P.E.R.C. NO. 87-112

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLIFTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-204-159

CLIFTON CUSTODIAL ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Clifton Custodial Association's motion for summary judgment that the Clifton Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally implemented a new work shift for its maintenance employees. The Commission finds that a plenary hearing is necessary to consider the Board's defenses that it had the contractual right to make the change and that it was entitled to make the change because impasse had been reached and the Association refused to negotiate.

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In the Matter of

CLIFTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-204-159

CLIFTON CUSTODIAL ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Dines & English, Esqs.
(Patrick C. English, of counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Louis P. Bucceri, of counsel)

DECISION AND ORDER

On February 3, 1986, the Clifton Custodial Association ("Association") filed an unfair practice charge against the Clifton Board of Education ("Board"). The charge alleges the Board violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it

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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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

unilaterally implemented a new work shift for its maintenance employees.

On April 22, 1986, a Complaint issued. The Board then filed its Answer. It admitted implementing a new work shift, but denied violating the Act.

On January 9, 1986, the Association filed a Motion for Summary Judgment, with supporting brief and certifications.

On July 8, 1986, the Chairman referred the Motion to the Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). On July 9, the Board filed its brief and certification in opposition.

On July 23, 1986, the Hearing Examiner granted the motion. H.E. No. 87-7, 12 NJPER 644 (¶17244 1986). He found that the Board violated the Act when it changed the shift hours prior to exhausting the Commission's impasse procedures.

On August 4, 1986, the Board filed exceptions. It contends that it had the right to institute the new shift because the Association refused to negotiate over this issue. On August 4, 1986, the Association filed a response seeking adoption of the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's undisputed findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.

Motions for summary judgment are only to be granted under limited circumstances. In Jersey City Medical Center, P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986), we reiterated the standards to determine when it is appropriate:

[S]ummary judgment is appropriate:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and movant...is entitled to its requested relief as a matter of law....
>
> A motion for summary judgment is to be granted with extreme caution, the moving papers are to be considered in the light most favorable to the party opposing the motion, all doubts are to be resolved against the movant, and the summary judgment procedure is not to be used as a substitute for a plenary trial. In light of these principles, the Commission has been reluctant to grant summary judgments. [Id. at 20; citations omitted.]

We have reviewed the record and find that summary judgment should not have been granted. Changes in starting and stopping times are mandatory subjects of negotiations. E.g., State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). However, there is no unlawful change where the parties' agreement permits the change. E.g., Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). We believe that the parties' submissions have raised a question of fact concerning whether there is such an agreement.

Paragraph 6 of the August 29, 1985 memorandum of agreement provides:

> Not to be made part of the contract, but to be part of a separate agreement manifested by this memo is that no action shall be taken with regard to shift changes in the elementary schools before the Association is provided an opportunity to meet with Mr. Piliere, Mr. Gibson, and Mr. DeGraef and, further, with the P.P.I. Committee of the Board to present the reasons and justifications for not changing shift hours.

The Board's certification submitted by a member of its negotiations committee stated that:

> I interpreted the above as an agreement meaning that shift hours could be altered once the above meetings had taken place...it was always believed by me that, based upon [this paragraph] the contract language regarding shifts would be superseded once the process described therein had been completed. In November, pursuant to [this paragraph] there were two meetings. During those two meetings the issue of shift hours was thoroughly discussed and complete input was given by the representatives of the Association. At all times, I felt that we were operating pursuant to paragraph 6....On December 4, 1985, the Board voted to effectuate a third shift of 11:00 a.m. to 8:00 p.m. This was accomplished only after the procedures set forth in paragraph 6 of the Memorandum of August 29, 1985 were exhausted and the custodians refusal to further discuss the matter....[T]he Board and [Association] agreed that discussions concerning shift changes would be severed from the main negotiations. In the Memorandum of August 29, a specific procedure was spelled out for the alteration of shifts. The Board followed the procedure completely.

The Association disputes these assertions. It claims that Paragraph 6 was intended only to allow Association input into a proposed shift change already permitted by the contract. In the absence of a fully developed record concerning that claim, no determination on the merits can be made. The Board is entitled to the opportunity to establish that Paragraph 6 is a waiver of the Association's right to negotiate shift changes. E.g., Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). This question, however, can only be resolved after a hearing. See Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980) (the trier of fact is permitted to look at a variety of factors, such as the history of negotiations

over the disputed contract provision, to determine if, in fact, there was a waiver of the right to negotiate). See also State of New Jersey; City of Jersey City, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983).

In view of this determination, we need not consider the Board's alternate argument that it was entitled to make the change because impasse had been reached and the Association refused to negotiate. On remand, however, the Board may present evidence in support of that claim.

