P.E.R.C. NO. 96-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREDON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-424

FREDON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Fredon Township Board of Education violated the New Jersey Employer-Employee Relations Act by unilaterally implementing salary, longevity and health benefit proposals before reaching a genuine post-factfinding impasse. The Commission reaffirms that the concept of implementation is predicated on the notion that the majority representative has rejected the employer's last best offer. In this case, the employer implemented a portion of its last best offer.

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

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In the Matter of

FREDON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-424

FREDON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Schwartz Simon Edelstein Celso & Kessler, attorneys (Nathanya G. Simon, of counsel; Nathanya G. Simon and Mark A. Tabakin, on the brief in opposition to exceptions)

For the Charging Party, Bucceri & Pincus, attorneys (Sheldon H. Pincus, of counsel)

DECISION AND ORDER

On June 3, 1993, the Fredon Education Association filed an unfair practice charge against the Fredon Township Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it unilaterally

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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. (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."

implemented terms and conditions of employment during negotiations for a successor collective negotiations agreement.

The charge was accompanied by an application for interim relief. On June 23, 1993, the application was denied. I.R. No. 93-22, 19 NJPER 421 (¶24189 1993).

On August 2, 1993, a Complaint and Notice of Hearing issued. The Board's Answer denied that the Board violated the Act and asserted that it negotiated in good faith and lawfully implemented terms and conditions of employment.

On March 9 and 10, April 18 and 19, May 17 and 19, and June 9, 1994, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On January 26, 1995, the Hearing Examiner issued his report and recommendations. H.E. No. 95-15, 21 NJPER 79 (¶26058 1995). He found that the employer had negotiated in good faith and legally implemented its last best offer on its salary, longevity and health insurance proposals. He therefore recommended that the Complaint be dismissed.

On February 27, 1995, the Association filed exceptions to certain findings of fact.[2/] It also asserted that: the Board's unilateral change in the level of health care benefits during mediation and factfinding tainted the negotiations; the Board

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2/ We will address the factual exceptions below.

violated the Association's exclusive negotiations rights by trying to meet directly with employees over health benefit changes; the Hearing Examiner erred in not inferring bad faith from the alleged attempt of the Board's chief negotiator to mislead this agency in the interim relief proceeding; there was no genuine post-factfinding impasse and hence the Board did not have the authority to implement its last best offer; and the Association accepted the Board's offer to continue negotiations, yet the Board selectively implemented certain terms and conditions of employment.[3/] By way of remedy, the Association contends that a return to the status quo with an order to negotiate cannot take place since it would require reductions in compensation in violation of N.J.S.A. 18A:28-5. Instead the Association seeks an order directing the Board to pay the increases the Association sought during factfinding or, in the alternative, the increases recommended by the factfinder.

On March 23, 1995, the Board filed an answering brief. It contends that the totality of circumstances show that it negotiated in good faith; a genuine impasse had been reached when it implemented its last best offer; its continued willingness to negotiate did not invalidate the genuine impasse; it did not implement those provisions that were already agreed upon in negotiations because they were non-economic changes or a continuation of existing benefits; and it did not implement a change

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3/ The Association also relies on its post-hearing brief.

in the length of the work day or work year as was contained in its final offer before the factfinder. As for the Association's requested remedy, the Board responds that monetary damages are inappropriate because the Association has not demonstrated that any unit members sustained any actual losses.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 6-28) with these comments and modifications.

Finding 2, when read in concert with findings 3 and 4, acknowledges the difficulty the Association experienced in getting an accurate scattergram.

In finding 6, the Hearing Examiner found that Association representative Bunny Thompson had been provided with information from Travelers Insurance Co., the Board's new health insurance carrier. That finding does not conflict with the Association's assertion that its negotiations team first learned of the change in carriers at the second mediation session.

In response to the Association's exceptions, we agree with the Board that: the Hearing Examiner recognized the parties' strained relationship going into negotiations; we should not infer bad faith from the Board's successful attempt to vacate an arbitration award on the grounds that the award did not draw its essence from the contract; we should not infer bad faith from the Board's negotiations proposals even if they included workload increases and a 0% percent salary increase; the Board's negotiations

position was not unvarying; the Hearing Examiner properly found that the Board did not meet directly with unit members and that the parties' negotiations teams did not meet on the health insurance issue; and the Hearing Examiner properly characterized the grievance arbitrator's finding that the Board had the right to change insurance carriers, but had to reimburse employees for increased deductibles and improve the chiropractic benefit.

We add to finding 10 that the Association provided the Board with a May 21, 1993 letter from the State Department of Education. That letter addressed the Board's concern that funds budgeted for salaries, but not paid because the contract was not settled, would cause the Board's surplus to exceed statutory limits and subject the Board to forfeiture of state aid. The Board's attorney testified that the letter dealt with one-year holdovers only and that the Board could not get a clarification that any protection extended beyond one year (7T46).

We summarize the events leading to the Board's unilateral implementation of certain terms and conditions of employment. In the fall of 1990, the parties entered into negotiations for a successor to their July 1, 1989 through June 30, 1991 agreement. The first formal negotiations session was held in October 1990.

The parties exchanged proposals in December 1990, but the Association did not present a salary proposal because the Board's scattergram was incomplete. The Association included a proposal on health insurance coverage by Blue Cross and language proposals on

such subjects as preparation time, workyear, work hours, workload, just cause, pupil contact time, and evaluation procedures. The Board's proposal provided for no salary increase; a 50% co-pay for health benefits; and certain language changes on such subjects as workyear, workday, workload, curriculum update, attendance at meetings, method of payment, longevity, and tuition reimbursement.

At the fourth negotiations session, the parties reached agreement on "Teacher Rights," "Rights of Parties," "Negotiation of Successor Agreement," a statutory savings clause, several sections of the teacher evaluation article, and the non-discrimination and notice sections of the miscellaneous provisions article. At the fifth session the parties reached further agreement on "Rights of Parties," the Association bulletin board, the teacher lunch period and certain teacher evaluation language.

At the seventh session, the Association made a package proposal that included a 10% wage increase, plus increments. It also included language requiring the Board to pay for health, dental and prescription insurance, with no caps or deductibles; mileage; separation benefits; and other items.

At the eighth session, the Board did not respond to the Association's proposal but instead proposed its own package that included a 3% increase in total salaries; no increments or longevity; the Board's right to select the health insurance carrier, policy and coverage; no just cause provision; its own language on workyear, workday, and work hours; and the previous contract

language on tuition, grievance procedure and personal leave. The Board also noted an agreement on previously agreed-upon clauses.

At the ninth and final negotiations session, the parties agreed they were at impasse. Mediation ensued. The first mediation session was held on June 4, 1991 and produced no agreements. At the second session held on September 24, 1991, the mediator informed the Association that the Board wanted to change insurance carriers. The mediation seesion concluded without agreement and the matter was moved to factfinding.

On January 23, 1992, the Board sent a memorandum to employees informing them of the change in health insurance carriers. On March 4, the Association filed an unfair practice charge alleging a unilateral change in health benefit levels (CO-92-278). The charge was deferred to arbitration. On April 15, 1994, the arbitrator issued his decision. He found that the Board had the right to change insurance carriers, but that it had to reimburse employees for increased deductibles and to improve the chiropractic benefit.

The original factfinding date of March 25, 1992 was cancelled while the Association pursued the arbitration concerning the change in health benefits. The first factfinding session was held on January 6, 1993, but the Association insisted that health insurance not be included pending the arbitration.

The factfinder was presented with information on the areas of agreement and the open issues. At the second session, both

parties presented lengthy submissions to support their respective proposals. The Association's salary proposal was 9.5% for 1991-92, 8% for 1992-93, and 7.75% for 1993-94 exclusive of longevity. Longevity had consisted of either 2, 4 or 6% of salary depending on years of service. The Board's salary proposal was 3.5% for 1991-92, 4% for 1992-93, and 5% for 1993-94, inclusive of longevity. The Board proposed to maintain longevity for current employees and have a fixed dollar amount for new hires. The Board's other factfinding proposals included lengthening the workday, limiting separation benefits, decreasing the number of personal days, limiting or eliminating family illness days, limiting returns from childrearing leaves to the next September, and accepting the Travelers Insurance Co. health plan. The parties did not discuss the health insurance issue in factfinding and did not reach agreement on any articles at the second meeting. There were no other factfinding sessions.

The factfinder issued her report on March 16, 1993. She recommended increases of 6.5% for 1991-92, 6% for 1992-93 and 6.38% for 1993-94, inclusive of increments and longevity for existing employees. She also recommended that: the Board drop its proposal to extend the workday (arrival and dismissal time) and instead that the parties negotiate language to "reflect reality"; the Association drop its contact time and preparation time proposals and the parties continue to discuss preparation time; the Association's lunchtime proposal be adopted; and no teachers be allowed to leave the building during lunch or preparation time. There were no comments

or awards regarding health insurance, separation benefits, family illness days, or personal days.

By letter of March 27, 1993, the Board notified the Association that it wanted "to schedule the final session concerning this round of negotiations in order to finalize the process." The letter ended with:

> Please note that we expect your cooperation in meeting with us on one of the dates offered in order to avoid unilateral implementation by the Board.

