

P.E.R.C. NO. 83-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-81-176-160

CHERRY HILL ASSOCIATION
OF SCHOOL ADMINISTRATORS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Cherry Hill Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5), when it dishonored a contractual clause allowing all administrators whom the Cherry Hill Association of School Administrators represented to take days off when schools were closed for religious holidays.

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Charging Party.

Appearances:

For the Respondent, Davis & Reberkenny, Esqs.
(Kenneth D. Roth, of Counsel)

For the Charging Party, Robert M. Schwartz, Esq.

DECISION AND ORDER

On December 5, 1980, the Cherry Hill Association of School Administrators ("Association") filed an unfair practice charge against the Cherry Hill Board of Education ("Board") with the Public Employment Relations Commission. On January 9, 1981, the Association amended its charge. The amended charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(3), (5), and (7),^{1/} when it dishonored a contractual clause

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

granting all administrators days off when schools were closed for religious holidays. Specifically, the Association alleged that the Board impermissibly required all administrators either to work on September 11 and 12, 1980 -- Rosh Hashanah -- or be charged a personal or vacation day.

On May 11, 1981, the Director of Unfair Practices issued a Complaint. The Board filed an Answer. It asserted that the contractual clause in issue only permitted religious observers, not all administrators, to take a leave of absence on religious holidays without being charged a personal or vacation day and that the clause, as so interpreted, favored religious observers and thus violated the First and Fourteenth Amendments to the United States Constitution.

Pursuant to N.J.A.C. 19:14-6.7, the parties agreed to waive a hearing examiner's decision and submitted stipulations of fact to the Commission. The stipulations, however, were insufficient, and the Commission transferred the case to Hearing Examiner Joan Kane Josephson for hearing.

On February 17, 1982, the Hearing Examiner conducted a hearing at which the parties examined witnesses and presented documentary evidence. The parties waived oral argument, but submitted post-hearing briefs.

On May 28, 1982, the Hearing Examiner issued her report and recommendations, H.E. No. 82-54, 8 NJPER ____ (¶ _____ 1982) (copy attached). She found that the contract gave all administrators, almost all of whom are principals and assistant principals, the right to take off religious holidays when schools were closed,

regardless of whether they observed a particular religion. So interpreted, the clause was religiously neutral and constitutional. She therefore found that the Board had committed an unfair practice when it unilaterally rescinded this contractual right. She recommended an order requiring the Board to negotiate any changes in contractually guaranteed holidays, restore all vacation and personal leave days which employees used on religious holidays when schools were closed in 1981 and 1982, and post an appropriate notice to employees.

On June 10, 1982, the Board and Association filed Exceptions. The Board asserts that the Hearing Examiner erred in interpreting the contractual clause to grant all administrators the right not to work on religious holidays when schools were closed. The Association asserts only that the Hearing Examiner's recommended remedy should be modified to apply to the Fall of 1980 and 1981 rather than the Fall of 1982.

As evident from the foregoing history, this case involves primarily a question of contractual interpretation. The parties agree that if the Board's interpretation is correct, the clause is unconstitutional and if the Association's interpretation is correct, the clause is constitutional. See, Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teachers Ass'n, 86 N.J. 43 (1981), aff'g 174 N.J. Super. 468 (App. Div. 1980), P.E.R.C. No. 81-4, 5 NJPER 289 (¶10158 1979) ("Hunterdon").^{2/} Accordingly,

^{2/} Neither party has excepted to the Hearing Examiner's analysis of the constitutional question.

we focus on the question of contractual interpretation. In resolving this question, we must attempt to ascertain the intent of the parties, as revealed through the wording of the clause, the negotiations history, and the parties' practice under that clause.

Article VIII, Section B of the parties' collective agreement, effective July 1, 1980-June 30, 1982, covers temporary leaves of absence. Its preface states: "All administrators shall be entitled to the following leaves of absence with pay during each school year." The clause then lists various types of leave -- for example, leaves for personal business or to attend court or a funeral. Section B.7, the clause in dispute, provides:

On religious holidays, when schools are closed, administrators are entitled to take the religious holiday without being charged a personal day or vacation day.

Article X, entitled Holidays and Vacations, entitles administrators to certain paid holidays, including Good Friday and Christmas.

The parties negotiated their first contract in the fall of 1975. They included the identical language, unchanged in each intervening contract, now found in Section B.7.

