

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSBOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2003-141

HILLSBOROUGH EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Hillsborough Board of Education violated the New Jersey Employer Employee Relations Act by dealing directly with part-time clerical assistants represented by the Hillsborough Education Association regarding waivers of health insurance benefits. The Commission concludes that the Board violated its obligation to negotiate with the Association in good faith. By way of remedy, the Commission voids the individual waiver agreements. The Commission finds that part-time clericals working less than 35 hours per week had never received health benefits and therefore the Board did not unilaterally change a past practice of providing health benefits to part-time clerical assistants. Having voided the individual waiver agreements, the Commission grants the Association 15 days to file a contractual grievance alleging that the Board violated an obligation under the parties' contract to provide health benefits. The Commission also finds that the Board was not seeking to punish or retaliate against employees when it reduced their hours after the filing of the unfair practice charge, but was simply acting to protect itself from a financial obligation it never wanted to incur.

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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HILLSBOROUGH EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Fogarty & Hara, attorneys (Stephen R. Fogarty, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Arnold Shep Cohen, of counsel)

DECISION

The Hillsborough Board of Education and the Hillsborough Education Association have filed exceptions to a Hearing Examiner's Report and Recommendations. The Board excepts to the Hearing Examiner's finding that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} by dealing directly with part-

^{1/} These provisions 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."

time clerical assistants regarding health insurance benefits. The Association excepts to the Hearing Examiner's finding that the Board did not violate 5.4a(3) or (4)^{2/} by reducing and capping employee work hours to avoid having to pay for health benefits or violate 5.4a(5)^{3/} by paying an employee less than she was contractually entitled to be paid.

The Association filed the unfair practice charge on November 27, 2002 and amended it on December 19, 2002 and June 23 and September 10, 2003. On October 15, 2003, a Complaint and Notice of Hearing issued.

On October 27, 2003, the Board filed an Answer admitting that four part-time clerical employees agreed to waive health insurance benefits in exchange for being allowed to work additional hours, and denying that any later reduction in hours

2/ These provisions 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

3/ This provision prohibits public employers, their representatives or agents from: "(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."

was in retaliation for the filing of the charge. The Answer contends that the Board's actions were consistent with an established past practice and other legal authority.

On January 5 and March 1, 2004, Hearing Examiner Jonathan Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On October 7, 2004, the Hearing Examiner issued his report and recommendations. H.E. No. 2005-5, 30 NJPER ____ (¶150 2004). He found that the Board violated 5.4a(5) and, derivatively, a(1) by soliciting and obtaining waivers of health insurance benefits from part-time clerical assistants represented by the Association. The assistants had sought additional work hours and the Board conditioned the grant of additional hours on the assistants' entering into individual health insurance waivers. The Hearing Examiner further found that the Board did not discriminate against unit employees or the Association in violation of 5.4a(3) or (4) by reducing the clerical assistants' work hours after the filing of the charge. Finally, the Hearing Examiner found that an allegation concerning one clerical assistant's rate of pay was a mere breach of contract claim that did not warrant the exercise of our unfair practice jurisdiction.

Neither party has filed exceptions to the Hearing Examiner's findings of fact. We adopt and incorporate them (H.E. at 4-22).

We now address the parties' exceptions to the Hearing Examiner's legal analysis.

In its exceptions, the Board argues that the Hearing Examiner erred in finding that it violated 5.4a(5) and, derivatively, a(1), by soliciting and securing health insurance waiver agreements from part-time clerical assistants and finding that such action was incompatible with the principle of exclusive representation. The Board relies, in part, on Troy v. Rutgers, 168 N.J. 354 (2001).

In Troy, the Court reaffirmed the decades-old principle that collective agreements are "designed to supersede the possible terms of individual agreements of employers with terms which reflect the strength and bargaining power and serve the welfare of the group." 168 N.J. at 372, citing Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 428 (1970). But collective agreements may reserve certain issues to be resolved by individual agreement. 168 N.J. at 375. Individual contracts are void only to the extent they conflict with collective agreements or interfere with the principles of collective negotiation. Id. at 376. In Troy, the Court found that the collective agreement did not preclude individual agreements over the work year for faculty members because the individual agreements were not inconsistent with the collective agreement, such agreements did not diminish any rights provided under the collective agreement,

and the faculty union agreed to allow individual rights to be enforced by faculty members.