The first post-factfinding meeting was held on March 31, 1993. The Association informed the Board that it would accept the factfinder's award, drop any demands not addressed by the factfinder's award, include any items agreed to by the parties up to that time, and accept the arbitrator's determination of the health insurance grievance. The Board rejected the factfinder's award and no agreement was reached. The Board offered a package proposal that included a dollar amount based on the percentages it had offered.

The second post-factfinding meeting was held on April 6, 1993. The parties did not reach agreement.

On April 7, 1993, the Board passed a resolution adopting its last offer presented to the factfinder to be implemented in a contract to be effective from July 1, 1991 through June 30, 1994. The Board's attorney notified the Association of the Board's intention to implement its offer and attached a draft of the contract "with all those items agreed to in negotiations prior to factfinding or after the factfinding where the last, best offer by

the Board was proposed." Salary guides were also attached. The notice ended with "[p]lease be advised that the Board is willing to meet and continue negotiations with regard to this contract." Shortly thereafter, the Board realized that the draft contract contained numerous errors and it notified the Association to disregard it. The Board never sent the Association a replacement contract.

The Board's attorney testified that its April 7 resolution was intended to express its feelings on the contract to the community and the incoming Board. On May 14, the Association accepted the Board's invitation to continue negotiations. The Board did not respond. On May 27, the Association again asked for dates to continue negotiations. By letter dated June 2, the Board's attorney notified the Association:

> that the next meeting of the Board is scheduled for June 14, 1993, at which time your request for dates will be reviewed. I will be in touch with you thereafter to provide suggested dates to meet when the Board representatives would be available.

On June 3, 1993, the Association filed this unfair practice charge. The Board's attorney testified that the Board had already considered implementation and that once the charge was filed, it decided to do what it thought right. On June 14, the Board passed another resolution. This resolution specifically implemented the wage, longevity and health insurance proposals as set forth in the Board's last formal offer to the Association. Longevity was to be limited to employees hired before July 1, 1993 and health insurance was to be as implemented in February 1992.

By letter dated June 28, 1993, the Board notified the Association that it was willing to negotiate, but only if the Association showed a willingness to move toward agreement. The Association responded that it was willing to negotiate but wanted to know about the status of previously agreed-upon issues. No further negotiations were held.

In its exceptions, the Association contends that the Hearing Examiner erred in finding that the Board negotiated in good faith. Reviewing the sequence of events from the beginning of negotiations through factfinding, we agree with the Hearing Examiner that the Board negotiated in good faith. This conclusion extends to the mid-negotiations change in health insurance carriers. The Board recognized that there might be some differences in health benefit levels when it changed carriers and it set up a petty cash fund to guarantee that unit members would not experience a change in benefit levels. The arbitrator's award recognized some differences in benefit levels and ordered the Board to continue benefit levels. Under all the circumstances, we conclude that the Board negotiated in good faith through factfinding.

The Association next contends that the Board lacked the lawful authority to implement terms and conditions of employment unilaterally. In City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977), we addressed the sensitive issue of when a public employer can implement terms and conditions of employment without a mutual agreement. In that case and others since then, we have

concluded that a public employer that has negotiated in good faith and has reached a genuine post-factfinding impasse may unilaterally implement its last best offer.[4/] See also Bayonne City Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp.2d 99 (¶81 App. Div. 1981); Rutgers, the State Univ., P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); see generally In re New Jersey Transit Bus Operations, Inc., 125 N.J. 44, 54 (1991).

This case raises both factual and legal questions. Were the parties at a genuine post-factfinding impasse, and if they were, did the employer legally implement its last best offer? We believe that the questions of whether the parties were at a genuine post-factfinding impasse and whether the Board could have unilaterally implemented a portion of its last best offer are inextricably intertwined. Under the particular circumstances of this case, we conclude that the parties were not at a genuine post-factfinding impasse and the Board could not lawfully implement a portion of its last best offer.

The employer's last offer to the Association appears to have included:

> Salary - 3.5%, 4%, and 5% inclusive of longevity.
>
> Maintenance of longevity of current employees with an undisclosed/undetermined fixed dollar amount for new hires.

4/ This rule of law does not apply to public police or fire departments subject to interest arbitration. See N.J.S.A. 34:13A-16 et seq.

Undisclosed/undetermined fixed dollar amount for separation benefits in lieu of a rate based on one-half current substitute's pay, plus limits on eligibility.

Deletion of accumulative family illness days.

Decrease from 3 to 2 the number of annual paid personal days.

Limitations on childrearing leaves

Changes in reporting and dismissal times

Changes in language to reflect the change to Travelers health insurance

The Association rejected this proposal. After two post-factfinding meetings where agreement was not reached, the Board adopted a resolution announcing its intention to implement its last best offer. The Board sent the Association a draft contract and a letter indicating a willingness to meet and continue negotiations. Shortly thereafter, the Board notified the Association that it should disregard the draft contract. The Association then accepted the offer to continue negotiations. The Board finally responded that it would consider the request for dates at its next meeting. At that next meeting, the Board voted to implement changes in salaries, longevity and health insurance only. The salary and health insurance proposals that were implemented reflected the proposals in the Board's last offer. The longevity proposal that was implemented appears to have eliminated longevity for new hires even though the last offer included an undisclosed fixed dollar amount for new hires.

When the Association rejected the Board's offer of a package that included "givebacks" in a number of areas -- such as

the number of personal days, the length of the workday, and the ability to return from childrearing leave mid-year -- the parties were not truly at genuine post-factfinding impasse because the Board was willing to accept a contract without those "givebacks" as evidenced by its unilateral implementation of a contract preserving the status quo in those areas. Put another way, the parties were not truly at genuine post-factfinding impasse because the Association had not been given an opportunity to accept, reject or suggest modifications to the package that the employer ultimately implemented. There were numerous proposals in addition to salaries, longevity and health benefits over which the Board demanded "givebacks" and over which the parties disagreed. The record does not support a finding that further trade-offs would not have occurred or that the parties would not have reached a voluntary settlement had the Board presented to the Association the package it ultimately imposed unilaterally.

The concept of implementation is predicated on the notion that the majority representative has rejected the employer's last best offer. Under these facts, to allow the Board to implement something other than its last best offer presupposes that the Association would have rejected what may have been a more attractive package than the one the Board had finally presented to the Association.[5/]

5/ We recognize that the changes in the longevity benefits that the employer implemented appear more severe than its last offer. Any departure from the employer's last offer in itself would be a violation of the duty to negotiate in good faith.

This is not a case where an employer has shown a necessity to implement part of its last best offer while remaining willing to negotiate over the remaining unresolved issues. Nor can we find that the parties intended to treat separately the terms and conditions of employment that were unilaterally implemented. In fact, the Board's April 7 implementation resolution and the draft agreement sent to the Association evidenced the Board's intention at that time to implement its entire last offer.

The Board has contended that it was concerned that failure to pay accrued salary increases would have jeopardized its state aid. The Association tried to alleviate the Board's concern by forwarding an opinion letter from the Department of Education. The Board's attorney testified that they could not get a clarification that any protection extended beyond one year. But that statement is not supported by any evidence that the Board attempted to seek further clarification from the Department of Education or made any attempt to protect those funds. We address this point only to indicate that the Board did not prove a necessity to implement its salary proposal at that time.

Similarly, the Board did not need to implement its longevity or health insurance proposals at that time. This is not to say that the Board did not have a legitimate need to put these negotiations to bed. But nothing would have prevented the Board from maintaining the status quo in these two areas while it presented to the Association a true last best offer reflecting all

the terms and conditions of employment the Board was willing to settle for.

Under all the circumstances of this case, we conclude that the Board did not have the lawful authority to implement the parts of its last contract offer concerning changes in salary, longevity and health benefits. We next address the appropriate remedy.

In a perfect world, we would order the parties back to the positions they were in at the time of the implementation. But too much time has passed and unit members have been receiving the salary increases the Board unilaterally imposed. Neither party seeks rescission of those increases so we need not consider the impact of the tenure laws. The changes in health benefits do not involve a change in carriers or health plans, but only the termination of the petty cash fund used to maintain the level of benefits under the predecessor contract. We order the Board to restore those benefits and make employees whole for any losses incurred as a result of the change. In addition, we order the Board to restore the status quo on longevity benefits. This restoration would not appear to involve any payments since the unilaterally implemented changes only apply to new hires who presumably are not yet entitled to longevity payments.

We also order the Board to resume post-factfinding negotiations. We hope that the passage of time has affected the parties' expectations sufficiently so that a voluntary agreement can be reached.

ORDER

The Fredon Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, by unilaterally implementing salary, longevity and health benefit proposals before reaching a genuine post-factfinding impasse.

2. 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, by unilaterally implementing salary, longevity and health benefit proposals before reaching a genuine post-factfinding impasse.

B. Take this action:

1. Restore the longevity and health benefits that existed under the predecessor agreement with the Fredon Education Association and make employees whole for any losses incurred because of the change.

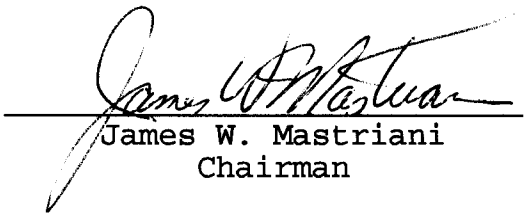
2. Negotiate in good faith with the Association over terms and conditions of employment for unit employees.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately

and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. Commissioner Klagholz voted against this decision. Commissioner Boose abstained from consideration.