No witness could recall the interchange concerning section B.7 between Board and Association representatives at the negotiations table in 1975. The record contains, however, the predecessor proposals of both sides and the handwritten comments on the proposals of one of the Board's representatives in the negotiations.

The Association's initial proposal stated:

All administrators shall be granted, upon request, up to three (3) days leave per school year, without reduction in pay, for observance of religious holidays where such observance precludes the administrator's attendance at his normal place of work.

The Board representative, an assistant to the superintendent, wrote next to this proposal: "Yes - if added wording" and then added "and when schools are closed" at the end. Subsequently, he drafted the following Board counterproposal:

All administrators shall be granted, upon request, the opportunity to take religious holidays, on days schools are closed, without being charged a personal day or a vacation day.

(Emphasis added)

Sometime before the 1975 contract negotiations commenced, the Board had decided to close the schools and central office for all official business on Rosh Hashanah and Yom Kippur. The schools and central office were not closed on any other religious holiday besides Christmas and Good Friday. Thus, the Board's counterproposal effectively restricted the opportunity to take religious holidays to the three Jewish holidays on which the Board had closed the schools.

Since the record is silent on how the negotiating process led from proposal and counterproposal to contractual clause, we turn to a comparison of the original proposals and the language ultimately adopted in section B.7. This analysis reveals that the following conditions were removed from the Association's proposal before agreement on the final language: (1) the requirement that the administrators request a holiday, (2) an explicit statement of the purpose -- observance -- of the religious holiday, and (3) the requirement that the observance preclude attendance at the normal place of work. It also reveals that the following

conditions were removed from the Board's counterproposal: (1) the requirement that the administrators request a holiday, and (2) the explicit statement that administrators would have the opportunity, rather than the entitlement, not to work on religious holidays. The final language embodies the Board's demand that such holidays only be taken on days when schools are closed.^{3/}

The parties offered markedly different testimony on what they understood the clause to mean and on how it was applied from 1975 through 1980.

The assistant to the superintendent testified that he has issued a memorandum each year similar to the one described in footnote three, with the exception that he reproduced the language of section B.7 on the accompanying chart. He testified that he assumed that all administrators would understand this language to mean that only those administrators who wanted to take off Rosh Hashanah or Yom Kippur for religious purposes could take advantage of the clause. In the 1977 and 1978 memoranda, he reproduced the contractual language but added, in a covering statement, that administrators were entitled to take the religious

^{3/} The actual language was apparently borrowed from an October 1, 1975 memorandum which the assistant to the superintendent circulated to administrators and which set forth the Board's policy and previous contractual agreements covering non-administrators on what employees were entitled to observe what holidays. Prior to the first Association-Board contract, administrators who wanted to observe a religious holiday had to ask and receive permission before doing so, but did not have to use a personal or vacation day. A chart incorporating the October, 1975 memorandum did not include administrators as a group entitled to take off Rosh Hashanah and Yom Kippur.

holiday for the purpose of observing the holiday.

He further testified, however, that he was not in the chain of command over the administrators in the unit, primarily principals and assistant principals, and thus had no knowledge of whether any of these administrators were actually working on Rosh Hashanah and Yom Kippur during the period 1975-1980. He did testify that he assumed they worked because he did not receive forms requesting leave on any of these days.^{4/}

Several administrators testified for the Association that they understood that the contract entitled all administrators to take off religious holidays when schools were closed without being required to file a request to do so and without being charged a personal or vacation day.^{5/} They understood that the clause granted them the same benefit enjoyed by the teachers on those days: since the schools were officially closed, they did not have to work. They testified that other administrators they knew

^{4/} The attendance records are kept by a clerk who reports to the assistant to the superintendent. Those records show that for school years 1976 through 1980, only two administrators were ever charged with absences for these days. One of the two exceptions, a high school assistant principal, was charged with three "religious" leave days in 1978. That individual testified that he could not recall why he had submitted an absence form in that year, but that he took off those holidays each year. The records indicated that only one other administrator was charged with one "religious" day, also in 1978, but that individual did not testify.

^{5/} Among those so testifying was the principal who had participated in the 1975 negotiations for the Association.

also took the days off routinely, regardless of whether they were Jewish. Based on this testimony and the other evidence in the record, the Hearing Examiner found that the administrators in the Association's unit did take these days without submitting an absence form to the central office as would be required for vacation, illness or personal leave days.

