafeteria Workers, P.E.R.C. No. 83-108, 9 NJPER 146 (¶14069 1983), enforcement granted Law Div. Dkt. No. L-20061-85; Board of Education of the Borough of Oakland and Oakland Teachers' Ass'n, P.E.R.C. No. 82-125, 8 NJPER 378 (¶13172 1982), affmd App. Div. Dkt. No. A-4975-81T3 (6/20/83); Randolph Tp. Bd. of Ed. and Randolph Ed. Ass'n, P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), affmd App. Div. Dkt. No. A-5077-81T2 (6/24/83); and Borough of Teterboro and Local No. 945 Teamsters, P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1983), affmd App. Div. Dkt. No. A-4371-82T2 (4/24/84.[23/] Our power to award interest is a vital remedial tool; without it we could not make employees whole for their illegally induced economic losses nor could we prevent employers from obtaining an illegally motivated economic gain.[24/]

23/ In Oakland and Teterboro, the Appellate Division rejected express challenges to our power to award interest. The Board's reliance on Elizabeth Police Superior Officers Ass'n v. City of Elizabeth, 180 N.J. Super. 511 (App. Div. 1981), is misplaced. That case denied interest from the date of an interest arbitration award to the date of payment of that award because the interest arbitration statute did not authorize interest. That case, however, did not involve either us or our power under N.J.S.A. 34:13A-5.4(d) to order such affirmative relief as will effectuate the purposes of the Act and make employees whole.

24/ The NLRB has the power to use this remedy and does so. Florida Steel Corp., 231 NLRB 651, 96 LRRM 1070 (1977). The NLRB fixes

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The Board also argues that we may not award prejudgment interest against a governmental entity without a showing of overriding and compelling equitable reasons. It cites Newark Bd. of Ed. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984) ("Newark") and Fasolo v. Pensions, 190 N.J. Super. 573 (App. Div. 1983) ("Fasolo"). These cases considered the award of prejudgment interest in the absence of a statute authorizing interest. The statute we administer, however, authorizes an award of interest when appropriate to effectuate the purposes of the Act and to make wronged employees whole. Accordingly, an award of prejudgment interest beginning on the date of an unfair practice is statutorily permissible even absent overriding and compelling and equitable reasons.25/

The Board also argues that 12% is an unauthorized and inappropriate amount of interest. R. 4:42-11, however, establishes this rate and the Appellate Division in Salem County Board for Vocational Education v. McGonigle ordered payment in accordance with

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the amount of interest according to the "adjusted prime rate" used by IRS in calculating interest on the underpayment or overpayment of taxes. Olympic Medical Corp., 250 NLRB 146, 104 LRRM 1325 (1980). For the period of January 1 - June 30, 1985, the Board used an interest rate of 13%. Memorandum from NLRB Associate General Counsel, 118 LRRM 169 (1985).

25/ Even if we agreed with the Board that Fasolo and Newark applied, we would still hold, for the reasons articulated later, that there were compelling and equitable reasons for prejudgment interest in this case. We also reject the Board's technical argument that we may not award interest until a judgment has been entered.

this rule.[26/] We have used that rate since then and the Appellate Division has affirmed that rate in the cases already cited.[27/] While we may have discretion to vary that rate in some cases, Newark at 249, n. 4, we choose to follow it here. See also Levitt v. Bd. of Ed. of City of Newark, SB#22-83 (State Bd. of Ed., July 3, 1985) (awarding 12% interest).

Considering the nature of the illegality, we believe that an award of 12% simple interest from the date of that illegality is warranted. If we did not award such interest, the employees would suffer an economic loss and the Board would be rewarded for its illegality by accomplishing savings it would not have received if it had acted legally.[28/] That would be a particularly unfair result in a case where the very illegality was intended to deny employees money they had earned.

We now consider the Hearing Examiner's determination that the Association has not proved by a preponderance of the evidence

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26/ The 12% rate of interest was confirmed when the rule was amended on July 26, 1984, effective September 1, 1984. This rate is comparable to that the NLRB assesses.

27/ We specifically reject the Board's reliance on Fasolo where the Court awarded a lesser rate of interest to the plaintiff because the governmental entity, unlike here, had acted in good faith.

28/ We reject the Board's contention that we should not award interest when it has not been affirmatively requested. Cherry Hill Bd. of Ed., P.E.R.C. No. 79-71, 5 NJPER 185 (¶10102 1979) so held, but that case predated Salem County Board for Vocational Ed. v. McGonigle, the case which established our power to award interest to make employees whole. This power should not be defeated by a technical omission from an unfair practice charge.

that the Board illegally denied longevity salary increases and tuition reimbursements. The Association has not excepted to this determination and we agree with his analysis and conclusions. Accordingly, we dismiss those portions of the Complaint.

ORDER

The Collingswood Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, by deliberately lowering evaluations of employees Cochrane, Kurkian, Sandall and McDonnell to evade its contractual obligation to pay these employees an 8% salary increase for the 1983-84 school year.

B. Take the following affirmative action:

1. Immediately delete the 1982-83 evaluation scores of employees Cochrane, Kurkian, Sandall and McDonnell from their personnel files and insert a copy of this opinion instead.

2. Pay these employees the monetary difference between the amount they would have received had they received an 8% salary increase in 1983-84, and the amounts they were in fact paid in 1983-84, plus 12% simple interest on the monetary difference.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and,

after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

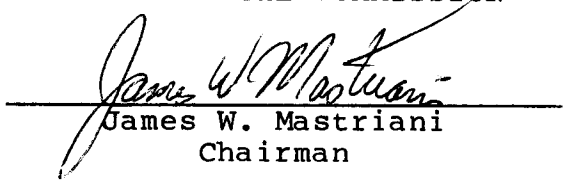
The Complaint is dismissed regarding the following allegations:

1. That the Board unlawfully failed to pay an additional 2% and 5% to employees Snyder and McDonnell, respectively.

2. That the Board unlawfully failed to pay tuition reimbursement, and,

3. That the Board violated subsection 5.4(a)(7) of the Act.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Suskin, and Wenzler voted in favor of this decision. Commissioner Suskin dissented from the rate of interest awarded in the Order. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
October 17, 1985
ISSUED: October 18, 1985

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, by deliberately lowering evaluations of employees Cochrane, Kurkian, Sandall and McDonnell to evade our contractual obligation to pay these employees an 8% salary increase for the 1983-84 school year.