DATED: July 28, 1995
Trenton, New Jersey
ISSUED: July 28, 1995

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,
We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, by unilaterally implementing salary, longevity and health benefit proposals before reaching a genuine post-factfinding impasse.

WE WILL cease and desist from 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, by unilaterally implementing salary, longevity and health benefit proposals before reaching a genuine post-factfinding impasse.

WE WILL restore the longevity and health benefits that existed under the predecessor agreement with the Fredon Education Association and make employees whole for any losses incurred because of the change.

WE WILL negotiate in good faith with the Association over terms and conditions of employment for unit employees.

Docket No. CO-H-93-424 FREDON TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

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

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

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 95-15

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

In the Matter of

FREDON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-424

FREDON EDUCATION ASSOCATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Fredon Township Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by implementing its salary and health insurance proposals. The Hearing Examiner found that the Board had negotiated in good faith and properly implemented its last best offer on those items.

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. 95-15

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

In the Matter of

FREDON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-424

FREDON EDUCATION ASSOCATION,

Charging Party.

Appearances:

For the Respondent,
Schwartz Simon Edelstein Celso & Kessler, attorneys
(Joel G. Scharff, of counsel
Mark A. Tabakin on the brief)

For the Charging Party,
Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION

On June 3, 1993, Fredon Education Association filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that Fredon Township Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3 et seq.[1/] In a

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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. (5) Refusing to

Footnote Continued on Next Page

three count charge, the Association alleged first; that the Board "lacked lawful authority" to implement terms and conditions of employment because on or about April 23, 1993, it unilaterally implemented terms and conditions of employment, but by letter of the same date notified the Association that it was willing to continue negotiations regarding a successor agreement. Second, it alleged that the Board lacked the authority to implement terms and conditions of employment because the document provided by the Board, purportedly showing the terms and conditions that were implemented, did not reflect the Board's best offer, and failed to include every element of the Board's last best offer made in fact-finding. Finally, the Association alleged that based upon the totality of circumstances, the Board, throughout the negotiation, mediation, and fact-finding process, negotiated in bad faith for a successor agreement. The Association requested in its charge that the Commission issue an order requiring a return to the status quo pending the outcome of good faith negotiations, as well as back pay and interest.

The unfair practice charge was accompanied by an application for interim relief. The Association sought to restrain

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1/ Footnote Continued From Previous Page

negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

the Board from implementing certain terms and conditions of employment. A show cause hearing was held on June 21, 1993. The Commission Designee denied the request for interim relief by decision of June 23, 1993. Fredon Twp. Bd. Ed., I.R. No. 93-22, 19 NJPER 421 (¶24189 1993).

A Complaint and Notice of Hearing was issued on August 2, 1993. The Board filed an Answer with affirmative defenses on October 25, 1993. It denied implementing terms and conditions under the April 23, 1993 communication; denied it did not have the authority to implement terms and conditions of employment; and, denied its conduct violated the Act. It asserted that it lawfully implemented terms and conditions of employment; that the Association refused to negotiate over health benefit proposals; and, that it negotiated in good faith.

Hearings were held on March 9 and 10, April 18 and 19, May 17 and 19, and June 9, 1994.[2/] During its opening remarks on March 9, the Association made a motion to keep the record in this case open pending the completion of an arbitration decision in Docket No. AR-93-118, which was the deferral of an unfair practice charge between these parties in Docket No. CO-92-278 concerning changes in the level of health benefits. The Association argued that the arbitration decision would be relevant to a decision in

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2/ The transcripts will be referred to as 1T (March 9), 2T (March 10), 3T (April 18), 4T (April 19), 5T (May 17), 6T (May 19), and 7T (June 9).

this case. The Board opposed the motion arguing that the Association was attempting to litigate the merits of CO-92-278 which had been deferred, then dismissed. I reserved on the motion noting that this hearing was far from complete, and the arbitrator's decision might be available by the end of this hearing (1T13-1T20).[3/]

Both parties filed post-hearing briefs by September 23, 1994. The Board filed a reply brief on October 11, 1994. In its post-hearing brief the Association made additional allegations/arguments and remedial requests. It alleged, in part, that the Board violated the Act by unilaterally reducing the level of medical benefits prior to the parties completing the dispute resolution process; that the Board violated the Act by seeking to meet with the employees regarding medical benefits rather than placing the subject in negotiations; that the Board violated the Act by seeking deferral of the matter in CO-92-278, then arguing before the arbitrator that the issue was not contractually arbitrable; that the charge in CO-92-278 should not have been deemed withdrawn, and that I should assert jurisdiction over that matter in order to properly review the arbitration decision and to decide whether the charges therein need further consideration; that the issues in

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3/ The arbitrator issued his decision on April 15, 1994. It was admitted into evidence in this case on May 17, 1994 as exhibit J-1 (5T5-5T9). Thus, the Association's motion to keep this record open became moot. The Board's concern about the Association's attempt to litigate the facts of CO-92-278, however, will be discussed in the Analysis, infra.

CO-92-278 should be considered as part of count three of this case because the merits of that charge have been fully and fairly litigated; that an affidavit relied upon by the Board in the processing of the interim relief proceeding misrepresented the truth and should be considered as evidence of the Board's bad faith in negotiations; that since the Board was proposing changes to what it allegedly implemented on April 7, 1993, it could not implement those changes without proceeding through a new round of negotiations, mediation and fact-finding. In its brief, the Association sought a remedy ordering the Board to retroactively pay the employees the difference between the salaries the Board implemented and the salaries the Association proposed in fact-finding, or alternatively, the difference between the Board's implemented salaries and the salaries recommended by the fact-finder.

In its reply brief the Board responded, in part, arguing that many of the Association's factual statements in its brief were untrue, and its legal conclusions faulty. The Board also argued that the remedy the Association sought in its brief had no basis in reality or the law, and was beyond the Commission's jurisdiction. It argued that the Commission, at most, could only order the Board

to reopen negotiations with the Association and, once again, complete that process.[4/]

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Board and Association were parties to a collective agreement (CP-1) effective from July 1, 1989 through June 30, 1991. In the fall of 1990 the parties entered into negotiations for a successor agreement. Both parties began negotiations with some trepidation. The Board was experiencing serious financial and educational problems. Its proposed budget had been defeated, then reduced; its physical plant/facilities were substandard and the Board lacked sufficient funds to complete all the repairs; its curriculum and staff supervision were deficient; and, it had failed monitoring (6T77-6T101). The Association perceived a change in its relationship with the Board resulting in what it believed was an unhealthy climate for negotiations. There had been a change in some Board members and the superintendent, and the Association believed the new individuals were determined to disturb the relationship that had previously existed between the parties (2T33; 2T70-2T71; 4T17-4T20).

4/ Even if the Board violated the Act, there would be no legal basis for either of the remedies the Association proposed in its brief.

If the Board negotiated in bad faith, it would be required to enter into good faith negotiations, and/or mediation and fact-finding. If it negotiated fairly, but failed to implement its last best offer, it would only be required to implement the proper offer.

The Board's negotiations team consisted of Board members Robert Dunning and Anthony Miragliotta. They were joined by others for fact-finding and post fact-finding (1T55; 2T13). The Association's team consisted of several teachers including Jeanne Parrella, Wolfgang Rast and Nina Hidelberger, and union representative Bernard Lelling (1T53). One of the Association's goals for negotiations was to memorialize in the new contract certain prior practices affecting terms and conditions of employment that had not been included in CP-1 (1T82-1T83). The Board's goal was to contain costs so it could deal with many of its problems.

2. Prior to the start of negotiations the Association requested salary guide information and the Board complied with that request (CP-46, CP-47, CP-48). The first formal negotiations session was held on October 23, 1990, which was originally intended to discuss ground rules for negotiations (1T52, CP-2). No ground rules were actually discussed at that meeting, however, and no proposals were exchanged (1T54, 1T58). But the Association did request a scattergram of the then-current teaching staff salaries to be used as an information tool for negotiations (1T54).

By memo of October 25, 1990 (CP-49), the Board confirmed a meeting for November 20, 1990. On October 30, 1990, the Board provided a scattergram to the Association (CP-50), but on November 1, 1990 the Association indicated that some information was inaccurate (CP-51). On November 19, 1990, the Board provided the Association with an undated scattergram (CP-52).

The second negotiations session was held on November 20, 1990, but the parties did not exchange proposals nor actually discuss ground rules (1T62-1T63). The Association asked for, and the Board agreed to provide, more accurate scattergram information (1T61-1T62). The parties also agreed to exchange proposals before the next session set for December 13, 1990.

3. The parties exchanged proposals on December 3, 1990 (CP-53). The Association's proposal (CP-4) did not contain a salary proposal because the scattergram information was incomplete (3T89-3T90). But CP-4 did contain a proposal on health insurance coverage by Blue Cross; and language proposals on, but not limited to prep time; work year, work hours and workload; just cause; contact time; and teacher evaluation (1T83-1T89, CP-4). The Board's proposal (CP-5) provided for no salary increase beyond the 1990-91 salaries; a 50% co-pay for health benefits; and certain language changes which included--but were not limited to--length of work year, work day, workload; curriculum update; attendance at meetings; method of payment; longevity; and, tuition reimbursement (1T71-1T81), CP-5).[5/]

On December 5, 1990, the Board provided the Association with an improved copy of the scattergram information (CP-54).