The Board argues that the individual waivers did not conflict with Troy's analysis or diminish any collective rights because the collective agreement is silent with respect to the hourly threshold that part-time assistants must work to be eligible for health benefits, and because there is no past practice of part-time assistants receiving benefits. However, we need not decide whether the individual agreements secured in this case conflicted with the terms of the collective agreement or diminished rights provided under that agreement. The very act of soliciting and securing those agreements conflicted with the principles of collective negotiations.

Majority representatives have the statutory right and obligation to negotiate terms and conditions of employment for all unit members. N.J.S.A. 34:13A-5.3. Eligibility for health benefits is a mandatorily negotiable subject. Burlington Cty. College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). Waivers of health benefits must generally be negotiated with a majority representative. But see N.J.S.A. 40A:10-17.1 and 52:14-17.31a (decision of municipalities and counties to permit waivers and the amount of consideration are not negotiable).

This union negotiated health benefit coverage for unit employees. It also negotiated a provision permitting clerical

assistant work hours to be set by their individual contracts. We do not have to decide the number of hours contractually required to trigger eligibility for health benefits to conclude that any waiver of eligibility, whether real or surmised, had to be negotiated with the majority representative, not with individual employees, unless the majority representative agreed to permit such individual negotiations. The parties' decision to permit employees to negotiate their individual work schedules did not encompass or extend to a decision to permit individuals to negotiate over health benefits. Contrast Troy (unusual circumstance where union approved pursuit of individual rights by individual plaintiffs). The Board's direct dealing with unit employees violated its obligation to negotiate with the Association in good faith in violation of 5.4a(5). It also derivatively interfered with the exercise of the right to negotiate and therefore violated 5.4a(1). By way of remedy, we will void the individual waiver agreements.

The Hearing Examiner next considered whether voiding the individual waiver agreements meant that the part-time clerical assistants who had entered into invalid waivers and worked as many as 32.5 hours per week were entitled to health insurance. He found that the collective agreements had no provision specifying a minimum number of weekly work hours entitling clerical assistants to health insurance benefits. He further

found that one clerical assistant worked 35 hours per week and received health insurance, but no part-time clerical assistant working less than 35 hours per week had ever received benefits. The Hearing Examiner thus could not conclude that the Board had unilaterally changed a term and condition of employment by not providing health insurance benefits to part-time clerical assistants working less than 35 hours per week. The Association excepts to this conclusion.

The Association acknowledges that the collective agreement does not specify a minimum number of weekly hours that would entitle clerical assistants to health insurance benefits. The Association argues, however, that the agreement otherwise requires the Board to provide health insurance coverage and that the parties have a mutual expectation and past practice under that agreement that part-time clerical assistants would be eligible for benefits upon working two-thirds the hours of a full-time position, or 23.5 hours per week. It notes that teachers and other certificated employees working two-thirds of the regular school year receive health benefits.

We agree with the Hearing Examiner that since no part-time clerical assistants working less than 35 hours per week have ever received health benefits, the Board did not unilaterally change a past practice of providing health benefits to part-time clerical assistants. The remaining question is whether the collective

agreement would have entitled these employees to health benefits and whether they are therefore entitled to reimbursement for benefits for any period of time covered by this dispute. This is an issue of contract interpretation that we decline to consider further. Any entitlement to health benefits derives from the parties' collective agreement. Any dispute over contractual benefits should be resolved through the parties' negotiated grievance procedure. See also N.J.S.A. 34:13A-5.3 (grievance procedures shall be utilized for any dispute covered by the terms of the agreement).

Having voided the individual waiver agreements, we will grant the Association 15 days to file a contractual grievance claiming that the Board violated an obligation under the collective negotiations agreement to provide health benefits. We will also order the Board to waive any contractual timeliness defenses should the Association seek binding arbitration of this contractual dispute. This remedy is appropriate because until the individual waivers were declared invalid, a contractual claim could not be upheld. Our remedy puts the parties back in the position they would have occupied if the waiver had not precluded employees who actually worked longer hours from seeking health benefits. We, of course, express no opinion on the merits of any such contractual claim.