WE WILL immediately delete the 1982-83 evaluation scores of employees Cochrane, Kurkian, Sandall and McDonnell from their personnel files and insert a copy of this opinion instead.

WE WILL pay these employees the monetary difference between the amount they would have received had they received an 8% salary increase in 1983-84, and the amounts they were in fact paid in 1983-84, plus 12% simple interest on the monetary difference.

COLLINGSWOOD 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 Public Employment Relations Commission, 495 West State, Trenton, New Jersey 08618 Telephone (609) 292-9830.

H. E. No. 85-53

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

In the Matter of

COLLINGSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-165-108

COLLINGSWOOD PRINCIPALS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Collingswood Board of Education violated subsection 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it intentionally lowered evaluations of certain unit members to avoid paying them an 8% increase. The Hearing Examiner recommended that their evaluation scores be corrected to show the correct average score, and that the employees be made whole for any lost salaries. The Hearing Examiner recommended dismissal of the complaint in relationship to longevity pay and tuition reimbursement.

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. 85-53

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

In the Matter of

COLLINGSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-165-108

COLLINGSWOOD PRINCIPALS
ASSOCIATION,

Charging Party.

Appearances:

For the Board
Brown, Connery, Kulp, Willie, Purnell & Greene, Esqs.
(Joseph F. Greene, Jr., of Counsel)

For the Association
Wayne J. Oppito, Esq.
N. J. Principals and Supervisors Association

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 20, 1983, and amended on December 30, 1983, by the Collingswood Principals Association ("Association") alleging that the Collingswood Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleged that the Board unlawfully and intentionally kept the evaluations of certain unit members lower than in past years in order to avoid paying them an 8%

increase; that the Board unlawfully failed and refused to give unit employees, McDonnell and Snyder, an additional 5% and 2% salary increase respectively for longevity; and, that the Board unlawfully failed to give unit employees tuition reimbursement, all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 1, 1984. The Board submitted an Answer on March 14, 1984 denying the allegations in the Charge. The Board asserted in part that there had been no collectively negotiated agreement covering the employees in question, and that the employees had not been in a recognized or certified collective negotiations unit during the time that a collective negotiations agreement had allegedly been negotiated.

Hearings were held in this matter on August 29 and December 10 and 11, 1984, in Trenton, New Jersey, at which time the parties

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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; (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; (5) Refusing to negotiate in good faith with a majority representative of employees in an approrpriate unit concerning terms and conditions of employment of employees in that unit,

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had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.[2/] By agreement of the parties witness John W. Heck was deposed by both attorneys before a certified shorthand reported on January 7, 1985 outside my presence. The parties agreed to submit that deposition as part of the record in this matter.[3/] At the close of hearing both parties filed post-hearing briefs which were received on February 22, 1985. The Board submitted a reply brief which was received on March 4, 1985.

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

Upon the entire record I make the following:

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or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

2/ This matter was originally assigned to Hearing Examiner Charles Tadduni who scheduled and conducted the first hearing on August 29, 1984. Pursuant to N.J.A.C. 19:14-6.4, I was assigned as Hearing Examiner in this matter on September 21, 1984.

3/ The parties were advised that since Heck was to be deposed outside my presence I would be unable to make any credibility judgments with respect to his testimony. The parties, however, did not expect his testimony to raise credibility issues (Transcript "T" 3 p. 107).

Findings of Fact

1. The Collingswood Board of Education is a public employer within the meaning of the Act and is subject to its provisions and is the employer of the employees involved herein.

2. The Collingswood Principals Association is a public employee representative within the meaning of the Act and is subject to its provisions, and is the majority representative of the employees involved herein.

3. The Association's unit consists of seven employees, five principals and two assistant principals, including employees Sandall, Ridinger, Kurkian, Rickerhauser, Cochrane, McDonnell, and Snyder. In their 1982 evaluations all seven employees received a commendable evaluation (a point score of 6.5 or above) which entitled them to an 8% salary increases for 1982-83. However, in 1983 only Ridinger, Snyder and Rickerhauser received commendable evaluations, and Sandall, Kurkian, Cochrane and McDonnell received only satisfactory evaluations (below 6.5) which only entitled them to 6% salary increases for 1983-84. The Association alleged that the Board's Superintendent intentionally lowered the evaluations of these four employees in order to avoid paying them an 8% salary increase. The Association alleged that action to be a violation of the Act. A critical element in deciding that issue is whether the parties had been engaged in a negotiations relationship during the relevant time period.

The facts show that on June 28, 1979 former Assistant Superintendent Charles Mullin sent a memorandum (Exhibit P-1) to

several people, including principal Ed Kurkian, regarding the scheduling of an "Administrative Negotiation Meeting" on July 5, 1979. Principal Wayne Cochrane testified that the Association's negotiating committee consisted of Sandall, Ridinger, Kurkian and McDonnell, and that the Board's negotiating committee at that time consisted of Board members Vera Harte, Ed Bohn, and H. R. Rossell (T 1 pp. 20-21).

The two committees met on July 5 and signed a document (Exhibit P-2) that was entitled "Administrative Salary Guide" and included a procedure for computing administrative salaries which tied the amount of a principal's percent salary raise to his performance evaluation score. The last sentence of P-2 was:

> The final decision on percentage raise shall be the assistant superintendent/Superintendent's.

Exhibit P-2 was signed by the three Board members and four principals[4/] and was effective beginning July 1, 1979.[5/]

On June 1, 1981, Ed Sandall, Chairman of the Association's negotiations committee, sent Joseph Fittipaldi, Chairman of the Board's Personnel Committee, a memorandum (Exhibit P-5) pursuant to

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4/ In addition to Sandall, Ridinger and Kurkian, P-2 was signed by Cochrane, but not McDonnell.

5/ Superintendent Walter Ande testified that Exhibit R-14 which is entitled "Administrative Salary Policy Replacement" was an "addition to P-2," but he also indicated that R-14 was never officially adopted (T 3 p. 11). R-14 is essentially the same as P-2 and does not appear to be of any particular importance.

Fittipaldi's request concerning the principals' contractual agreement for 1981-82. That information presented the rationale for the principals' recommended salaries for 1981-82.