5/ The handwritten notes on the copy of CP-4 in evidence were Lellings notes (1T66-1T67). The handwritten notes on the copy of CP-5 in evidence were either Lelling's or Parrella's notes (1T66).

4. The third negotiations session was held on December 13, 1990. The parties discussed--but each side rejected--the other's proposal. The Association asked for more accurate scattergram information (1T90-1T91; 3T78-3T80; CP-3). The Association's notes on CP-5 show that the Board sought to delete longevity and separation benefits from a new agreement. The Board ultimately provided the necessary scattergram information (3T80).

The fourth negotiations session was held on December 20, 1990. The parties discussed teacher evaluation (1T92), and actually reached agreement on Board proposal Article 3, "Teacher Rights", and Article 4 - "Rights of Parties", Sections A, B, C and D (1T93-1T94, CP-5). The Association's notes on CP-4 show that on December 20, the parties also agreed to the Board's language for Article 2 - "Negotiation of Successor Agreement"; and agreed to language for the statutory savings clause, several sections of the Teacher Evaluation article, and the non-discrimination, and notice sections of the miscellaneous provisions article.

The fifth negotiations session was held on January 8, 1991. The parties discussed teacher evaluation, work hours and workload, and the Association's proposal on student contact time, instructional time, prep time and lunch. The Board rejected the contact time/instructional time proposal because it wanted more flexibility for teacher scheduling (1T97-1T98, CP-3). The parties reached agreement on the Board's Article 4 - Rights of Parties, Sections E and F, the Board agreed to drop its proposed Section G,

and substitute new language for G making a bulletin board available to the Association (1T98-1T99, CP-5).

The Association's notes on CP-4 also show the parties reached agreement on language for the teacher lunch period, and on certain teacher evaluation language.

The sixth negotiations session was held on January 17, 1991. The parties reviewed the three articles they had agreed upon--Successor Agreement, Rights of Parties, and Teacher Evaluation. They also discussed placing representation fee language in Article 1 - the Recognition Clause (1T101, CP-3).

The seventh negotiations session was held on January 30, 1991. The Association made a package proposal which included a 10% wage increase, plus increments. It also included language requiring the Board to pay for health, dental, and prescription drug insurance, with no caps or deductibles; mileage and separation benefits; and other items (1T107-1T109; CP-3).

The eighth negotiations session was held on February 6, 1991. The Board did not directly respond to the Association's package proposal (1T109). Instead, it presented its own package proposal that day (CP-6) which included a 3% increase on total salaries in the scattergram, no increments or longevity; the right to select the health insurance carrier, policy and coverage; no just cause provision; its own language on work year, work day, work hours; the previous contract language on tuition, grievance procedure and personal leave; and it noted an agreement on

previously agreed upon clauses. The parties clarified their respective positions but reached no agreements (1T116).

The ninth and final negotiations session was held on February 27, 1991. Early in the session the Association's representative told the Board team that if it was not changing its positions he would move the matter to impasse (1T118, CP-3). The Board's team was opposed to impasse at that point. It caucused and returned without making any further proposals, thus, the parties agreed they were at impasse (1T118; 1T123-1T124).

The Association filed a Notice of Impasse (CP-7), Docket No. I-91-209, on March 11, 1991.[6/] The items in dispute included work year, hours and load; salaries, medical benefits, and some other items. The record shows that the parties discussed every item each party had proposed (3T105; CP-7).

5. The first mediation session was held on June 4, 1991 (CP-8). The parties jointly discussed with the mediator those items agreed upon, and those still in dispute (1T127-1T128). Each party then met separately with the mediator but no agreements were reached. On June 21, 1991, the mediator scheduled a second mediation session (CP-9). There were no discussions between the two teams between the mediation sessions (1T130).

6/ The Association's witness testified that CP-7 was filed with the Commission on March 6, 1991 (1T124). However, a document is only considered "filed" with the Commission on the date it is received, and CP-7 was received on March 11, 1991.

The second mediation session was held on September 24, 1991. The mediator met separately with the parties and informed the Association that the Board was interested in changing the insurance carrier, but the Association did not pursue that topic because it conceded that it did not have the right to negotiate the carrier (3T114-3T115). The parties could not reach agreement on salaries, insurance and fringe benefits. The mediation concluded without agreement, and the matter was moved to fact-finding and assigned Docket No. FF-91-73 (3T116-3T117).

By letter of October 25, 1991 (CP-10), the Commission submitted a list of fact-finders to the parties. The Association responded by letter of October 28, 1991 (CP-11) that the list was unacceptable. The Commission responded with a new list by letter of December 10, 1991 (CP-12), and appointed a fact-finder on January 10, 1992 (CP-13). By letter of January 27, 1992, the fact-finder scheduled a meeting with the parties for March 25, 1992 (CP-16).

6. The health insurance plan in CP-1, Article 10, included coverage by Blue Cross Comprehensive P.A.C.E. plan, a dental program, and a prescription drug program with a $2.00 co-pay. In school year 1990-91 the insurance premium increased 52% over what it had been in 1989-90, and in 1991-92 it increased 17% over the 1990-91 rate (5T105-5T106). In June 1991, Mary Roszkowski, the Board Secretary/Business Manager, was informed that for 1992-93 Blue Cross was expecting a 56% rate increase for the health insurance premium over the 1991-92 rate. The new rate would take affect July 1, 1992 (5T100-5T102).

As a result of the large increases in the cost of health insurance, the Board asked Roszkowski to research the cost of insurance through other carriers (5T97). Roszkowski was instructed to obtain quotes of plans where the benefit levels would basically stay the same as the current plan (5T108).

In accordance with the Board's directive, Roszkowski gathered several insurance comparisons from an independent insurance broker (CP-56, CP-57). In the fall of 1991, Association representative, Bunny Thompson (4T126), requested Roszkowski provide her with the information she (Roszkowski) had collected on insurance carriers. Roszkowski complied with that request in October 1991 (CP-55, 5T112); and late in 1991, or early in 1992, she also provided Thompson with the plan from Travelers Insurance Co. which was eventually implemented (5T120-5T121).[7/]

The Travelers plan was presented to the Board in December 1991. Board members were interested in it, and asked Roszkowski and Superintendent Christie to meet with the Association to talk about

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7/ Wolfgang Rast, one of the members of the Association's negotiations team testified that he had no indication from the Board that the Travelers plan was being considered; that no information was given to him in negotiations about Travelers; and that no information had been presented in negotiations about the level of benefits in the Travelers plan (4T129-4T130). While it may be accurate that Rast had no such information, I find that Thompson was given the information regarding Travelers, and she was acting on behalf of the Association, thus, the Association was in possession of that information. Thompson was not offered to rebutt Roszkowski's testimony, thus, I credit Roszkowski that she gave the information to Thompson.

the Plan (5T121, 6T120). On January 14, 1992, Christie met with the Association's co-presidents and tried to set up a meeting with the Association's members to discuss the health plan (6T121). By memorandum of January 16, 1992 (R-9), Christie reminded the Association's co-presidents of the Boards desire to meet with the staff regarding health insurance. But by memorandum of January 21, 1992 (R-10), the Association declined to have the Board meet with the general membership (6T122).

After January 21, the Board instructed Roszkowski to replace the Blue Cross carrier with Travelers (5T123). As a result, on January 23, 1992, Christie sent a memo (CP-14) to the staff asking them to complete enrollment forms for Travelers. The Association responded with a memorandum of January 24, 1992 (CP-15) indicating that the forms would be completed, but reserving its legal rights, and stating it was not accepting the proposed health plan. There was no meeting between the two negotiation teams regarding the health insurance issue (6T127).

The Travelers plan took effect in February 1992. The Board was aware that some deductibles in the Travelers plan were different than the PACE plan, and it directed Roszkowski to establish a plan to ensure that employees would not be adversely affected. Roszkowski established a petty cash fund as of February 1, 1992 to make whole any employee who had to pay an additional prescription drug, dental, or major medical co-pay or deductible (5T132-5T136). The Board also was prepared to issue purchase orders in the amount

of $400 to two employee couples who might be adversely affected by the State law prohibiting married employees working for the same employer from both selecting family coverage. The $400 would make them whole for the difference they would have received if they both had family coverage and filed claims (5T132, 5T148).[8/]

By memorandum of February 7, 1992 (R-5), Roszkowski notified Board employees that Travelers was taking over the health benefits, she gave them the insurance number, and explained how to use it. She also notified them that they would receive cards and booklets (5T141). Roszkowski issued a follow up memorandum to staff on February 25, 1992 (R-6), providing them with new cards and booklets, and advising them of the insurance brokers' availability to answer questions (5T142).

7. On March 4, 1992, the Association filed an unfair practice charge with the Commission, Docket No. CO-92-278, alleging that the Board violated the Act by changing certain benefit levels when it unilaterally changed health insurance carriers. That charge was filed by Association attorney, Michael Barrett. By letter of March 16, 1992 (CP-17), the Commission scheduled CO-92-278 for an exploratory conference (N.J.A.C. 19:14-1.6(c)) on March 23, 1992.