In 1980, the Board, upon hearing of the Hunterdon decision, decided that Article VIII, Section B.7 was unconstitutional and therefore void. It informed the Association that no administrator could have a day off on Rosh Hashanah or Yom Kippur unless that administrator used a personal or vacation day under another portion of the contract. The Association filed the instant charge in response. During the ensuing litigation, the administrators have complied with the Board's directive. In school years 1980-1981 and 1981-1982, a substantial number of administrators, both Jewish and non-Jewish, took vacation or personal days on Rosh Hashanah and Yom Kippur.^{6/}

We believe that the Association has established, by a preponderance of the evidence, that its interpretation of Article VIII, Section B.7 is correct. The preface to Article VIII, Section B entitles all full-time administrators to the specified leaves of absence; paragraph 7 reiterates this language of entitlement. The comparison of the language of the Association's proposal, the Board's counterproposal, and section B.7,

^{6/} Thus, there is no dispute that the Association, if correct in its interpretation, may recover for post-charge deprivations.

establishes that the requirements that an administrator had to request a religious leave day, that the day could only be used for religious observance, and that such observance precluded attendance at work, were deleted. In the absence of any contrary evidence concerning what was said at the negotiations table, it is reasonable to assume that these changes occurred during the give and take of the negotiation of the entire contract. More significantly, in the absence of any such contrary evidence, the contractual language should be given its most logical and evident meaning: administrators are entitled to take the day off whenever schools have been officially closed by the Board due to a religious holiday. This interpretation is particularly sound when the Association's witnesses all testified that they and other administrators routinely took these days off, without filing a request and without objection from the Board.

Our holding is that the preponderance of the evidence in this record supports the Association's interpretation, not that there is no evidence to support the Board's interpretation. Thus, in our review of the record, we have considered the Board's Exceptions and all evidence which it argues supports its interpretation, such as the placement of section B.7 in the article on leaves of absences, the testimony of the assistant to the superintendent concerning his understanding of the provision,^{7/}

^{7/} The Hearing Examiner found the assistant to the superintendent to be a credible witness and we have no reason to question that finding. However, the witness acknowledged that he could
(continued)

and the stipulation of facts. Nevertheless, we find that the Association has met its burden of proof.

The placement of the religious holiday clause in the article covering leaves of absence rather than the article covering vacations is some evidence in the Board's favor. We do not, however, find the placement controlling. As discussed by the Hearing Examiner, the initial proposal and counterproposal were properly raised under the heading temporary leaves of absence. While the final language, as we have interpreted it, perhaps more logically belonged in the article on vacations, we believe it would be elevating form over substance to find this placement dispositive evidence of intent, particularly where there is a logical explanation for its placement in the article on leaves of absences.

The parties initially stipulated that:

The issue herein is whether the Board violated the Act by unilaterally denying unit employees a holiday for religious purposes as set forth in Article VIII, Section B(7).

7/ (continued)

not remember the discussions on this clause and thus could not testify as to the significance of the change from the language of the original proposal and counterproposal to the final language of section B.7. Similarly, he testified that he had no personal knowledge of whether administrators worked on the days in question; he knew only that he did not receive requests to take the day off or absence reports and thus he assumed they worked. This testimony by itself does not give strong support to the Board's interpretation since this witness acknowledged he was not in the administrator's chain of supervision and would not know if they worked or not. In fact, the record shows that the administrators routinely took the day off without protest from the Board. This fact is stronger evidence of the practice than the inference that all agents of the Board were suffering from the same lack of knowledge and operating under the same assumption as the one administrator who testified for the Board.

This stipulation is somewhat damaging to the Association because it ties the taking of the holiday to religious purposes. Nevertheless, the wording of the clause, the history of negotiations, and the parties' practice are more probative sources of contractual interpretation.

Turning to the question of remedy, we agree with the Association that the remedy should apply to those days in September and October, 1980 and 1981, when the schools were closed for religious holidays, not September and October, 1981 and 1982, as recommended by the Hearing Examiner. We will modify the remedy accordingly.^{8/}

Finally, while we order the Board to refrain from unilaterally altering contractually agreed-upon provisions on days off when schools are closed for a religious holiday, we note that the Board may seek to negotiate the removal of that clause in successor contract negotiations.