On September 10, 1981, Superintendent Walter Ande sent Sandall a letter (Exhibit P-6) with copies to five other principals and Vera Harte, regarding "Negotiation Meeting." Ande indicated in that letter that the Personnel Committee wanted a meeting. He stated in pertinent part that:

> I am writing to advise you that the committee has directed that a meeting be established as soon as some preliminary planning has been established by the committee.
>
> It is my expectation that a meeting with the principal's representatives and the personnel committee will be scheduled during the month of September 1981.6/

6/ Ande testified that he did not intend the term "negotiation" in P-6 to mean a proceeding leading to a written contract between the principals and the Board, and he referred to the meeting as a "preliminary planning meeting" between the Committee and the Principals (T 3 pp. 78-79). I do not credit Ande's explanation attempting to distinguish the term "negotiations" from the term "preliminary planning meeting." P-6 is clear on its face and refers to the scheduling of a negotiations meeting and not a planning meeting. In fact, the language in the first sentence of the above-cited paragraph indicates that the meeting would be established as soon as the committee (the Board's committee) had established some preliminary planning. P-6 did not state that the meeting was for planning. Ande's explanation is nothing more than unsupported parol evidence which expresses an interpretation at variance with the clear language in P-6, and which is wholly unexpressed in P-6 and is therefore inadmissible to alter P-6. See Casriel v. King, 2 N.J. 45 (1949); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953);

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In early November 1981 the Association, through its negotiations committee consisting of Sandall, Cochrane, Kurkian and Ridinger, presented a proposed administrative compensation plan (Exhibit P-7) to the Board's Personnel Committee which consisted of Vera Harte, Bernard Beals, Larry Davis and Betty Busch (T 1 pp. 41-42, T 2 pp. 5-6). That proposal consisted of a base salary rate, a percentage salay ratio, a longevity plan, a merit compensation plan, and a compensation formula. At a meeting on November 16, 1981, the Association presented the Personnel Committee with proposed salaries for the principals for 1982-83 and 1983-84 (Exhibit P-8). The following day Sandall thanked Personnel Committee Chairperson Harte for her responsiveness on November 16 (Exhibit P-9). Then on November 24, 1981 Sandall and Cochrane submitted a new compensation proposal to Harte (Exhibit P-10) addressing certain Board concerns that had been expressed regarding P-7 (T 1 pp. 44-45).

On January 27, 1982, Sandall sent a letter to Harte (Exhibit P-11) to confirm the scheduling of a negotiations meeting for February 16, 1982. On February 19, 1982, the Association submitted a revised salary proposal for the principals for 1982-83 (Exhibit P-12), in response to the Personnel Committee's request that adjustments be made to P-8 (T 1 pp. 47-48).

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Cherry Hill Bd.Ed. v. Cherry Hill Assoc. of School Administrators, App. Div. Docket No. A-26-82T2, December 23, 1983.

Subsequent to February 16, 1982, Board member Larry Davis became chairman of the Personnel Committee. On March 22, 1982 Cochrane met with Davis and Ande and made final adjustments to the Principals Compensation Plan which was then initialed by Davis and Cochrane (Exhibit P-13)(T 1 pp. 50-51). P-13 included a base rate, position ratios, a longevity plan, a merit compensation plan, and a compensation formula. It was made effective from July 1, 1982-June 30, 1984.[7/] The paragraph under the position ratio in P-13 provided that:

> Initial placement on the guide would be at the first step unless, in cases of promotion, transfer, or credit for previous administrative experience, consideration is given. This would then be negotiated between the candidate and the Board of Education in consultation with the Collingswood Principals' Association.

P-13 did not include the last sentence in P-2 giving the Superintendent the final decision on the percentage raise (T 3 pp. 76-77). The last sentence in P-13 provided:

> Parties to this agreement will make a reasonable and good faith effort to conclude a successor agreement by February 28, 1984.

The Board adopted P-13 in its entirety entitled "Principals' Compensation Plan - 7/1/82-6/30/84" at the Board meeting on March

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7/ Although P-2 did not specifically set a beginning and ending effective date, the record reflects that P-2 was effective throughout the negotiations for P-13 and expired on June 30, 1982, the day before P-13 became effective.

22, 1982 (Exhibit J-1).[8/]

The Association argued that P-2 and P-13 were reached through negotiations with the Board (T 1 pp. 18, 24, 50). The Board, however, denied that "negotiations" took place. Personnel Committee member Bernard Beals testified that he was unaware of any bargaining group or unit composed of principals and assistant principals, that he was unaware of any majority representative for a unit composed of principals and assistant principals, and that he had no knowledge of any written agreements (T 3 pp. 84-85). However, Personnel Committee member Betty Busch disagreed with Beals. She testified that the Committee had engaged in negotiations with the Association and that P-13, in particular, had been negotiated (T 2 pp. 5-6). I credit Busch's testimony and discredit Beals' testimony. Both Busch and Beals were on the Personnel Committee when P-13 was negotiated.

8/ When the Association proposed Exhibits P-7, P-10, and P-13 to the Board those Exhibits included position ratios for the superintendent and assistant superintendent in addition to those ratios for the principals and assistant principals. In fact, the Board included those ratios in J-1 when P-13 was adopted by the Board. The inclusion of those titles in those exhibits, however, is not indicative of an Association intent to represent those titles. First, the Association did not purport to represent those titles by any other action, and the pricing samples which it submitted as the proposed salaries, Exhibits P-8 and P-12, only included the principals and assistant principals. Second, p. 1640 of J-1 clearly indicated that the superintendent's salary was reviewed by the Board in an executive session, and the Board approved an additional 1.7% above what he received in the public meeting of the Board. The granting of the additional percentage evidenced the lack of participation by the Association in the determination of the superintendent's salary.

Beals knew that there was a group of principals presenting proposals on behalf of all principals and assistant principals. He also knew that the Association had submitted additional proposals to address certain Board concerns, and he had to know that the Personnel Committee and the principals reached an agreement. Accordingly, I cannot accept Beals' testimony that the principals had no bargaining group and that the Association had not negotiated an agreement with the Board.