8/ Wolfgang and Judy Rast were one of the couples affected by the State prohibition on double family coverage. They were informed of the law (R-2), and although they contested it (CP-58), the Board's insurance broker advised them they were required to comply (R-8). The Rasts, however, were not adversely affected by the State prohibition (5T26).

On March 23, in addition to the conference in CO-92-278, the Association notified the Board that it had asked the fact-finder in the instant case to cancel the fact-finding hearing set for March 25, 1992 so it could resolve CO-92-278 (CP-18, 3T118). The parties did not resolve that charge at conference, but agreed that the charge would be held in abeyance. On June 2, 1992, the Director of Unfair Practices requested that Barrett advise him of the status of that case.[9/] There was no response. By letter of July 22, 1992, the Director notified Barrett that the case would be dismissed if he did not respond regarding the status of that case. Barrett responded by letter of August 5, 1992, asking that the case be sent to Hearing. On August 6, 1992, the Board objected to a hearing in that case.

On August 17, 1992, the Director notified the parties that he was inclined to defer the charge in CO-92-278 to their contractual arbitration procedure. The Director confirmed the deferral on August 28, 1992 (CP-19), reminding the Association that it had to initiate the arbitration process, and that the Commission would retain jurisdiction to, among other things, review whether the arbitration was fair and regular, or whether the arbitrator reached a result repugnant to the Act.

By letter of September 3, 1992 (CP-20), Barrett submitted a request for a panel of arbitrators to the Commission in accordance

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9/ Pursuant to N.J.A.C. 19:14-6.6, I have taken administrative notice of pertinent facts from the file in CO-92-278.

with the Director's decision to defer CO-92-278. An arbitrator was selected and that case docketed as AR-93-118.

The arbitrator held his first hearing on March 2, 1993. When the Board raised a jurisdictional/arbitrability issue the arbitrator suspended consideration of the grievance on its merits, and heard argument on the arbitrability issue. On May 20, 1993, the arbitrator issued an interim award finding that the grievance was arbitrable (See J-1 at 3).

An arbitration hearing on the merits was held on May 26, 1993. The Board agreed at hearing that it was required to provide equivalent benefits, and that where differences were more than de minimus, it had to make the employees whole (J-1).

Prior to the arbitrator issuing a final award in that matter, however, the Director of Unfair Practices on August 4, 1993, unaware of the status of the arbitration, sent Barrett a letter requesting the status of CO-92-278, and noting that the failure to respond by August 16, 1993 would be deemed a withdrawal of that charge pursuant to N.J.A.C. 19:14-1.5(d) (the file in CO-92-278). That letter was sent to the same address as the Director's letter in CP-17, and correctly matched Barrett's address on his letterhead. There was no response. Therefore, by letter of August 24, 1993 (CP-59, Exhibit C), the Director deemed the charge in CO-92-278 withdrawn, and the case was closed.

On March 11, 1994, the Association filed a substitution of attorney in CO-92-278, substituting the attorney of record here, for Barrett.

On April 15, 1994, the arbitrator in AR-93-118 issued his decision regarding the health insurance grievance (J-1). He found that the Board had the right to change insurance carriers and did not violate its contract except for a few exceptions, and further found that the Travelers plan was equal to, or better, than the previous plan. He concluded that the Board was obligated to reimburse employees for increased deductibles and to improve the chiropractic benefit.

On April 21, 1994, the Association's new counsel asked Barrett whether he had received the Director's August 24, 1993 letter dismissing CO-92-278 (CP-59, Exhibit B). Barrett responded on April 22, 1994 (CP-59, Exhibit D), as follows:

> I received your letter of April 21, 1994 and again reviewed my file in search of the document(s) referenced to in your correspondence.
>
> The only correspondence that I have from PERC on this matter concerns their decision early on not to hear the matter on an emergent basis and their recommendation to resolve the matter pursuant to the arbitration provisions of the contract between the parties. As you know, that was how the matter was resolved.
>
> The copy of the letter from PERC that you forwarded is addressed correctly, but I have no recollection receiving it. Further, I believe that I would have responded if I had received it. If you have any questions, please call.

At the hearing in this matter on May 19, 1994, an affidavit from Barrett was admitted into evidence (CP-59). He said in pertinent part that he had no recollection receiving the Director's letter of August 24, 1993, and that no such letter was in his file.

Neither of the attorneys who have represented the Association in CO-92-278 have filed a request or motion with the Director of Unfair Practices seeking to reopen that matter, nor has the Association's current attorney of record argued that the arbitrator's decision in J-1 did not comply with the Spielberg standards.10/

8. The original fact-finding hearing date of March 25, 1992 had been cancelled while the Association pursued the charge/arbitration of health benefits. On October 9, 1992, the Board's attorney notified the Association that it wanted to proceed to fact-finding (CP-21). On October 16, 1992, the Association requested the fact-finder reconvene a fact-finding hearing but noted it wanted to exclude health benefits from that hearing (CP-22). The Association did not want to go to fact-finding until the health insurance issue was resolved, but agreed to go only after insisting that health coverage not be included in that process (3T126). On October 19, 1992, the fact-finder scheduled a hearing for January 6, 1993 (CP-23). On October 20, 1992, the Board's attorney notified the Association that it preferred to place health insurance coverage before the fact-finder (CP-24).

10/ See Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955), which established criteria for deferral to arbitration awards requiring 1) that the proceedings be fair and regular; 2) the parties had agreed to be bound by the award; and 3) the decision was not repugnant to the Act.

On December 23, 1992, the Association had a team meeting to discuss its fact-finding positions (3T127-3T128, CP-3). Subsequently, it prepared a document for the fact-finder, CP-26, intended to show which articles were open, and which were closed (3T129). CP-26 listed that an agreement had been reached on the following articles: Preamble; Recognition; Successor Agreement; Teacher Rights; Rights of Parties; Evaluation; and Grievance Procedure. It listed as open issues: Work hours and work load; salaries; duration; and, indicated that the arbitrator (presumably in AR-93-118) should decide the health insurance article.

The first fact-finding hearing was held on January 6, 1993. CP-26 was not actually presented to the fact-finder, but the information contained therein was discussed (3T129-3T136). The parties agreed to Article 5, Work Year, at that session (3T134).

The second fact-finding session was held on January 26, 1993 (CP-25). Both parties prepared lengthy documents to support their respective proposals before the fact-finder (CP-27 for the Association, and CP-30 for the Board). The Association's salary proposal was 9.5% for 1991-92, 8% for 1992-93, and 7.75% for 1993-94 in addition to longevity (1T152, 1T154, 3T129-3T140, CP-34). Longevity had consisted of either 2, 4 or 6% of salary depending upon years of service (CP-1, Art. 9; CP-34). The Board's salary proposal was 3.5% for 1991-92, 4% for 1992-93, and 5% for 1993-94, inclusive of longevity. The Board proposed to maintain longevity only for those employees currently employed (CP-30). The Board's

other fact-finding proposals included lengthening the work day, limiting separation benefits, decreasing the number of personal days, limiting or eliminating family illness days, limiting the return from child rearing leaves to the following September, and accepting the Travelers health plan (CP-30). The parties did not discuss the health insurance issue in fact-finding, and did not reach agreement on any articles at the second meeting. There were no other fact-finding sessions.

The Board and Association submitted briefs to the fact-finder on February 19 and February 22, 1993, respectively.[11/] The Board's brief (CP-31) first indicated that its salary proposal in the second year was 4.5% not 4%, which it corrected back to 4% in CP-32. The Board also attacked the Association's salary proposal, and argued there was a legitimate issue regarding its inability to pay.

The Association's brief (CP-28) first indicated that the Board's proposal on work day was unclear. The Association sought no change from the pre-existing work day. The Association also addressed other issues, including further justification for its salary proposal.

On March 8, 1993 (CP-32), the Board responded that the second year of its salary proposal was actually 4% not 4.5%, and it indicated that its work day proposal included having teachers report

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11/ The Association amended/corrected its brief on February 24, 1993 (CP-29).

to work 15 minutes before the students school day and leave one-half hour following the departure of the last bus. The Association responded on March 9, 1993 (CP-33), again criticizing the Board's salary and work day proposals.

9. The fact-finder's report (CP-34) was issued on March 16, 1993. The fact-finder found that the Board's salary proposal was more reasonable than the Association's, but she felt that if the salary increases were to be inclusive of increments and longevity (for existing employees), the increase should be 6.5% for 1991-92, 6% for 1992-93, and 6.38% for 1993-94. The fact-finder also recommended that: The Board drop its proposal to extend the work day (arrival and dismissal time), but she did not recommend the Association's proposed language on work day, and, instead, recommended the parties negotiate language to "reflect reality"; that the Association drop its contact time and prep time proposals, but recommended more discussion on prep time; that the Association's lunch time proposal be adopted; that no teachers be allowed to leave the building during lunch and prep time. There were no comments or awards regarding health insurance, separation benefits, family illness days, and personal days.

After the fact-finder's award issued the Association's team decided it would accept her recommendations (2T6). The Board, having reviewed the fact-finder's award, felt it did not include decisive recommendations (7T13-7T18). The Board wanted to bring the contract matters to closure (7T21). It had been saving money for

retroactive raises and wanted to distribute the money because it was concerned about how State regulations might affect it, and about how it could impact on tax matters (7T22-7T24). Consequently, since the Board was aware it was required to meet with the Association after the fact-finder's award issued (N.J.A.C. 19:16-4.3(h), 7T19),[12/] it wanted the Association to be placed on notice that at some point it was going to distribute the money (7T23).