ORDER

The matter is remanded to the Hearing Examiner for proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987

H.E. NO. 87-7

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

In the Matter of

CLIFTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-204-159

CLIFTON CUSTODIAL ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Respondent Board violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally and without exhaustion of the Commission's impasse procedures, including mediation and fact-finding, implemented a change in the shift hours of the custodians in its elementary schools effective January 2, 1986, without collective negotiations with the Association. By way of remedy, the restoration of the status quo ante was ordered: see Clifton Bd. of Ed., P.E.R.C. No. 80-104, 6 NJPER 103 (¶11053 1980).

H.E. NO. 87-2

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

In the Matter of

CLIFTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-204-159

CLIFTON CUSTODIAL ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Dines & English, Esqs.
(Patrick C. English, Esq.)

For the Charging Party
Bucceri & Pincus, Esqs.
(Louis P. Bucceri, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION ON CHARGING PARTY'S
MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 3, 1986, by the Clifton Custodial Association (hereinafter the "Charging Party" or the "Association") alleging that the Clifton Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that on January 2,

1986, the Board unilaterally established an 11:00 a.m. to 8:00 p.m. shift for the custodians in several of its elementary schools, which is not contained in the "Shift Hours" article of the previously expired collective negotiations agreement; this shift change was not negotiated with the Association during negotiations for a successor agreement and was implemented by the Board without exhausting the Commission's impasse procedures; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 22, 1986, scheduling hearings for June 10 and June 11, 1986, in Newark, New Jersey. Counsel for the Charging Party requested an adjournment of the hearing dates on May 30, 1986, in anticipation of filing a Motion for Summary Judgment with the Chairman of the Commission. As requested, the hearing dates were cancelled by the Hearing Examiner under date of June 9, 1986, the same date that the Charging Party filed its Motion for Summary Judgment herein.

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

Thereafter on July 8, 1986, the Chairman referred the Motion for Summary Judgment to the undersigned pursuant to N.J.A.C. 19:14-4.8(a) and on July 9th the Respondent filed its Brief and Certification in Opposition.

Upon the record papers filed by the parties in these proceedings to date, the Hearing Examiner makes the following:

UNDISPUTED FINDINGS OF FACT

1. The Clifton Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Clifton Custodial Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The prior collective negotiations agreement between the parties was effective during the term July 1, 1982 through June 30, 1984 ("G" Exh. "A")[2/] In this agreement the Board recognized the Association as sole representative for all custodial, maintenance and truck driver personnel. Also, this agreement provided in Article XVI, "Shift Hours," inter alia, that the shifts for elementary schools would be from 7:30 a.m. to 4:30 p.m. and from 2:00 p.m. to 11:00 p.m. Further, the Association agreed to meet with the Business Administrator "...to review and consider changing the present shift schedules..." (Exh. "A" p. 9).

2/ The "G" reference is to the Certification, including exhibits, made by Philip Grisanti, the President of the Association, in support of the Charging Party's Motion for Summary Judgment.

4. After negotiations for a successor agreement had ensued for many months, the Association filed a Notice of Impasse with the Commission on February 7, 1985, wherein the principal items in dispute were listed, none of which referred to shifts ("D" Exh. "A").[3/]

5. On May 22, 1985, the parties executed a Memorandum of Agreement "...subject to approval by the Board and ratification by the Association..." paragraph 4 of which provided that, "Any items in the current contract not altered herein or by way of mutual agreement will remain in effect..." ("G" Exh. "B"). This Memorandum was reached with the assistance of a Commission mediator.

6. The May 22nd Memorandum of Agreement was rejected by the Association and the parties returned to negotiations, again with the assistance of a mediator ("G" ¶6).

7. On August 22, 1985, the parties' negotiators reached a second Memorandum of Agreement, which was again subject to approval by the respective parties ("G" Exh. "C"). This second Memorandum made no reference to shift hours or changes in Article XVI of the prior agreement, supra. It did, however, state that, "Terms of the memo of 5/22/85 not altered herein will remain in effect..." It appears uncontradicted that the reason that this second Memorandum

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3/ The "D" reference is to the Certification, including exhibits, made by Henry DeVos, a member of the Board who served on its negotiating committee as well as the Board's Plant Planning and Improvement (PPI) Committee.

of Agreement did not mention shift hours was because the issue of shift hours was going to be dealt with through the PPI Committee ("D" ¶'s 8, 10).