4. On April 22, 1983 Superintendent Ande sent all seven principals and certain other employees a letter (Exhibit R-12) informing them that all contracts would be presented to the Board on May 23, 1983. Ande indicated that he needed time to review all evaluations. On May 23, 1983 the principals presented the Board with two letters (Exhibits R-1 and R-2), advising the Board of their intent to organize, and requesting recognition as the Collingswood Administrators' Association. Both R-1 and R-2 were signed by all seven principals.[9/] The Personnel Committee reviewed the Association's recognition request on June 1, 1983 (Exhibit R-4).

At a Board meeting on June 27, 1983 the Board approved salaries for the principals for 1983-84 as recommended by the Superintendent (Exhibit R-10). Those salaries were not fixed in accordance with P-13 or J-1. The following day Board President

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9/ The Board inserted R-1 and R-2 in its minutes of May 23, 1983. Exhibit R-23.

Beals acknowledged receipt of the Association's request for recognition (Exhibit R-18), and he raised a question regarding the appropriateness of the unit. On June 30, 1984, the Association submitted a letter to Ande and certain Board members (Exhibit P-14) complaining about the salaries fixed by the Board in R-10. The Association in R-10 maintained that the salaries fixed in June did not comply with the compensation plan that had been agreed upon by the Board in P-13 and J-1 which would result in a 6% or 8% increase based upon one's evaluation score. The Association also alleged that several evaluation scores were tailored to meet caps in the principals' salaries. The Association asked that the salaries and inappropriate evaluations be resolved at the Board meeting on August 22, 1983.

On July 22, 1983 Cochrane, in response to Beals' request, provided Beals with a memorandum (Exhibit P-15) explaining what the principals' salaries should be in accordance with J-1. At the Board meeting on August 22, 1983 the Board recognized the Association as the majority representative for certified administrators and supervisors (Exhibit R-5).

Finally, on September 26, 1983 the Board officially (Exhibit R-11) increased the salaries of six of the seven principals in order to minimally comply with P-13 and J-1 (T 3 p. 74). The results of that action left Sandall, Kurkian, Cochrane and McDonnell with 6% increases, and Ridinger, Snyder and Rickerhauser with 8% increases (T 1 p. 85).

5. Part Four of P-13 and J-1 indicated that the Annual Merit Compensation for principals was a 6% salary increase for those employees receiving a satisfactory evaluation, and an 8% salary increase for those employees receiving a commendable evaluation. The evaluation instrument itself (Exhibit P-3) indicated that a satisfactory evaluation could fall anywhere between a 3.5 and 6.4, and a commendable evaluation began with a 6.5 through 9.0. There are 68 evaluation items on P-3 that may be rated between one and nine. A total is then taken and the average is determined to arrive at the evaluation score.

The record shows that Wayne Cochrane received a commendable evaluation with a 7.5 or better average for 1979, 1980, 1981 and 1982 (Exhibit P-17). Cochrane was first evaluated by Superintendent Ande for 1981-82 at which time he received his highest evaluation score (T 1 pp. 90-93). In 1982 Ande gave Cochrane a total point score of 536 which resulted in an average of 7.88. At that time Ande informed Cochrane that he (Ande) was proud to give him (Cochrane) the highest evaluation he (Cochrane) had ever received, and Ande told him that he had earned it and that he was an outstanding administrator (T 1 p. 93). In 1983, however, Ande gave Cochrane the lowest evaluation score he had received in over five years. Cochrane received a total point score of 409 with an average of 6.01. Ande did not offer any educational justification for Cochrane's lower evaluation score.

Ed Kurkian has also received commendable evaluations with an 8.06 or better average for 1980, 1981 and 1982 (Exhibit P-18).

Kurkian was first evaluated by Ande in 1982 at which time he also received his highest evaluation score (T 2 p. 57). In 1982 Ande gave Kurkian a total point score of 571 which resulted in an average of 8.39. However, for the following year, 1983, Ande gave Kurkian his lowest evaluation with a total point score of 415 which resulted in an average of 6.10. Although Ande testified that Kurkian's performance diminished (T 3 p. 69), Ande did not offer any evidence to support an educational justification for the dramatic lowering of Kurkian's evaluation score. Consequently, I do not credit Ande's bare allegation regaring Kurkian's performance.

Ed Sandall also received commendable evaluations with a 7.6 or better average for 1979, 1980, 1981 and 1982 (Exhibit P-19). Sandall's highest evaluation score was received from Ande in 1982. That year Sandall received a total point score of 577 which resulted in an average of 8.48. However, Ande gave Sandall his lowest evaluation score in 1983 (T 2 p. 84). That year Sandall received a total point score of 423 which resulted in an average of 6.22. No educational justification was offered to substantiate Sandall's lower evaluation score (T 2 p. 89).

Finally, Ed McDonnell, like the other principals, also received commendable evaluations for 1981 and 1982. In fact, Ande evaluated McDonnell in 1981, 1982 and 1983 (T 2 p. 101). Ande gave him a point score of 572 with an 8.41 average in 1981, and he gave him a point score of 573 with an 8.42 average in 1982 (Exhibit P-20).

In conjunction with his 1982 evaluation of McDonnell, Ande on March 1, 1982 issued a written document (attachment to P-20) complimenting McDonnell for his outstanding performance.10/ However, in 1983 Ande gave McDonnell a point score of only 412 with an average of 6.05 (T 2 pp. 102-103). Although Ande alleged that McDonnell's performance diminished (T 2 p. 72), he never gave McDonnell any indication that his performance had diminished (T 2 p. 103), and he (Ande) never produced evidence of any educational justification for the dramatic drop in McDonell's evaluation score. Consequently, I do not credit Ande's testimony that McDonnell's performance diminished.

6. The overwhelming evidence established that Ande was pressured by certain Board members to lower the principals' evaluations in order to reduce the number of principals who received 8% salary increases. There was no apparent educational justification for the lower evaluations.

10/ In the March 1, 1982 attachment to P-20 Ande said in pertinent part:

> "Ed McDonnell has excelled in the areas of:
>
> -School organization
> -Instructional program
> -Relations with students
> -Relations with fellow administrators
> -Relations with the community
>
> Ed continually evaluates the job that he is doing, and frequently meets with the superintendent. Ed McDonnell has lived up to all of the expectations. He has had a great year -- he is a true professional in every sense of the word, and he has earned the highest evaluation category.