^{8/} The Hearing Examiner's remedy would restore all vacation and personal days that had been used by the employees in the unit for the days schools were closed due to the religious holidays in question. If only Jewish teachers had been allowed to take these days off in 1980 and 1981, then the remedy might present a Hunterdon Central question because it would give only observers the extra days in these two years. However, our review of the record, particularly a chart introduced by the Board showing which administrators took off these days in 1980 and 1981, indicates that the Board did not limit the right to use a personal or vacation day on these days to Jewish teachers and that the non-Jewish witnesses also took these days off in 1980 and 1981. Thus, restoring the days to all people who used them will not limit relief only to observers of the religious holiday. In the absence of any constitutional problem with the remedy, and given the Association's express approval of the Hearing Examiner's recommended remedy, as already modified, we believe the recommended order effectuates the purposes of the Act. N.J.A.C. 19:14-7.3(b).

ORDER

It is Ordered that:

A. The Board cease and desist from:

1. Unilaterally altering the provisions of its collective negotiations agreement with the Cherry Hill Association of School Administrators entitling the administrators to take religious holidays when schools are closed for religious holidays without being charged a personal day or a vacation day.

B. The Board take the following affirmative action:

1. Restore all vacation and personal leave days that have been used by the employees in this unit for the days in school years 1980-1981 and 1981-1982 when schools were closed for religious holidays.

2. Send each administrator a copy of the notice to employees attached as Appendix "A."

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

C. The allegations in the Complaint that the Board violated N.J.S.A. 34:13A-5.4(a) (3) and (7) are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves and Butch voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioners Hartnett and Suskin were not present.

DATED: Trenton, New Jersey

July 20, 1982

ISSUED: July 21, 1982

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT unilaterally alter the provision of our collective negotiations agreement with the Cherry Hill Association of School Administrators entitling administrators to take a religious holiday when schools are closed for religious holidays without being charged a personal day or a vacation day.

WE WILL forthwith restore all vacation and personal leave days that have been used by the employees in this unit for the days in school years 1980-1981 and 1981-1982 when schools were closed on religious holidays.

CHERRY HILL BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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Docket No. CO-81-176-160

CHERRY HILL ASSOCIATION OF SCHOOL
ADMINISTRATORS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsection (a)(5) of the New Jersey Employer-Employee Relations Act when it unilaterally denied a contractually guaranteed holiday to administrators when schools were closed for religious holidays. The Respondent argued that the clause was an illegal religious leave that violated the establishment clause of the First Amendment of the U.S. Constitution, citing Hunterdon Central H.S. Bd/Ed, P.E.R.C. No. 81-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J.Super. 468 (1980), aff'd o.b. 86 N.J. 43 (1981). The Hearing Examiner found that the provision allowed the entire bargaining unit to have a leave day when the employer closed schools on a day that happened to be a religious holiday.

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.

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Appearances:

For the Respondent
Davis & Reberkenny, Esqs.
(Kenneth D. Roth, Esq.)

For the Charging Party
Robert M. Schwartz, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on December 5, 1980 and amended on January 9, 1981 by the Cherry Hill Association of School Administrators (the "Charging Party" or "CHASA") alleging that the Cherry Hill Board of Education (the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") in that it unilaterally denied a contractually guaranteed holiday to administrators when schools were closed for religious holidays which is alleged to violate N.J.S.A. 34:13A-5.4

(a) (3), (5) and (7). ^{1/} The Board's response is that the contractual clause is illegal because it grants religious leave which is prohibited by the First Amendment of the United States Constitution.

It appearing that the allegations, if true, may constitute unfair practices within the meaning of the Act, a Complaint was issued on May 11, 1981. The parties entered into certain stipulations of fact and pursuant to N.J.A.C. 19:14-6.7 agreed to submit the matter directly to the Commission, waiving a hearing and a hearing examiner's recommended decision. Simultaneous briefs were filed on September 28, 1981 and the matter was transferred to the Commission. Upon receipt of the stipulations and briefs, it was evident that there remained a factual dispute and the case was transferred to the undersigned for hearing. A hearing was held on February 17, 1982 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post hearing briefs were submitted by March 25, 1982.