The Hearing Examiner next found that the Board did not reduce part-time clerical assistant work hours in the 2003-2004 school year in retaliation for the filing of this unfair practice charge. He found that from the outset, the Board did not wish to provide health insurance to part-time clerical assistants and that reducing the employees' work hours after the charge challenged the validity of the waivers was consistent with its earlier effort to restrict benefits. The Association argues that the post-charge reduction in work hours was tainted by anti-union animus. The Board responds that there is no evidence that the filing of the charge was a motivating or substantial factor in the Board's decision to return to the previous work schedules.

N.J.S.A. 34:13A-5.4a(3) and (4) prohibit retaliation against employees for filing unfair practice charges. The determination of whether the Board violated these provisions when it reduced the 2003-2004 work hours of clerical assistants requires an application of the tests established in In re Bridgewater Tp., 95 N.J. 235 (1984). In re Hunterdon Cty. and CWA, 116 N.J. 322 (1989). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this

activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

There is no dispute that the filing of this unfair practice charge was protected activity and that the Board was aware of this activity. Under Bridgewater, we must next determine whether the Board was hostile to the exercise of protected rights. In a letter to the Association, Board counsel wrote:

As a result of the filing of the Original UPC by the HEA and the uncertainty regarding whether such waivers of health benefits will be considered valid for the 2003-2004 school

year, the Board decided to reduce all clerical assistants hours below 23 ½ hours per week. The Board's decision to return the clerical assistants back to their original hours (i.e., before they waived the health benefits in return for additional hours) was based on the uncertainty regarding the validity of the waivers. For example, if the waivers are eventually held to be invalid, the Board will be required to reimburse the clerical assistants for health benefits not only for the 2002-2003 school year at issue in the Original UPC, but also any subsequent school years that the clerical assistants worked more than 23 ½ hours per week.

The Board's decision to return the clerical assistants back to their original weekly schedules is merely an attempt to return to the previous schedule and avoid any future litigation on the waiver of benefits issue. Simply stated, by reducing the clerical assistants hours the Board wishes to avoid a situation in which, pending on the outcome of the Original UPC, it may become financially responsible for the cost of the clerical assistants health benefits for the 2003-2004 school year (in addition to the 2002-2003 school year).

Applying Bridgewater and agreeing with the Hearing Examiner, we conclude that the Board was not seeking to punish or retaliate against employees for filing the unfair practice charge. It was simply acting to protect itself from a financial obligation it never wanted to incur.

In the absence of exceptions, we adopt the Hearing Examiner's recommendation to dismiss the remaining allegations in the Complaint.

ORDER

The Hillsborough Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by dealing directly with part-time clerical assistants regarding waivers of health insurance benefits.

2. Refusing to negotiate in good faith with the Hillsborough Education Association concerning terms and conditions of employment of employees in its negotiations unit, particularly by dealing directly with part-time clerical assistants regarding waivers of health insurance benefits.

B. Take this action:

1. Void any individual health benefit waivers signed by part-time clerical assistants.

2. Waive any contractual timeliness defenses should the Association seek binding arbitration of a grievance, filed within 15 days of this decision, seeking reimbursement for health benefits for part-time clerical assistants who signed individual waivers of health benefits.

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. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", is written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz, Mastriani and Watkins voted in favor of this decision. None opposed.

DATED: February 24, 2005
Trenton, New Jersey
ISSUED: February 24, 2005



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 employees in the exercise of the rights guaranteed to them by the Act, particularly by dealing with part-time clerical assistants regarding waivers of health insurance benefits.

WE WILL cease and desist from refusing to negotiate in good faith with the Hillsborough Education Association concerning terms and conditions of employment of employees in its negotiations unit, particularly by dealing directly with part-time clerical assistants regarding waivers of health insurance benefits.

WE WILL void any individual health benefit waivers signed by part-time clerical assistants.

WE WILL waive any contractual timeliness defenses should the Association seek binding arbitration of a grievance, filed within 15 days of the Commission's February 24, 2005 decision, seeking reimbursement for health benefits for part-time clerical assistants who signed individual waivers of health benefits.