Both Cochrane and Kurkian testified that Ande admitted that he was pressured by certain Board members to hold down the principals' salaries (T 1 p. 71; T 2 p. 59). Cochrane also testified that Ande admitted that the lower evaluations of the four affected principals were inaccurate and should have been higher (T 1 p. 94). Cochrane further testified that Beals admitted that Ande had been pressured and that the evaluations were rigged (T 1 pp. 82, 144).

Two Board members supported that testimony. Elizabeth Busch and Albert Profico testified that at Personnel Committee meetings on November 30 and December 14, 1983, Ande admitted that he had been pressured by certain Board members to lower the principals' salaries by lowering the evaluations (T 2 pp. 13-15, 46-48). In fact, Profico testified that Ande told the Personnel Committee that certain Board members told him (Ande) that "it was his (Ande's) ass" if he did not keep the money or the evaluations down (T 2 pp. 48-49). Ironically, Ande admitted that certain Board members felt that principals were too highly paid (T 3 p. 65), that he had been placed under pressure (T 3 pp. 34-35, 37), and that he did make a statement to the effect that "it was his ass if he did not keep the money or evaluations down." (T 3 pp. 37, 65).

7. The facts show that at the time P-13 was being negotiated, the Board asked the Association to determine if Snyder and McDonnell would accept a lower longevity step, allegedly in the first year of P-13, than they would otherwise normally receive (T 1

p. 48). The Board felt that if Snyder and McDonnell had received their proper amounts they would receive a total percentage raise substantially higher than other principals.

As a result of the Board's request, the Association's negotiations committee asked Snyder and McDonnell if they would defer longevity raises of 2% and 5% respectively for the first year of P-13 (1982-83), with the understanding that they would receive those amounts the following year (1983-84)(T 1 p. 48, T 2 pp. 98-99, 112). Snyder and McDonnell then agreed to defer those amounts (T 1 pp. 48, 135-136, T 2 p. 112). However, in 1983-84 Snyder and McDonnell were not given their respective 2% and 5% longevity increases. The Association alleged that the Board had agreed to defer those amounts, but the Board alleged that there was never an agreement to defer the money to a subsequent year.

The record shows that other than P-13 and J-1 which merely included the longevity plan, no document specifically provided that Snyder and McDonnell would receive their respective 2% and 5% longevity raises after they had agreed to forego those amounts in 1982-83 (T 1 p. 126, T 2 pp. 111-112). Cochrane testified that Board member Larry Davis had agreed that Snyder and McDonnell were due the 2% and 5% increases (T 1 pp. 102-103), and Board Member Busch testified that she was on the Personnel Committee when the principals were told that McDonnell and Snyder had received salary adjustments in the succeeding year (T 2 p. 18). However, Busch also testified that although the Personnel Committee recommended that

Snyder and McDonnell receive those increases, the Board rejected that recommendation (T 2 pp. 24-25).

Therefore, it is apparent that the Board never formally agreed to defer 2% and 5% increases for Snyder and McDonnell, and at most there was no meeting of the minds regarding an agreement to defer those inceases.

8. The Association maintained that the Board failed to pay its members tuition reimbursement in accordance with their agreement and/or past practice. The Board alleged that no agreement existed with the Association to provide tuition reimbursement.

The facts show that the Collingswood Education Association ("CEA") which represents teachers, but not principals, has included a tuition reimbursement article in its collective agreement for several years. The CEA 1978-80 agreement (Exhibit R-22) and the 1980-82 agreement (Exhibit R-21) provide in Article 15 and Article 18, respectively, that the Board will provide for a certain amount of tuition reimbursement based upon certain conditions. Included in both R-21 and R-22 was the following sentence:

> For an adminitrator, study under this program shall normally be limited to the administrative field of the applicant.

However, in its most recent agreement (Exhibit R-17 covering 1982-85) the CEA and Board deleted any reference to administrators in Article 18, the tuition reimbursement plan.

The facts show that prior to the 1983-84 school year Association unit members applied for and received tuition

reimbursement in accordance with Exhibit P-4 (T 1 p. 30, T 2 pp. 60-68). P-4 is Article 18 of R-21, the CEA 1980-82 agreement. In 1983-84 both Cochrane and McDonnell applied for tuition reimbursement but their requests were rejected (T 1 p. 30, T 2 pp. 110, 121). Superintendent Ande rejected McDonnell's request for tuition reimbursement by letter of October 5, 1983 (Exhibit R-20). That letter provided in pertinent part:

> Several years ago, tuition funds for administrators were paid from funds that were budgeted in one account for teachers and administrators. However, in the present "Written Agreement" the Collingwood Eduction Association eliminated administrators from their tuition proposal.
>
> No additional funds were budgeted for administrators for tuition reimbursement--therefore, your application for reimbursement has been denied.

Ande also testified that Article 18 of R-17 does not cover administrators (T 3 p. 44), and that the principals were denied tuition reimbursement because the CEA agreement did not provide for it (T 3 p. 60).

There was nothing included in P-2, P-13 or J-1 regarding tuition reimbursement, and there was no showing that principals specifically applied for and received tuition reimbursement for 1982-83.

Analysis

Despite the Board's argument, it is clear to me that the Board recognized and negotiated with the Association in reaching collective agreements, both P-2 and P-13. It is equally clear that

the Superintendent intentionally lowered the evaluations of four principals to keep their salaries from rising to 8%, and not as a result of any educational considerations. Given the parties' negotiations relationship, the Superintendent's actions in that regard violated the Act. However, the Board did not violate the Act by refusing to pay employees Snyder and McDonnell an additional 2% and 5% respectively, nor by refusing to grant tuition reimbursement. There was insufficient evidence to establish that the Board ever agreed to defer 2% and 5% for Snyder and McDonnell, and there was no evidence that the Association had ever negotiated for tuition reimbursement on behalf of its members.