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

^{1/} These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

The following Stipulations of Fact agreed upon by the parties were jointly entered into evidence (J-1) and are incorporated into this report:

1. That the Cherry Hill Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and is the employer of the employees involved herein.
2. That the Cherry Hill Association of School Administrators is an employee representative within the meaning of the Act.
3. That the parties are signatories to a collective agreement dated 1980-1982, which is admitted into evidence. The relevant clauses in question herein are Article VIII, Section B(7) and Article X.
4. The issue herein is whether the Board violated the Act by unilaterally denying unit employees a holiday for religious purposes as set forth in Article VIII, Section B(7). The Board contends that Article VIII, Section B(7) is illegal pursuant to the decision in In re Hunterdon Central H.S. B/E, P.E.R.C. No. 80-4, 5 NJPER 289 (¶ 10158 1979), aff'd 174 N.J. Super 468 (1980), aff'd _____ N.J. _____ (No. A-98 April 30, 1981). The Association contends that the instant clause is distinguishable from the Hunterdon case and is therefore legal.
5. The parties agree that the identical clause has been in operation continuously since the 1975-77 contract.

Based on the remainder of the record the undersigned makes the following:

FINDINGS OF FACT

The Charging Party, CHASA, represents administrators employed by the Respondent. The CHASA unit has about 40 principals and assistant principals assigned to 21 schools in the district. There are also a few other administrators in the unit, one of whom

is located in the central administration office. The parties negotiated their first collective negotiations agreement in 1975. During the course of negotiations the Charging Party proposed that its members be granted certain leaves of absence, holidays and vacations. The employees in this unit are twelve-month employees whose work schedules at times are different from the school calendar that teachers and pupils follow.

The Leaves of Absence proposal contained a subsection entitled Temporary Leaves of Absence which stated:

All full-time administrators shall be entitled to the following leaves of absence with pay during each school year.

* * *

7. All administrators shall be granted, upon request, up to three (3) days leave per school year, without reduction in pay, for observance of religious holidays where such observance precludes the administrator's attendance at his normal place of work.

This clause (7.) ultimately became part of the agreement between the parties in a changed form. A member of the Board's negotiating team for what became the 1975-77 contract submitted contemporaneous notes made during the negotiations (R-1 in Evid.). He recalled, and his notes corroborated, that the Board wanted this clause to apply only "when schools are closed." (Tr. 119) ^{2/} This concept was ultimately agreed upon by both parties and placed in the "Leaves of Absence" section of the contract under "Temporary

^{2/} In the mid-seventies (the precise year was not recalled by any witnesses) the Cherry Hill School District began closing schools for students and teachers on Yom Kippur and Rosh Hashanah, but certain Board employees were required to work. On other religious holidays when schools are closed (e.g. Easter and Christmas), no employees are expected to work except in certain rare exceptions not relevant herein.

Leaves of Absence" as proposed. The final wording was:

7. On religious holidays when schools are closed, administrators are entitled to take the religious holiday without being charged a personal day or vacation day. 3/

This first contract was typed in final form by the Board and approved by CHASA.

From 1975 through 1982 the Cherry Hill Schools have been closed for students and teachers on Rosh Hashanah and Yom Kippur when those holidays have fallen on school days. There are about 40 administrators in the CHASA unit and it had been general practice since the inception of the contract for these administrators to take those days off without submitting an absence form to the Central Office as would be required for vacation, illness or a personal leave day. 4/

3/ Neither a 1975 Board representative on the Negotiations Committee, Assistant to the Superintendent Rowland C. Hill nor a CHASA representative on the Committee that year, Elementary School Principal John Morrow, could recall any specifics of the negotiations that led to the changes from the proposed to the final wording other than Mr. Hill's recollection of the Board's insistence on "when schools are closed." This was the parties' first contract and Mr. Morrow recalled the negotiations was a continuing process with many items to be resolved (Tr. 25). Mr. Hill testified: "I don't recall all the dialogue that took place." (Tr. 146)

4/ Prior to the first CHASA contract, administrators were granted religious holidays with pay upon their request when school was in session for religious observance without being charged a vacation or sick day. "Anybody who had a religious holiday to observe took it off with no charge." (Tr. 13, 30) After the first contract the practice changed and applied only to days when schools were closed. Assistant Principal Richard Locovaro testified that while he is not Jewish he has always taken off the above holidays without handing in absences and that to his knowledge other members of the unit also do not work on these holidays (Tr. 9). Principal Morrow (also not Jewish) corroborated this testimony (Tr. 30). Principal Tracy Miller

(continued)

Attendance records of administrators are kept by a clerk in the office of Assistant to the Superintendent Towland C. Hill. Those records corroborate testimony that from 1975-76 until the 1980-81 school year absence slips were not submitted. ^{5/}

Mr. Hill testified credibly that he assumed administrators worked on the days in question since no absence reports of any type were submitted to his office (Tr. 130). He noted these administrators work in 21 locations throughout a 25-square mile district and as part of management it is assumed they will submit absences when they are absent (Tr. 102). These administrators do not report to Mr. Hill in their chain of command. Elementary and junior school principals report to the Assistant Superintendent for "K through 8 education" and the high school principals report directly to the Superintendent (Tr. 96).