8. After further negotiations a third and final Memorandum of Agreement was reached on August 29, 1985,[4/] which incorporated by reference the two prior Memoranda of Agreement, and which provided in ¶6 as follows:

> Not to be made part of the contract, but to be part of a separate agreement manifested by this memo is that no action shall be taken with regard to shift changes in the elementary schools before the Association is provided an opportunity to meet with Mr. Piliere, Mr. Gibson, and Mr. DeGraef and, further, with the P.P.I. Committee of the Board to present the reasons and justifications for not changing shift hours. ("G" Exh. "D," p. 4).[5/]

9. On October 23, 1985, the Board unanimously ratified a contract, based on language previously drafted by a representative of the Association and counsel for the Board, which did not alter the provisions of Article XVI of the 1982-84 agreement except to

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4/ Neither the "G" nor the "D" Certification indicates that the second Memorandum was rejected. The Certifications state merely that negotiations continued and resulted in the August 29th Memorandum.

5/ DeVos states in ¶'s 12 and 13 of his Certification that it was his understanding that the above-quoted provisions of ¶6 of the August 29, 1985 Memorandum of Agreement meant that shift hours could be altered by the Board once the above meetings of the PPI Committee had taken place. This does not raise a material issue of fact since the intentions of the parties, unless manifested by clear and unambiguous contract languge, are immaterial to the disposition of the instant Motion for Summary Judgment.

change the designation of the Junior High School to Middle School ("G" ¶'s 16-18 & Exhs. "F" and "G"). However, the Association subsequently rejected the contract as ratified by the Board for reasons unrelated to shift hours.

10. Pursuant to ¶6 of the August 29th Memorandum of Agreement, supra, two meetings were held between the Association and the Board's PPI Committee ("D" ¶'s 15 & 16).[6/] However, none of these discussions related to the implementation of any elementary school shift other than 7:30 a.m. to 4:30 p.m. and 2:00 p.m. to 11:00 p.m., i.e., there was no proposal or negotiations regarding an 11:00 a.m. to 8:00 p.m. shift through mid-November 1985 ("G" ¶15).

11. At the mid-November 1985 meeting, supra, the Board first proposed the creation of an 11:00 a.m. to 8:00 p.m. shift ("G" ¶20). The Association rejected this proposal on December 5, 1985 ("G" ¶21 & Exh. "I"). Counsel for the Board responded by letter dated December 6, 1985, in which he stated that there was no contract since there had been no "meeting of the minds" and that he had advised the Board that an impasse exists and that it may, thus, unilaterally change shift hours either on the basis of impasse or "...upon inherent management prerogative under New Jersey law..." ("G" ¶21 & Exh. "J").

6/ The Association agrees that there were meetings between it and the Board's PPI Committee in mid-November, adding that on November 15, 1985, the Association wrote to the Acting Superintendent, William Liess, regarding its objections to proposed shift changes in the elementary schools ("G" ¶19 & Exh. "H").

12. On December 11, 1985, Ronald Piliere, the Board's Business Administrator, sent a memorandum to all custodians, advising them that the Board on December 11th had changed the shift hours in the elementary schools by adding an 11:00 a.m. to 8:00 p.m. shift, which is to become effective January 2, 1986 ("G" ¶23 & Exh. "M").7/

13. The additional 11:00 a.m. to 8:00 p.m. shift at the several elementary schools became effective as mandated on January 2, 1986, there being a slight change made by the Board on January 8, 1986 ("G" ¶'s 24, 25 & Exh. "Q").

14. Notwithstanding the continuing failure to agree on shift changes by the parties, they did consummate a final collective negotiations agreement, which was first ratified by the Association and then by the Board on January 22, 1986, the Board attaching a reservation to its ratification as follows: "...subject to the understanding that with respect to Article XVI, the parties maintain their respective positions concerning the imposition of an 11:00 a.m. to 8:00 p.m. shift in the Elementary Schools..." ("G" ¶26 & Exh. "R" p. 19).

7/ There are 16 elementary schools in the Clifton school district. Not all of these schools were affected equally by the addition of the 11:00 a.m. to 8:00 p.m. shift. In disposing of the instant Motion for Summary Judgment, the Hearing Examiner need not concern himself with the particulars of the impact of the shift change on the various schools. Suffice it to say that if only one school was affected the legal principles involved would be the same. It is noted that the impact varies, in particular, as to whether or not various custodians are required to "float."

15. At no time have the parties utilized the services of a fact-finder in reaching their final agreement although a mediator was used in reaching the first two Memoranda of Agreement.