The Negotiations Relationship

The Board presented several arguments to support its position that it had not engaged in a negotiations relationship with the Association. First, it argued that it only met with--and consulted with--the principals in compliance with its obligations under N.J.S.A. 18A:27-3.1 and 18A:29-4.3, and N.J.A.C. 6:3-1.19 and 6.3-1.21. Second, it argued that prior to the submission of R-1 and R-2 on May 23, 1983, the Association had not complied with the Commission's Rules N.J.A.C. 19:10-1.1 and 19:11-3.1 regarding recognition. In conjunction therewith, the Board argued that it did not recognize the Association as the majority representative of the principals prior to the adoption of R-5 on August 22, 1983. Third, the Board argued that neither P-2 nor P-13 were negotiated collective agreements. Rather, the Board alleged that they were

merely "salary schedules" which were adopted by the Board. Fourth, the Board questioned the appropriateness of the Association's unit, particularly the inclusion of the assistant principals in a unit with principals who may be involved in developing their yearly evaluations.

The Board's first argument has no merit. N.J.S.A. 18A:27-3.1 concerns observations and evaluations for non-tenured teaching staff, and 18A:29-4.3 requies boards of education to adopt salary schedules for teaching staff who have full-time administrative responsibilities. However, there is nothing in those statutes that otherwise required the Board to engage in negotiations with the Association, or to sign P-2 and initial P-13. Those were voluntary acts. Indeed, the above statutes did not require the Board to agree to provide principals with longevity or with an annual merit compensation plan. The Board agreed to those items during the negotiations process. If the Board really believed that no negotiations relationship existed with the Principals as a unit, then it was not required under 18A:29-4.3 to even consult with the principals over a salary schedule. It could simply have implemented a salary schedule. However, the Board chose to negotiate the salary which supports a finding of a negotiations relationship.

The Board's reliance upon N.J.A.C. 6:3-1.19 and 6:3-1.21 is similarly rejected. Those respective sections of the Administrative Code concern the evaluation of non-tenured and tenured teaching

staff. They are primarily intended to cover non-supervisory teaching staff, not administrators. However, to the extent that administrators are covered by those rules, 6:3-1.21(c) provides that:

> The policies and procedures shall be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members....

There is nothing in either section of the Code to even remotely suggest that a board must consult with staff concerning the "establishment of a salary schedule," or a longevity plan, or a merit compensation plan. N.J.A.C. 6:3-1.21(c) is limited to consultation concerning the establishment of evaluation policies and procedures. Although P-2 included certain evaluation policies and procedures, it went well beyond that area, and clearly encompassed negotiable terms and conditions of employment. The Board's reliance upon the above statutory and code references is therefore misplaced.

The Board's second and third arguments must be considered together. The Commission's Rule, N.J.A.C. 19:10-1.1 defines "Recognition" as the:

> ...written acceptance by a public employer of an employee organization as the exclusie representative of employees in an appropriate unit.

Then in N.J.A.C. 19:11-3.1 the Commission estabished certain criteria to demonstrate recognition.[11/] The Board argued that the

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11/ N.J.A.C. 19:11-3.1 provides as follows:

(Footnote continued on next page)

(Footnote continued from previous page)

(a) Whenever a public employer has been requested to recognize an employee organization as the exclusive representative of a majority of the employees in an apporopriate collective negotiations unit, the public employer and the employee organization may resolve such matters without the intervention of the commission.

(b) The commission will accord certain privileges to such recognition as set forth in N.J.A.C. 19:11-2.8 (Timeliness of petitions), provided the following criteria have been satisfied prior to the written grant of such recognition by a public employer:

1. The public employer has satisfied itself in good faith, after a suitable check of the showing of interest, that the employee representative is the freely chosen representative of a majority of the employees in an appropriate collective negotiations unit;

2. The public employer has conspicuously posted a notice on bulletin boards, where notices to employees are normally posted, for a period of at least 10 consecutive days advising all persons that it intends to grant such exclusive recognition without an election to a named employee organization for a specified negotiatins unit;

3. The public employer shall serve written notification upon any employee organizations that have claimed, by a written communication within the year preceding the request for recognition, to represent any of the employees in the unit involved, or any organization with which it has dealt within the year preceding the date of the request for recognition and shall contain the information set forth in paragraph 2 of this subsection.

4. Another employee organization has not within the 10-day period notified the public employer, in writing, of a claim to represent any of the employees involved in the collective negotiations unit or has not within such period filed a valid petition for certification of public employee representative with the director of representation;

5. Such recognition shall be in writing and shall set forth specifically the collective negotiations unit involved.

Association did not comply with 19:11.3.1 prior to May 23, 1983, and that, therefore, anything which occurred prior thereto could not be sanctioned as recognition. I do not agree. The Board apparently overlooks the evidence which shows that the Board has conferred at least de facto recognition upon the Association.

Before reviewing those facts it is important to note that the Commission has already held that the recognition requirements in N.J.A.C. 19:11-3.1 do not necessarily need to be met to establish a negotiations relationship. The Commission in In re Salem City Bd.Ed., P.E.R.C. No. 81-6, 6 NJPER 371 (¶11190 1980) held:

> These same preconditions [N.J.A.C. 19:11-3.1] do not necessarily have to be met before a negotiations obligation arises between a public employer and an employee organization which does represent a majority of the employees in an appropriate unit. Such an organization may have the right to negotiate but only so long as it can satisfy the employer that it represents a majority of the employees in the unit.

See also In re Atlantic County Sewerage Authority, P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981).[12/]

The Appellate Division has also sanctioned the concept of de facto recognition despite the wording of the Commission's recognition rules. In PBA Local 53 v. Town of Montclair, 131 N.J. Super. 505 (1974), the Town met with and negotiated with the PBA over terms and conditions of employment, but the Town, subsequently,

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12/ The demand for recognition need not be stated in formal or precise terms. See Laclede Cab Co., 236 NLRB 206, 98 LRRM 1426 (1978).

unilaterally established a salary schedule. The Town argued that it had not recognized the PBA, and further argued that the PBA had failed to comply with the Commission's recognition rules.[13/] The Court held that:

> [3] Notwithstanding these provisions of the administrative codes it is clear that defendant Montclair, by its actions commencing September 1973 and continuing into February 1974, has recognized plaintiff as a designated and selected representative of all police officers and by so doing has conferred at least de facto status on plaintiff. Basic principles of fairness dictate that if Montclair was going to question the right of plaintiff to act as the majority representative of the police officers, it should have done so promptly and not acted so as to lull plaintiff over a period of months into a false sense of security and into thinking it had recognition. 1/
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> 1/ Further support for this argument is obtained from an examination of the procedure available under the National Labor Relations Act The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 et seq., parallels the National Labor Relations Act, 29 U.S.C.A. § 141 et seq., and can be interpreted in light of that act. Lullo v. Intern. Ass'n of Fire Fighters, 55 N.J. 409, 424 (1970); Toltec Metals, Inc. v. N.L.R.B., 490 F.2d 1122 (3 Cir. 1974), holds that where an employer orally recognizes a union as the employees' repreentative, it can not later withdraw recognition and refuse to bargain.