At the beginning of each school year Mr. Hill has sent a memo to all administrators (CP-1, 2, 3) setting out school holidays for personnel under their jurisdiction noting that "all personnel for which there is a negotiated agreement the agreement is the guide." Each year this memo also contains a chart of holidays and under the Yom Kippur and Rosh Hashanah columns for CHASA the language of the collective bargaining agreement is reproduced.

^{4/} (continued) who is also not Jewish, also corroborated the practice. He stated: "It was clear to him [his vice-principal] and myself that these were days that we did not work when the schools were closed for religious holiday." (Tr. 74)

^{5/} There are two exceptions. In 1978-79 one then high school assistant principal was charged with three "Religious" leave days. He testified that while he always takes off the holidays he could not recall why he would have submitted absence forms in that one year. One other administrator was charged with one "Religious" day in 1978.

In September 1980 the administrators were notified that they would be required to work on September 11 and 12 (schools were closed for Rosh Hashanah) or if they chose to be absent, would be required to take a personal day. ^{6/} This charge was filed on December 5, 1980, alleging this was a change in a term and condition of employment without negotiations.

DISCUSSION AND ANALYSIS

Initially, the undersigned finds that the Charging Party has failed to allege facts, which if proven true, would constitute violations of subsections (a)(3) and (7) of the Act and I therefore recommend dismissal of that aspect of the unfair practice charge. There remains the issue of whether the Respondent Board unilaterally changed the religious leave policy that was provided in the parties' contract which would be a violation of subsection (a)(5) of the Act.

The Board argues that the disputed clause provides that when schools are closed for religious holidays, individuals who observe a particular religious faith may take the day off with pay "for the purpose of observing a religious holiday and to comply with the tenants of their faith." They submit that this constitutes paid leave for religious purposes which violates the First Amendment of the United States Constitution. They rely on Hunterdon Central H.S. Bd/Ed v. Hunterdon Central H.S. Teachers Ass'n, 86 N.J. 43 (1981) ("Hunterdon Central"). Their interpretation of the contractual clause is based on Mr. Hill's testimony concerning memos he

^{6/} A substantial number of administrators took the days off in 1981 and 1982 and their absences were charged to either personal or vacation days. (R-4 in Evid.)

had written concerning school holidays, the bargaining history of this clause, and Mr. Hill's personal interpretation of the clause. Their argument is also based on the fact that the clause is contained in the "Leave of Absence" section of the contract rather than the "Holidays and Vacations" section of the contract. Also, they point out that their joint stipulations submitted in this case set out the issue as whether the Board violated the Act in denying employees a holiday for religious purposes as set forth in Article VII, Section B(7).

The Association distinguishes this case from Hunterdon Central arguing that the clause provides that when the schools are closed for religious purposes all administrators covered by the agreement have the right not to report to work and that this is not tied into any religious observance by the individuals. The Board acknowledges this practice but argues that it was contrary to the established Board procedures.

The parties are not in disagreement that if the clause provides leave for religious purposes, which leave cannot be used for nonbelievers, favoring religion over nonreligion, the clause is violative of the Establishment Clause of the First Amendment of the United States Constitution. In Hunterdon Central the New Jersey Supreme Court upheld a Commission decision wherein the Commission held that granting additional days off with pay, i.e., not charged to personal days, vacation or any other leave available to all employees, specifically for the observance of religion, violates the constitutional prohibition against the establishment of religion.

After a careful consideration of this clause, the evidence proffered concerning its bargaining history and the Commission decisions examining religious leave vis-a-vis personal leave days, the undersigned concludes that the words are clear and unambiguous and do not violate the Establishment Clause of the First Amendment.