By letter of March 27, 1993 (CP-35), a Board attorney notified the Association that the Board wanted "to schedule the final session concerning this round of negotiations in order to finalize the process". The last paragraph of CP-35 provides:

> Please note that we expect your cooperation in meeting with us on one of the dates offered in order to avoid unilateral implementation by the Board.

The first post fact-finding meeting was held on March 31, 1993. The Association informed the Board that it would accept the fact-finder's award, drop its demands where the fact-finder did not award anything, include what the parties had agreed to up to that time, and accept the arbitrator's determination of the health insurance grievance (3T147-3T148). The Board rejected the fact-finder's award (4T97-4T98). The parties discussed several

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12/ N.J.A.C. 19:16-4.3(h) provides: The parties shall meet within five days after receipt of the fact-finder's findings of fact and recommended terms of settlement, in order that statements of position may be exchanged and an opportunity provided for the parties to reach an agreement.

items but could not reach an agreement. The Board felt that since the parties could not reach an agreement on percentages, it would offer a package proposal which was a total dollar amount based upon the percentages it had offered (7T26-7T30). An Association witness talked about whether the Board had made a longevity proposal for new hires, but he could not recall dollar figures, and was unsure of the whole issue (3T161-3T162, 3T167-3T168). I find that the Board did not propose longevity for new hires. The meeting concluded with an agreement to meet again (7T31).

The second post fact-finding meeting was held on April 6, 1993. The parties discussed several matters but could not reach agreement.

10. On April 7, 1993, the Board passed a resolution (CP-36), adopting its last fact-finding offer to be implemented in a contract to be effective July 1, 1991 to to June 30, 1994.[13/] By letter of April 23, 1993 (CP-37), the Board's attorney notified the Association of its intent to implement, and attached a document called the Redline-Strikeout Draft which it thought would become the 1991-94 contract. The letter provides:

> Enclosed please find a draft of the 1991-94 contract, with all those items agreed to in negotiations prior to fact-finding or after the fact-finding where the last, best offer by the Board was proposed. Also enclosed are the

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13/ CP-36 provided in pertinent part: ...that the Board hereby adopts its last offer presented to the fact finder to be incorporated into a new contract for implementation effective July 1, 1991 to June 30, 1994.

> salary guides which were discussed in negotiations, and which are being implemented by the Board of Education.

The last paragraph of CP-37 extended to the Association the offer to continue negotiations. It said:

> Please be advised that the Board is willing to meet and continue negotiations with regard to this contract.

The Board had intended CP-36, its April 7 resolution concerning implementation, as a statement to the community regarding its position on the contract, but it did not actually implement terms and conditions at that time (7T36). Shortly after CP-37 and the Redline Draft were sent, the Board realized it had made mistakes in the Draft, and it notified the Association on April 28 or 29 that it (the Association) should disregard the Draft (3T165-3T170, 7T37-7T38). The Association's representative said he disregarded the Draft (3T170).

The Board did not send the Association a replacement for the Redline Draft, and since the Board in CP-37 had expressed its willingness to continue to negotiate, the Association, on May 14, 1993 (CP-38) accepted the Board's invitation to continue negotiations. The Association asked to be advised of dates. There was no response. On May 27, 1993 (CP-40), the Association again asked for dates to continue negotiations.

The Board had not immediately responded to CP-38 or CP-40 for several reasons. After having completed two post fact-finding

sessions, the Board was unsure whether it had any legal obligation to continue negotiations (7T39). The Board attorney felt it was necessary to obtain Board approval on the matter, but since the new Board committees were not established, she had to wait (7T40). The Board was also interested in distributing the money it had saved for raises (7T41-7T42).

But, by letter of June 2, 1993 (CP-41), the Board attorney responded to CP-40 and notified the Association:

> ...that the next meeting of the Board is scheduled for June 14, 1993, at which time your request for dates will be reviewed. I will be in touch with you thereafter to provide suggested dates to meet when the Board representatives would be available.

There is no indication when the Association received CP-41.

On June 3, 1993, the Association filed its charge in this case (C-1), together with its request for interim relief. The Commission Designee signed the Order to Show Cause on June 5, 1993, originally scheduling the return date for June 15, 1993. By letter of June 10, 1993, the Association's attorney notified the Commission Designee that the Board had agreed not to implement any new terms and conditions of employment through at least June 21, 1993, and confirmed that the return date was, therefore, rescheduled for June 21.

Prior to June 14, 1993, the Board had already considered implementing a contract. Once the instant charge was filed and the Board knew it had to litigate the matter anyway, it decided it was

right to pass a resolution that would distribute the retroactive money (7T43-7T44). Consequently, on June 14, 1993, the Board passed a Resolution (CP-42) implementing the wages, and health insurance coverage as set forth in its last offer to the Association. The Board had prepared salary guides which were attached to CP-42. The guides were based on its percentage wage offer, which was inclusive of longevity for employees hired before July 1, 1993. CP-42 also provided health insurance coverage as implemented in February 1992 which included a $5.00 co-pay for prescription drug.[14/] The Board waited until the Association's interim relief request was denied (by decision of June 23, 1993) before distributing the retroactive salary increases (7T47, 7T119).

By letter of June 28, 1993 (CP-43), the Board notified the Association that it was willing to continue engaging in negotiations, but only if the Association showed a willingness to move toward agreement. The Association responded by letter of August 3, 1993 (CP-44), explaining that it was willing to negotiate,

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14/ The pertinent portions of CP-42 provide: ...the Board deems it necessary to unilaterally implement, effective this date [June 14, 1993], the wages and health insurance coverage as set forth in the Board's last best formal offer to the FEA, as further set forth below:

(1)(a) Salary Guides for 1991-92, 1992-93 and 1993-94 [which were attached to CP-42]

(b) Longevity pay shall be available to employees hired before July 1, 1993.

(2) Health Insurance coverage per program implemented February, 1992.

but asked for the status of items the parties had agreed upon but were not included in the Redline Draft. The record does not reflect whether there was a respone, but no further negotiations were held.

There was no allegation or evidence that the Board failed to comply with the articles the parties had agreed upon, or had not changed.

ANALYSIS

The Association made three basic allegations in its charge. First, that the Board lacked lawful authority to implement terms and conditions of employment because at the same time it announced its intent to implement, it also expressed its willingness to continue negotiations. Second, that the Board did not implement its last best offer; and third, that based upon the totality of circumstances the Board negotiated in bad faith. Despite pleading only those allegations set forth above, the Association, at hearing and in its post-hearing brief, also attempted to litigate the merits of its charge in CO-92-278 alleging that the Board violated the Act by changing health benefit terms and conditions of employment during negotiations; and, it alleged that the Board demonstrated bad faith by arguing before the arbitrator that the grievance regarding health benefit changes was not contractually arbitrable; it alleged that the Board violated the Act by seeking to meet with the Association's unit members regarding its health insurance change rather than negotiating the subject; and, that the Board demonstrated bad faith

based upon the content of an affidavit it submitted in the interim relief proceeding regarding this case. Although I will discuss all of these issues, I find that the Association's case is limited to what it alleged in its charge. The Association is not entitled to use this case as a vehicle to litigate matters that were not pled, that have already been resolved, and over which I have no jurisdiction.

Negotiations Leading to Impasse

It is well settled law in this State that a public employer who has, in good faith, engaged in--and exhausted--the dispute resolution procedures as provided by law,[15/] and remains at impasse with the majority representative, may implement its last best offer.[16/] City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); Red Bank Bd. Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd App. Div. Dkt. No. A-4496-79T2 (1981); Bayonne City Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990), adopting H.E. No. 90-32, 16 NJPER 84 (¶21034 1990). But since the legal authority to implement is based first upon an employer having engaged in the dispute resolution process in good faith, and second, upon having genuinely reached impasse, I must

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15/ N.J.S.A. 34:13A-5.3; N.J.A.C. 19:12-1.1 thur 19:12-4.3.

16/ This statement does not apply to police and fire employees whose majority representatives initiate compulsory interest arbitration. N.J.S.A. 34:13A-16 thru 13A-21; N.J.A.C. 19:16-1.1 et seq.

review whether the Board engaged in good faith negotiations, mediation and fact-finding prior to considering the Association's impasse allegations. Thus, I will consider the Association's third allegation (bad faith conduct) first, and then address the impasse issues.

The Bad Faith Allegation

In deciding whether an employer has engaged in good or bad faith negotiations the Commission has consistently held that the totality of the employer's conduct and/or attitude throughout the dispute resolution process must be analyzed to determine whether the employer came to negotiations:

> ...with an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [State of New Jersey and Council of New Jersey State College Locals, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd P.E.R.C. No. 76-8 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).]

See also, Bayonne, 16 NJPER at 90; Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984); Mt. Olive Bd. Ed., P.E.R.C. No. 84-73, 10 NJPER 34, 35-36 (¶15020 1983); Jersey City.