That decision was vacated and remanded by the New Jersey Supreme Court, 70 N.J. 130 (1976), at least in part to give the

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13/ The recognition rule in effect during the processing of that case was N.J.A.C. 19:11-1.14 which was the predecessor rule to N.J.A.C. 19:11-3.1 and contained the same or similar language in pertinent parts.

Commission the opportunity to make the primary factual determination as to whether the PBA had achieved majority status. However, the Supreme Court did not criticize the Appellate Division's de facto recognition analysis.[14/] Therefore, given the Commission's own decision to approve recognition that did not meet 19:11-3.1 where majority status was otherwise established, and given the Appellate Division's approval of the de facto recognition concept, I find that the Association was at least de facto recognized as the majority representative of the instant employees.[15/]

In that regard I find that the Association demonstrated that it represented a majority of the principals for purposes of collective negotiations. P-2 itself was signed by four of the seven principals and is evidence of majority support by the principals. Subsequently, there were negotiations between the Board Personnel Committee and a committee of four of seven principals which culminated in P-13 and J-1. The Board was fully aware that at least four of the seven principals supported the principals' collective

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14/ Although PBA Local 53 v. Town of Montclair, supra, was remanded to give the Commission the opportunity to exercise its primary jurisdiction over the main issues, the Commission never issued any decision regarding that matter because the issue was resolved by the parties.

15/ In a recent decision, In re New Jersey Transit Bus Operations, Inc., H. E. No. 85-46, 11 NJPER ___ (¶_____ 5/31/85), a different Commission Hearing Examiner also found a de facto recognition, and he held that the unilateral withdrawal of that recognition violated the Act.

negotiations efforts. In fact, P-6 was sent to six principals regarding the establishment of a negotiations meeting between the "principals' representatives" and the Personnel Committee. That was a clear indication that the Board knew that the home grown principals association represented a majority of the principals for collective negotiations.

Another important element in finding a de facto recognition, as well as in response to the Board's third argument herein, is that both P-2 and P-13 represent collective agreements--or at the very least--memorandums of agreement--leading to formal agreements. The elements for collective negotiations were established early in the Commission's existence.

> The essential elements for collective negotiations are the give and take of a bilateral relationship, through proposal and counter proposal directed towards consummation of a mutually acceptable agreement. See In re Henry Hudson Reg. Bd.Ed., E.D. No. 12 (1970); In re Township of Teaneck, E.D. No. 23 (1971)

In addition to the elements of collective negotiations, the Commission has also clearly described the type of relationship that is required to suport a claim of established practice, i.e., a negotiations relationship. The Commission held that such a relationship requires:

> ...an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. In re West Paterson Bd.Ed., P.E.R.C.No. 77 (1973); In re West Paterson Bd.Ed., P.E.R.C. No. 79 (1973)

Those elements, as well as the established practice requirements, were satisfied in this case. Although the evidence regarding the reaching of P-2 is sketchy, the evidence regarding the reaching of P-13 and J-1 is clear. The Association engaged in a give and take relationship with the Board which included proposal and counter proposal and resulted in the reaching of a mutually acceptable agreement. The Association submitted an initial proposal for 1982-1984, P-7 and P-8, then submitted its first counter-proposal, P-10, in response to Board concerns with P-7, and submitted a third proposal, P-12, in response to the Board's concerns regarding P-8. Then the Board requested that employees Snyder and McDonnell take a lower salary and the Association agreed. Subsequently, the parties initialed the agreed upon terms P-13, and the Board adopted those terms in J-1, and implemented those terms in 1982-1983. J-1 clearly referred to P-13 as an "agreement," and Board member Busch admitted that the Personnel Committee had negotiated with the Association in reaching P-13. The parties had clerarly engaged in dialogue (negotiations) with the intent to reach an agreement.

The entire series of events leading up to J-1 is proof that the Board recognized the Association as the majority representative for principals, and is also proof that the Board engaged in negotiations with the Association resulting in the reaching of a collective agreement. I do not ascribe any great significance to

the Association's formal request for recognition on May 23, 1983. The Board suggestion that the formal recognition request negates the previous negotiations history is without merit. I am not certain why the Association formally requested recognition, but I am certain that de facto recognition had already been achieved, and a collective agreement was already in place prior to May 23, 1983.

The Board's fourth argument is also without merit. The Act prevents the inclusion of supervisors with nonsupervisors, N.J.S.A. 34:13A-5.3, but does not automatically find inappropriate, units including different supervisory levels. Where the inclusion of higher and lower supervisors in one unit presents an actual, or substantial potential conflict of interest it is inappropriate. Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

But where, as here, there is insufficient evidence of a substantial potential conflict of interest then the inclusion of principals with assistant principals is not inappropriate. The Commission has previously approved several units including different levels of supervision some of which include principals with vice-principals. In re City of Trenton, D.R. No. 83-33, 9 NJPER 382 (¶14172 1982); In re Edison Twp. Bd.Ed., D.R. No. 82-8, 7 NJPER 560 (¶12249 1981); In re Borough of Fair Lawn, D.R. No. 79-30, 5 NJPER 165 (¶10091 1979); In re Delaware Valley Reg. H.S. Dist. Bd.Ed., D.R. No. 79-15, 4 NJPER 496 (¶4225 1978); In re Lakewood Bd.Ed., D.R. No. 78-44, 4 NJPER 212 (¶4105 1978); In re Long Branch Bd.Ed., E.D. No. 47 (1974).

Finally, in view of the fact that the Board willingly recognized the unit of principals and assistant principals in August 1983, any argument that the same unit was inappropriate prior thereto is without merit. Thus, the Board's failure to recognize P-13 and J-1 as a collective agreement with the Association violated subsection 5.4(a)(5) of the Act.