DISCUSSION AND ANALYSIS

Based on the foregoing undisputed Findings of Fact, it is clear that the instant proceeding is ripe for disposition on the Charging Party's Motion for Summary Judgment: see analysis and discussion by the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) and the New Jersey Civil Practice Rules, 4:46-2. Under these authorities a motion for summary judgment may properly be granted when the record papers disclose that "...there is no genuine issue as to any material fact...and that the moving party is entitled to a judgment or order as a matter of law..." The Hearing Examiner is fully satisfied that the requisites for the granting of the Charging Party's Motion for Summary Judgment have been met since, aside from slight discrepancies, there are no genuine issues as to any material facts in the Certifications filed by Grisanti and by DeVos.

Based on the record papers and the legal memoranda submitted by counsel for the parties in support of their respective positions, the Hearing Examiner hereby grants the Charging Party's Motion for Summary Judgment for the following reasons:

* * * *

The Commission decision in Clifton Bd. of Ed., P.E.R.C. No. 80-104, 6 NJPER 103 (¶11053 1980)[hereinafter "Clifton I"] continues

to be controlling. Any doubt as to the continuing vitality of Clifton I was settled by a subsequent decision of the Commission in Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985) where, on a similar set of facts, the Commission held that in the absence of a clear managerial prerogative or a contractual right to do so a public employer may not unilaterally change the work schedule of its employees without prior collective negotiations with the majority representative. The Commission in Elmwood Park ordered the restoration of the status quo ante within 60 days of its decision as had been done in Clifton I.

The only possible distinction between Clifton I and the instant case is that Clifton I involved unilateral action by the employer during the term of its collective negotiations agreement with the Association while here the unilateral change was announced and implemented after the expiration of the 1982-84 agreement on June 30, 1984.

Although the Hearing Examiner does not propose to recite again the above found Undisputed Findings of Fact, suffice it to note the following:

As of August 29, 1985, the parties had executed a third and final Memorandum of Agreement, which incorporated parts not inconsistent from the two prior Memoranda of Agreement and this

third Memorandum of Agreement was ratified by the parties.[8/] Thus, in September and October 1985, there plainly had been no meeting of the minds on a final collective negotiations agreement. It will be recalled that the August 29th Memorandum provided in ¶6 that although not part of the contract no action was to be taken regarding shift changes in the elementary schools before the Association had met with three named representatives of the Board and also with the Board's PPI Committee where the Association was to present "...the reasons and justifications for not changing shift hours..." ("G" Exh. "D," p. 4). In November 1985, there were two meetings of the Association and the PPI Committee of the Board, during which there were discussions regarding the 2:00 p.m. to 11:00 p.m. shift, allowed under the previous agreement. At some point during these meetings the Board raised the question of creating a new shift - 11:00 a.m. to 8:00 p.m. The Association considered this proposal on December 3, 1985, and rejected it on December 5th ("G" ¶21 & Exh. "I"). Counsel for the Board responded on December 6, 1985, stating that it was clear that there was no agreement and that he had advised the Board that an impasse existed and that it could unilaterally change shift hours if it desired ("G" ¶21 & Exh. "J").

8/ There is some dispute, although not material, between the Grisanti and the DeVos Certifications as to whether the Board ratified the Memorandum of Agreement of August 29th. If the Board did not so ratify, it did ratify a proposed contract thereafter, which contract language was not ratified by the Association.

On December 11th the Board adopted a resolution and issued a memorandum, which created an 11:00 a.m. to 8:00 p.m. shift in its elementary schools, effective January 2, 1986 ("G" ¶23 & Exh. "M"). Thus, the fat was in the fire and the issue was drawn.

As previously found, none of the impasse procedures of the Commission have been utilized or exhausted by the parties except for their having obtained a mediator to assist them in reaching the first, and possibly the second, memoranda of agreement in May and August 1985. The Commission decisions on the unilateral implementation of a public employer's last good faith offer are clear and well settled: Piscataway Twp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975)...pet. for certif. den. Supr. Ct. Docket No. 12919 (1976); City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); Willingboro Twp. Bd. of Ed., P.E.R.C. No. 78-20, 3 NJPER 370 (1977); and Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980).

Piscataway held that a public employer may not unilaterally alter existing terms and conditions of employment, in that case the discontinuance of payment of hospitalization and medical insurance coverage, during the course of collective negotiations, at least until the Commission's impasse procedures, including mediation and fact-finding, have been exhausted. The Commission said: "It is the generally accepted view in both the public and private sectors that an employer is normally precluded from altering the status quo while engaged in collective negotiations, and that such an alteration constitutes an unlawful refusal to negotiate..." (1 NJPER at 50).