CHASA's original proposal provided that administrators must (1) make a request for leave (2) to observe religious holidays where (3) such observance precludes the administrator's attendance at his normal place of work. That proposal was one of seven proposed sections of CHASA's "Temporary Leaves of Absence" proposal. These seven sections with various changes became part of their final contract and have remained unchanged through successive contracts. Through the give-and-take of negotiations, the final agreement differed from the proposals. The final agreement on "religious holidays" was substantially changed. There was no requirement to (1) request leave or (2) that the purpose was to observe religious holidays or (3) that it would be permitted only when such observance precluded attendance at work. However, its application was now to be limited to religious holidays when schools are closed. It provided:

On religious holidays, when schools are closed, administrators are entitled to take the religious holiday without being charged a personal day or vacation day.

I can only conclude that the parties intended that the words of the clause were to be given their plain meaning. The final agreement was to be applied to all administrators and it eliminated the

three prerequisites because the parties agreed to do so. ^{7/}

Mr. Hill's memos concerning leave policies for employees not in this bargaining unit is irrelevant. The contract clause covers the employees in this unit. Personal leave is a term and condition of employment and the employer has negotiated a personal leave agreement here with the majority representative. Burlington County College Faculty Ass'n v. Bd. of Trustees, Burlington County College, 64 N.J. 10, 14 (1973).

I do not find that the reference in the joint stipulations to the dispute as a denial of a holiday for religious leave to be dispositive of the intent of this provision as the Board argues. The issue in dispute is the interpretation of the clause, not the characterization of the clause in a partial stipulation of facts by attorneys. In analyzing disputed contractual clauses the Commission frequently must look beyond the submission of the parties in order to determine the actual matter in dispute.

I also disagree that the clause would have necessarily been placed in the holiday section of the contract and not the Voluntary Leaves section if it was to have been given general application. CHASA proposed the clause as part of the Voluntary Leaves

^{7/} While Assistant to the Superintendent Hill may believe today that the final clause means the same to him that the proposed clause did, the undersigned believes that that is a subjective interpretation and not the standard to be used in interpreting contract clauses. See Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 221 (1979). Furthermore, while Mr. Hill may have been unaware that administrators throughout the district had taken these days off for four years, Mr. Hill was not in the chain of command of these administrators. Their immediate supervisors are an assistant superintendent and the superintendent.

section and it remained in that section of the contract. The holiday section of the contract lists the names of paid holidays and these leave days could just as well have ultimately been placed there. I find the clear language of this clause to be more persuasive than its integration with leave clauses that may have limited applicability, e.g., funeral leaves, personal leave which days if unused may be used for accumulated for sick leave (apparent general applicability), jury duty, court appearance and professional conventions.

Based on all of the above the undersigned concludes that this clause does not grant religious leave which is prohibited under Hunterdon Central. It is a leave granted to all employees in this unit when the Board closes school for students and teachers on a day that happens to be a religious holiday. See the Hunterdon Central Appellate Division decision, 174 N.J.Super 474, 476. The disputed clause herein is neutral with respect to religion.

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally denied contractually guaranteed holidays to administrators when schools were closed for religious holidays.

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(3) or (7).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Refusing to negotiate with Cherry Hill Association of School Administrators prior to unilaterally altering provisions of the parties' collective negotiations agreement pertaining to contractually guaranteed holidays for the administrators in the unit when schools are closed for religious holidays.

B. That the Respondent Board take the following affirmative action:

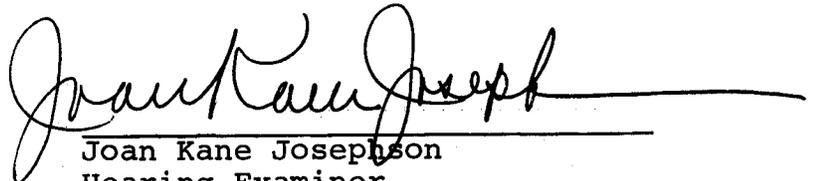
1. Restore all vacation and personal leave days that have been used by the employees in this unit for the days in 1981 and 1982 when schools were closed for students and teachers on religious holidays.

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

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

comply herewith.

C. That the allegations in the complaint that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(3) and (7) be dismissed in their entirety.


Joan Kane Josephson
Hearing Examiner

Dated: May 28, 1982
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate with the Cherry Hill Association of School Administrators prior to unilaterally altering provisions of the parties' collective negotiations agreement pertaining to contractually guaranteed holidays for the administrators in the unit when schools are closed for religious holidays.

WE WILL forthwith restore all vacation and personal leave days that have been used by the employees in this unit for the days in 1981 and 1982 when schools were closed for students and teachers on religious holidays.

CHERRY HILL BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.