The Evaluations

The overwhelming evidence shows that Superintendent Ande lowered the evaluations of Cochrane, Kurkian, Sandall and McDonnell for economic reasons, to prevent them from receiving 8% increases. Ande had no legitimate educational basis for his actions. I fully credit Busch, Profico, Cochrane and Kurkian that Ande had been pressured to lower the evaluations for economic reasons. I further credit Cochrane that Ande admitted that the evaluations should be higher, and that Beals admitted that the evaluations were rigged. Indeed, I credit that part of Ande's testimony where he admitted he was pressured and that it "would be his ass" if he did not lower some salaries by lowering the evaluations. However, I find that Ande's assertion that Kurkian's and McDonnell's performance diminished, to be a total fabrication. It was simply not a truthful statement in relationship to his credited testimony.

Given the parties' negotiations relationship, and that their collective agreement, P-13 and J-1, required the determination of the principals' annual compensation based upon their evaluation score, the Board was expected to, and indeed, required, to perform

and award the evaluations that the employees legitimately earned and deserved. The Board would have been entitled to lower the evaluations only for educational reasons, not for economic reasons. No educational reasons were established. The Board cannot lower evaluations to reduce annual compensation any more than it could unilaterally change the work year to reduce annual compensation. Piscataway Twp. Bd.Ed v. Piscataway Twp. Principals Assoc.; 164 N.J. Super. 98 (App. Div. 1978); In re Sayreville Bd.Ed, P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

As a result of Ande's actions in lowering evaluations and therefore reducing compensation the Board violated subsections 5.4(a)(3) and (5) of the Act. In order to properly remedy the Board's unlawful conduct the evaluations of the four administrators must be fixed based upon an average of their previous evaluations which would place all four principals well above a 6.5 score which would entitle them to an 8% increase.[16/] Then those employees should receive the difference between what they actually received at 6%, and what they should have received at 8%, plus interest.

Longevity Pay--Snyder and McDonnell

There was no dispute herein that the Association (and Snyder and Mconnell) agreed to forego a 2% longevity raise for

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16/ Cochrane should receive a total of 524 equating to a 7.70 score; Kurkian should receive a total of 557 equating to an

(Footnote continued on next page)

Snyder and a 5% longevity raise for McDonnell for 1982-83. The issue is whether the parties agreed to defer those amounts until 1983-84.

I find that the Association failed to prove by a preponderance of the evidence that the parties ever actually agreed to defer that money. The Association admitted that neither P-13 nor J-1 contained any reference to a 2% and 5% deferral for Snyder and McDonnell. In fact, the record shows that the Board's Personnel Committee specifically recommended that those amounts be deferred, but the Board rejected that recommendation. It is apparent that no meeting of the minds was reached regarding the longevity increase for those employees. Consequently, it is recommended that said portion of the Charge be dismissed.

Tuition Reimbursement

I am convinced that the only basis for the principals' receipt of tuition reimbursement was due to the provision in the CEA contract authorizing such payments. The Association, in fact, admitted that its justification for tuition reimbursement was P-4, which was the reimbursement clause in R-21, the CEA's 1980-82 agreement. The Association offered no evidence that it ever negotiated for a tuition reimbursement plan.

(Footnote continued from previous page)
8.19 score; Sandall should receive a total of 540 equating to a 7.94 score; and, McDonnell should receive a total of 573 equating to an 8.42 score.

I find that the principals' receipt of tuition reimbursement was a mere gratuity, unsupported by a quid pro quo or any consideration in collective negotiations. I similarly find that the Board's grant of tuition reimbursement did not establish a past practice. Rather, it was granted in accordance with the CEA agreement, and it ceased after the Board and CEA agreed to drop the referenc to administrators in R-17. Consequently, that portion of the Charge should be dismissed.

Finally, the alleged 5.4(a)(7) violation of the Act should be dismissed. The Association did not establish that any Commission rule or regulation was actually violated.

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

Conclusions of Law

1. The Collingswood Board of Education violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by lowering the annual compensation rate for four employees by intentionally lowering their evaluations, and by refusing to honor a collective agreement.

2. The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) or (7) by refusing to defer a 2% and 5% longevity increase for Snyder and McDonnell, respectively, nor by refusing to provide unit employees with tuition reimbursement.

Recommended Order

I recommend that the Commission Order:

A. That the Board cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and from failing and refusing to issue legitimate evaluations for employees Cochrane, Kurkian, Sandall and McDonnell, and from failing and refusing to pay those employees an 8% increase in accordance with their collective agreement.

B. That the Board take the following affirmativ action:

1. Immediately change the 1983 (1982-83) evaluation scores of employees Cochrane, Kurkian, Sandall and McDonnell to reflect a score equivalent to their respective average score prior to 1983.17/

2. Pay the above affected employees the monetary difference between the amount they would have received had they received an 8% salary increase in 1983-84, and the amounts they were in fact paid in 1983-84 to the present, plus 12% interest.18/

3. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as

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17/ See note 16, infra, for the average scores.

18/ The remedy includes all money the employees would have received had they received an 8% increase for 1983-84. Thus, if salaries for 1984-85 were based upon a percentage of what the employee(s) received in 1983-84 then the Board is required to also pay the difference for 1984-85 based upon the higher salary for 1983-84, plus interest at 12% on those amounts.

"Appendix A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the Complaint be dismissed regarding the following allegations:

1. That the Board unlawfully failed to pay an additional 2% and 5% to employees Snyder and McDonnell, respectively,

2. That the Board unlawfully failed to pay tuition reimbursement, and,

3. That the Board violated subsection 5.4(a)(7) of the Act.

Arnold H. Zudick
Hearing Examiner

Dated: June 28, 1985
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to honor the collective agreement between the parties covering 1982-84, and by failing to properly evaluate employees Sandall, Kurkian, Cochrane and McDonnell in 1983, and by failing to pay those employees an 8% increase for 1983-84.

WE WILL forthwith change the evaluations of employees Sandall, Kurkian, Cochrane and McDonnell to reflect a commendable score and average (above 6.5) for 1983.

WE WILL forthwith pay employees Sandall, Kurkian, Cochrane and McDonnell the difference between the amount they would have received for 1983-84 (and 1984-85) had they received an 8% increase (for 1983-84), and the amount they actually received, plus 12% interest.

COLLINGSWOOD 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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State State Street, Trenton, New Jersey 08618 Telephone (609) 292-9830.