But the Commission in State of N.J. also recognized that hard bargaining on salary levels was not necessarily inconsistent with good faith negotiations. It said:

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing

> levels is not necessarily a failure to negotiate in good faith.
> [1 NJPER at 40]

The Commission then drew a distinction between an employer who refuses to discuss or negotiate salary, and an employer who formulates a salary proposal based upon economic problems it believes exists. The Commission explained that in the first there is no intent to reach an agreement, but in the second, a firm salary proposal, particularly where the employer has also negotiated over all other issues, does not negate the intent to reach an agreement. The Commission concluded:

> Good faith collective negotiations do not require one party to adopt the position of the other; they only require a willingness to negotiate the issue with an open mind and a desire to reach an agreement. The fact that the two parties approach negotiations with different priorities does not mean that either side is not negotiating in good faith. Id.

The holding in State of New Jersey is particularly relevant here. The parties entered negotiations with entirely different perspectives on where the salary agreement should be struck. The Association began at 10%, the Board at zero. But going into fact-finding the Board's three year salary proposal reflected greater movement from its original position, than did the Association's. The fact-finder found that the Board's salary proposal was more reasonable than the Association's, particularly because she credited the economic realities argued by the Board.

Prior to the beginning of negotiations the Board was confronted with severe economic problems. It was determined not to negotiate a contract for more than it could reasonably afford. The parties then went through nine negotiation, two mediation and two fact-finding sessions. Throughout that process the Board consistently demonstrated a desire and willingness to negotiate, and a preference to reach an agreement. The parties reached agreement on several language items, the Board made a realistic salary proposal at the eighth negotiation session, then increased that proposal in fact-finding.

Just as in State of New Jersey, the facts here show that the Board bargained hard for its salary proposal, but it did so in good faith, with the consistent intent to reach agreement. Although the Association was frustrated that the Board did not move closer to its (the Association's) salary and health benefits proposals, that frustration cannot be converted into a finding of Board bad faith. The Board was (as was the Association) entitled to bargain hard for its salary and health proposals; it could not be required to concede to the Association's proposals, yet it still demonstrated an intent to reach an agreement.

In its post-hearing brief, the Association discussed several incidents from which it drew negative inferences to support its allegation that the Board negotiated in bad faith. The Association alleged the Board acted in bad faith by unilaterally changing health benefit levels during negotiations; by seeking to

meet with employees regarding health benefits rather than placing that subject in negotiations; by contesting the arbitrability of the health benefits grievance; and, by its allegedly late disclosure to the Association that it was considering a change in carriers. Contrary to the Associations assertions, I find that none of those incidents support a finding of bad faith.

The Health Benefits Issue

The Board did not violate the Act by changing health carriers, and none of its actions related to that change were done in bad faith. Except for police and fire employees, the identity of the insurance carrier is not mandatorily negotiable. City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981); Hunterdon Central H.S. Bd. Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986). The Board, thus, had the managerial prerogative to change carriers; it was not required to negotiate over that decision; it was not specifically required to share its research about insurance carriers with the Association; it was not required to give the Association significant advanced notice of that decision; and, because it was not a negotiable subject, the Board had the right to implement that decision even during the negotiations process. See, Ridgewood Bd. Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993). The Board had legitimate economic reasons for changing health carriers, and it was not done with the intent of disturbing the parties ongoing negotiations. Consequently, I do not infer bad faith because the Board changed carriers, or by the way it implemented that change or handled the ensuing arbitration.

The Association's argument that the merits of CO-92-278 should be litigated, and that the Board's conduct giving rise to that charge, and its change of certain benefits during negotiations, should be considered acts of bad faith, is entirely misplaced. Similarly, the Association's argument that the Board's challenge to the arbitrability of the health insurance grievance was evidence of bad faith, lacks merit.

The Association was given the opportunity to litigate the merits of CO-92-278 through the parties grievance/arbitration process. Therefore, it is not entitled to relitigate that matter here.

It is standard Commission policy to defer to arbitration those unfair practice charges alleging that a change in health carriers changed benefit levels. Newark Bd. Ed., P.E.R.C. No. 94-52, 19 NJPER 588 (¶24282 1993); Cape May Co. Sheriff, P.E.R.C. No. 92-105, 18 NJPER 226 (¶23101 1992); Stafford Tp. Bd. Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989). That was done here. The Board contested the arbitrability of the grievance in the appropriate forum, and that is neither an unfair practice, nor sufficient evidence from which one could infer bad faith. The arbitrator, nevertheless, rejected the Board's argument, and the Board, subsequently, fully participated in the arbitration and implemented the Arbitrator's award. The Arbitrator rejected the major portion of the Association's claim, found that the Travelers plan was substantially equal or better than the prior plan, and that

the Board did not violate the parties' contract except as to certain deductibles and the chiropractic benefit. He ordered the Board to make whole any employees who were required to pay higher deductibles. The Board in good faith, however, had created a petty cash fund to make employees whole even before the Arbitrator issued his decision, and there is no evidence that any employee suffered a loss. The Association has never challenged the Arbitrator's decision, and never argued before me, or in any other forum to my knowledge, that the decision violated Spielberg standards. Since the Association had the opportunity to present the issues in CO-92-278 to the Arbitrator, and since the Arbitrator found the Board had the right to make the change and did not violate the contract except for the deductibles which the Board remedied, there is no basis upon which to find that the Board's conduct was in bad faith.

It is also Commission policy for the Director of Unfair Practices to inquire into the status of a case, and to deem withdrawn those cases when there has been no response to the Director's inquiry. N.J.A.C. 19:14-1.5(d). The Director inquired into the status of CO-92-278, his letter was properly addressed to the Association's attorney of record, and although that attorney certified that he had no recollection of receiving it, and that it was not in his files, he did not state that his office did not receive it. Having received no response to his inqiury, the Director deemed CO-92-278 withdrawn and he closed the case.

Even if I believed that the merits of CO-92-278 should be relitigated, or that the charge should not have been deemed withdrawn, hearing examiners do not have the authority to reopen closed cases. The Commission carefully explained in State of New Jersey (Department of Human Services), P.E.R.C. No. 89-52, 14 NJPER 695, 696 (¶19297 1988), that the procedure for reopening closed cases is to file a motion with the Director of Unfair Practices. The Association has not filed such a motion.

In note 7 of its post-hearing brief, the Association also argued that the merits of CO-92-278 should be considered because the parties fully and fairly litigated the issues in that charge. That argument has no basis in fact and is rejected. Early in this proceeding the Board objected to any attempt by the Association to litigate the merits of CO-92-278, and I did not allow the merits of that case to be litigated. While the Association was permitted to present evidence about CO-92-278 and the related arbitration as background information, this record does not contain sufficient facts regarding CO-92-278 to allow me to rule upon the merits of that matter.

The Association's allegation that the Board also violated the Act by seeking to meet with employees regarding the health insurance change, lacks merit. The evidence shows that Board officials wanted to meet with employees to explain the Travelers plan, not to negotiate. The Board had asked the Association for its permission to meet with the employees (R-9), but the Association

rejected that request (R-40). No meeting ever took place. The Board obviously did not circumvent the Association, rather, it acted in good faith by making the request to the Association, and I draw no negative inferences therefrom.

Interim Relief Affidavit

In its post hearing brief the Association argued that I should draw negative inferences regarding the Boards overall conduct based upon alleged "lies" in an affidavit submitted by the Board in the interim relief proceeding related to this matter; from the Board's failure to call the affiant as a witness in this case; and, from the Board's failure to prove some of what it said it would show in its opening statement at hearing.

I reject the Association's contentions. The interim relief proceeding was not held before me, I have never seen the affidavit in question, it was not admitted, nor even offered to be admitted, into this record, and the Association is not now entitled to rely on it to prove its case. The burden of proof in this case is on the Association, not the Board. The Board was not required to prove the foundation for any of its opening remarks, and I will not draw negative inferences from the fact that the Board choose not to call certain individuals as witnesses. The Association had the same right as the Board to call the affiant as a witness. The Association did not call him, consequently, his affidavit is irrelevant to this case.

In addition, the affidavit in question, and the Board's decisions on how to present its case at hearing, occurred after the dispute resolution process had been completed. Thus, they could not be the basis upon which a finding could be made that the Board's totality of conduct during that process was in bad faith.

Other Bad Faith Allegations

In its post-hearing brief the Association also argued that the Board acted in bad faith by delaying the production of an accurate scattergram; by repackaging its salary offer in post fact-finding as an actual dollar amount; by the passage of its April 7, 1993 Board resolution (CP-36); by the Board's issuance, then withdrawal, of the Redline Draft; and by the Board, allegedly, not identifying its position on what constituted the new terms and conditions of employment. I reject those allegations as a basis for inferring bad faith. While some of the facts concerning those allegations are acurate, I find that the Board's conduct was never designed or intended to avoid reaching a collective agreement.

The Board provided the Association with scattergram information on several occasions. Although the most current information was not provided until later in the negotiations process, there is no evidence the Board was intentionally acting to withhold information, thus I will not infer that its actions were in bad faith.

The Association's argument that the Board acted in bad faith by attempting to "hoodwink" the Association into believing

that its repackaged money offer was something new, is completely unfounded. By the time that offer was made the dispute resolution process had been completed. The Board was not attempting to fool the Association. It merely repackaged its offer which it had a right to do, hoping it would be more acceptable to the Association. But the Association, apparently, did not understand the offer until it studied the numbers. The Board's offer was not made in bad faith.