In Jersey City, supra, the Commission permitted a proposed change in hours in the work week to be unilaterally implemented by the employer since, inter alia, the parties had exhausted the impasse resolution procedures of mediation and fact-finding and a genuine impasse existed after post fact-finding sessions had been held. The Commission distinguished Jersey City in Willingboro where, during negotiations for a successor agreement, the employer unilaterally reduced the lunch period of elementary school teachers from one hour to 35 minutes, notwithstanding a comparable reduction in the length of the workday. The Board in Willingboro had implemented the change in the length of the lunch period unilaterally before an impasse was declared and mediation sessions had taken place. The Board had urged that the Jersey City decision, supra, supported its action but the Commission disagreed, noting that in Jersey City the parties had exhausted the Commission's impasse procedures and that the City had expressed a willingness to continue to negotiate even after post fact-finding sessions.

Finally, in Rutgers, supra, where the employer unilaterally implemented its last best offer regarding the grievance procedure, following post fact-finding negotiations, the Commission said:

> ...Whether an impasse has been reached is a difficult judgment to make, and it must be tied to each specific situation. We perceive it to be a hybrid, partly a factual determination and partly a conclusion of law...We will not utilize a mechanical counting of the number of bargaining sessions but will look to the totality of the negotiations history in all post fact-finding unilateral implementation matters... (6 NJPER at 181).

Applying the above Commission decisions on "impasse" to the facts of the instant case, it is plain as plain can be that the Clifton Board of Education herein has violated the Act as alleged. Applying the analyisis of Clifton I and Elmwood Park, the instant Board had neither a managerial prerogative nor a contract right to create and implement the 11:00 a.m. to 8:00 p.m. shift for its elementary schools, effective January 2, 1986. The mere fact that there had been shift change discussions between the Association and the Board's PPI Committee, followed by the failure of the Association to agree as of December 3, 1985, did not give the Board a legally enforceable right to declare unilaterally an "impasse" and then to implement an 11:00 a.m. to 8:00 p.m. shift in its elementary schools without further negotiations with the Association. Clearly, the Board and the Association had to exhaust the Commission's impasse procedures, which were not even initiated, let alone exhausted. The four impasse decisions set forth and discussed above delineate the meaning and scope of the exhaustion of impasse procedures, including mediation and fact-finding, followed by additional post fact-finding negotiating sessions.

The Hearing Examiner has no doubt that the shifts set forth in Article XVI of the original agreement, carried forward in the parties' three Memoranda of Agreement, gave the Board no contractual right to make the shift changes. Paragraph 6 of the August 29, 1985 Memorandum of Agreement provides nothing more than the grant to the Association of the opportunity to discuss shift changes with the

three named individuals and the Board's PPI Committee. It in no way created a license for the Board to assert a contractual right to make the shift changes that it made unilaterally by resolution on December 11, 1985, and implemented on January 2, 1986.

Accordingly, under Clifton I and Elmwood Park, supra, the Hearing Examiner concludes that the Respondent Board violated §§5.4(a)(1) and (5) of the Act when it unilaterally implemented its decision to create a 11:00 a.m. to 8:00 p.m. shift for custodians in its elementary schools on and after January 2, 1986 without negotiations with the Association and without the exhaustion of the Commission's impasse procedures, including mediation and fact-finding.

* * * *

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

CONCLUSIONS OF LAW

1. The Charging Party's Motion for Summary Judgment is granted.

2. The Respondent Board, by its conduct herein, supra, has violated N.J.S.A. 34:13A-5.4(a)(1) and (5).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its custodians in the exercise of the right guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the

Association with respect to changes in the shift hours of custodians in its elementary schools before implementation.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment, including unilateral implementation of changes in the shift hours of custodians in its elementary schools.

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

1. Within sixty (60) days hereof, restore the status quo ante as of January 2, 1986, with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of the elementary school custodians with the Association prior to implementation or until such time as the Commission's impasse procedures, including mediation and fact-finding, followed by post fact-finding negotiations, have been exhausted.

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. Reasonable steps shall be taken 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 has taken to comply herewith.

Alan R. Howe
Hearing Examiner

Dated: July 23, 1986
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our custodians in the exercise of the right guaranteed to them by the Act, particularly, by refusing to negotiate in good faith with the Association with respect to changes in the shift hours of custodians in its elementary schools before implementation.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment, including unilateral implementation of changes in the shift hours of custodians in its elementary schools.

WE WILL within sixty (60) days hereof, restore the status quo ante as of January 2, 1986, with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of the elementary school custodians with the Association prior to implementation or until such time as the Commission's impasse procedures, including mediation and fact-finding, followed by post fact-finding negotiations, have been exhausted.

_____
(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, CN 429 495 W. State Street, Trenton, New Jersey 08625. Telephone (609) 292-9830