The Board's issuance of CP-37 and the Redline Draft were done after the completion of the dispute resolution process. The Board's issuance of CP-37 demonstrated its intent to implement certain terms and conditions of employment (which it had the right to do) but also revealed its preference, and continued willingness, to reach an agreement. That was not inconsistent or inappropriate conduct. The Act encourages the voluntary resolution of disputes, and the Board was indicating that although it intended to implement terms and conditions of employment if no agreement could be reached, it was still willing to work with the Association to reach agreement. That offer was made in good faith. Similarly, the Board's decision to withdraw the Redline Draft was done in good faith as soon as the Board realized it contained several errors.

After reviewing all of the facts and the Association's arguments, I am convinced beyond any doubt that the Board's conduct throughout the entire negotiation, mediation and fact-finding process was with the consistent intent to reach, rather than avoid, agreement with the Association.

Impasse

Having found that the Board engaged in good faith negotiations before the declaration of impasse, I next consider whether the parties genuinely reached impasse, justifying the Board's unilateral implementation of terms and conditions of employment. Impasse has been defined as:

> ...the deadlock reached by bargaining parties after good-faith negotiations have exhausted the prospects of concluding an agreement. Teamsters Local 175 v NLRB, 788 F.2d 27, 30; 121 LRRM 3433, 3435 (D.C. Cir. 1986).

The Association had alleged that the Board did not have the authority to implement because it had expressed its willingness to continue negotiations. In Rutgers, 6 NJPER at 181, the Commission held that in deciding the impasse issue it would not use a mechanical counting of the numbers of bargaining sessions, but would look to the totality of the negotiations history. In Bayonne, 16 NJPER at 89, the Commission (H.E.), citing from Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967), listed a number of factors to consider in deciding whether an impasse existed.

> The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. Id at 1388.

The decision in Bayonne also noted that the Commission in Jersey City found several factors in determining that impasse was reached,

but the Commission indicated that not all factors were necessary before an employer could implement its last best offer. 16 NJPER at 91.

The Association's argument that the parties were not at impasse was premised upon its belief that the Board had not negotiated in good faith. But the Association also argued that the Board's offer to continue negotiations in CP-37 (April 23, 1993), after it had indicated its intent to implement a contract (on April 7, 1993), and the Association's acceptance of that offer in CP-38 (May 14, 1993), obligated the Board to continue negotiations. In fact, in its post-hearing brief the Association argued that based upon the offer and acceptance to negotiate, the Board could not now implement terms and conditions absent a whole new round of good faith negotiations, mediation and fact-finding.

I reject the Association's arguments. I have already held that the Board negotiated in good faith throughout the dispute resolution process, thus, the Association's premise for its impasse argument has no weight. The Association's second argument is an attempt to create a legal requirement which is not supported by the intent of the Act, and is based on conduct that occurred after the parties had already reached impasse.

The impasse factors listed in Bayonne/Taft Broadcasting support the finding of an impasse here. The parties engaged in good faith negotiations throughout a lengthy negotiation/mediation/ fact-finding process, they disagreed on salary from the beginning

through the end of that process, they settled many other issues but could not agree on salary and health benefits.

By the completion of the post fact-finding meetings there was no reason to expect either party to concede on those issues, and the parties had exhausted the prospects of concluding an agreement. Thus, I find that the parties were at impasse going into fact-finding, and remained at impasse after the post-fact finding sessions were held. The Board was, therefore, entitled to implement after April 6, 1993.

There is a difference here between the Board's right to implement, and its duty to negotiate. The Act was intended, in large part, to resolve labor disputes. The primary way to resolve them is through agreement of the parties. To best effectuate that intent, the Legislature mandated parties engage in good faith negotiations. But recognizing that negotiations may not result in agreement, it mandated mediation, then, if necessary, fact-finding to reach an agreement. But the Legislature did not mandate any action thereafter.

In Jersey City, the Commission explained that the Legislature did not intend to require agreement before an employer could implement its last best offer, 3 NJPER at 124. But at note eight it also said that:

> Neither are we implying that the obligation to negotiate terminates with the implementation of the last best offer....Id.

Those two holdings are not inconsistent. In the first, the Commission was explaining that an employer must exhaust the statutory dispute resolution procedures before it implements. In the second, it was reemphasizing the Legislative preference that labor disputes be resolved between the parties. But even assuming there is something left to negotiate post-implementation, it does not mean the employer is required to re-enter the dispute resolution process.

The Board's language in CP-37 complies with the holding in Jersey City. Having exhausted the dispute resolution process in good faith, and still at impasse, the Board had the right to express its intent to implement. But the Board, recognizing the preference for a negotiated agreement, properly expressed its willingness to meet and continue negotiations. That offer was not an indication that the parties were no longer at impasse, nor did it create an obligation for the Board to reenter the dispute resolution process.[17/] The Board, therefore, retained its right to implement unresolved terms and conditions of employment that were included in its last best offer.

Last Best Offer

The last qualifying element of an employer's right to implement terms and conditions of employment pursuant to Jersey City is that it must implement its last best offer.

17/ My holding here is the same regarding CP-43, the Board's June 28, 1993 letter expressing its willingness to continue negotiations.

The final basis for the Association's allegation here that the Board did not have the right to implement salary and health benefits was that it did not implement its last best offer, nor every element of that offer. The Association contends that the last best offer had to be the Board's last offer presented to the fact-finder.

The record shows, and there is no dispute, that the Board's last best salary offer was 3.5% for 1991-92, 4.0% for 1992-93, and 5.0% for 1993-94, all inclusive of longevity. In its June 14 resolution (CP-42), the Board said it would implement the wages and health insurance as set forth in its last best formal offer to the Association, and it submitted salary guides intended to accomplish that purpose. There is no evidence on this record from which to conclude that the salary guides did not contain the percentage increases proposed by the Board. The burden was on the Association to prove that the guides did not properly reflect the correct percentage increases. No such proof was provided. Although the guides, themselves, had not been submitted to the fact-finder, the most important factor is whether the Board acted consistent with the intent of its last best offer, and if it did, then absent evidence to the contrary, the Board's implementation was in conformance with Jersey City. In the private sector, implemented terms must have been reasonably comprehended within the employers pre-impasse proposals. Taft Broadcasting, 64 LRRM at 1388. Here, since it is customary for percentage increases to be implemented thru salary

guides, and since there was no evidence that the guides were improper or inaccurate, I find that the Board did not violate the Act by implementing those salary guides.

Regarding longevity, the Board offered to grandfather current employees (certainly as of March 1993, the time of the fact-finding hearing), as included in their wage increase, and implemented that offer by providing that longevity pay would be available to employees hired before July 1, 1993. That language was consistent with the Board's longevity offer, thus, it did not violate the Act. In its post-hearing brief, the Association claimed that the Board had offered "an undisclosed/undetermined fixed dollar amount" of longevity for new hires, but the evidence does not support that claim.

Regarding health insurance, the Board in its fact-finding brief had proposed to continue the terms of the Travelers plan it had implemented in February 1992. In its June 1993 resolution the Board merely implemented the Travelers plan that was already in effect. That implementation was in conformance with Jersey City.

Finally, the Association argued that the Board's June 1993 implementation was improper because it did not implement every element of its fact-finding proposal, such as those specific proposals concerning separation benefits, personal and family illness days. That argument lacks merit.

Neither Jersey City, Bayonne, nor any other Commission case specifically defines "last best offer". I do not believe that an

employer is required to implement every particular element of its last best offer to meet the intent of Jersey City, unless its last best offer was clearly made as a package proposal, or the employer was simply excluding specific elements of its offer where it had actualy offered to add or increase a benefit. But where, as here, the remaining elements of the Board's last best offer were more regressive than the Association's position on those elements, the Association can not possibly prefer that those elements be implemented. The Association only made that argument in an attempt to undo the implementation of salary and health benefits.

Since the intent of the Act is to encourage the voluntary resolution of disputes, it would be absurd to believe that the Commission in Jersey City, et al., was establishing a policy that preferred the unilateral implementation of terms and conditions of employment. Jersey City merely stands for the proposition that once the dispute resolution process has been exhausted, an employer may implement terms and conditions of employment. The preference in those circumstances would be for an employer to implement only those terms and conditions that are necessary to allow the parties relationship to proceed. A requirement to implement every element of the employer's last best offer, even when those elements are more regressive than the status quo, in order to meet a last best offer standard, would be inconsistent with the intent of the Act. Thus, the Board's decision to implement only its salary/longevity and health insurance proposals did not violate the Act.

Finally, the Association's reliance on the Redline Draft to support allegations in its charge, and arguments in its brief, is entirely misplaced. Shortly after that Draft was issued the Board notified the Association that the Draft had numerous mistakes and was not being implemented. The Association acknowledged that notice. The Board never subsequently relied on the Draft, thus, the Association's reliance on it to support its allegations and arguments carries no weight.

Conclusion of Law

The Board did not violate the Act, or the principles established in State of N.J., and Jersey City, et al., by implementing its resolution of June 14, 1993.

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

RECOMMENDATION

I recommend the complaint be dismissed.

Respectfully submitted,

Arnold H. Zudick
Hearing Examiner

Dated: January 26, 1995
Trenton, New Jersey