CO-2003-141

Docket No.

HILLSBOROUGH 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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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

In the Matter of

HILLSBOROUGH BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2003-141

HILLSBOROUGH EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Hillsborough Board of Education violated the exclusivity principle by dealing directly with unit employees; specifically, soliciting and obtaining waivers of health insurance benefits from part-time clerical assistants, who are represented for purposes of collective negotiations by the Hillsborough Education Association. The Board's conduct violated 5.4a(5) and derivatively a(1) of the Act.

The Hearing Examiner also recommends that the Board did not discriminate against the employees or the Association in violation of 5.4a(3) or (4) of the Act by reducing part-time clerical assistant work hours for the 2003-2004 school year. The Board had awarded additional hours to those employees in the 2002-2003 school year. The Board had a (collective) contractual right to negotiate individual agreements with the clerical assistants regarding "daily schedules" and "work year" and the Association had never negotiated work hours on their behalf with the Board. Finally, the Hearing Examiner recommends that the Commission also dismiss an allegation that the Board violated 5.4a(5) of the Act by paying a part-time clerical assistant a lesser wage rate than she was contractually entitled to receive. The Hearing Examiner recommended that the allegation was merely a breach of contract claim which did not warrant the exercise of unfair practice jurisdiction.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2005-5

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

In the Matter of

HILLSBOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2003-141

HILLSBOROUGH EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Fogarty & Hara, attorneys
(Stephen R. Fogarty, of counsel)

For the Charging Party,
Oxford Cohen, P.C.
(Arnold S. Cohen, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On November 27 and December 19, 2002, and June 23 and September 10, 2003, the Hillsborough Education Association filed an unfair practice charge and amended charges against the Hillsborough Board of Education. The charge as amended alleges that on September 30, 2002, Association President Barbara Parker learned that a unit employee working more than "half-time" [compared to a full-time unit employee] was not receiving health insurance benefits which she was "required" to receive. The amended charge also alleges that certain unit employees--part-time clerical assistants and lunch aides--worked "enough hours to

receive health benefits" and that unspecified clerical assistants were "getting paid partially as lunch aides [i.e., paid comparatively lesser wages]. The charge also alleges that a [part-time] employee "was told" that if she demanded health insurance benefits, she would be denied a position, which would then be "divided into two positions of less than half-time." The employee allegedly agreed to waive her rights to health insurance benefits. The amended charge alleges that five part-time employees signed health insurance waivers and others did not. Finally, the amended charge alleges that in June 2003, employees who waived health insurance benefits were notified that their work hours will be reduced in the next school year, an action taken "in direct retaliation for filing the charge." The Board's conduct allegedly violates 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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

On October 15, 2003, a Complaint and Notice of Hearing issued. On October 27, 2003, the Board filed an Answer, admitting some allegations, denying others, and asserting defenses. The Board acknowledged certain health insurance coverages set forth in the collective agreement(s) negotiated by it and the Association; admits that four clerical employees at their request agreed to waive health insurance benefits in exchange for being allowed to work additional hours; admits that in June 2003, clerical employees, agreeing at "their" request to waive the benefits in exchange for being allowed to work additional hours were assigned part-time hours and were not eligible for health benefits; denies that any employee was asked to waive or was coerced into waiving benefits; and denies that any reduction in hours was in direct retaliation for the filing of the charge. The Board also contends that the second amended charge is barred by the statute of limitations; by the doctrines of res judicata and collateral estoppel; that its conduct was consistent with an established past practice, and other defenses.

On January 5 and March 1, 2004, I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs and replies were filed by June 25, 2004. Based on the record, I make the following:

FINDINGS OF FACT

1. The Board and the Association signed collective negotiations agreements extending from July 1, 1999 through June 30, 2002 and from July 1, 2002 through June 30, 2005 (J-1; J-2).^{2/} The Association represents teachers, custodians, maintenance personnel, mechanics, pupil transportation drivers, clerical assistants, office personnel, permanent school aides and other titles (J-1; Article 1, "Recognition"; Article 22). The "Recognition" provision also specifies:

1-3

Definition of Full-Time Personnel (Custodial, Maintenance, and Transportation)

1-3.1

Unless otherwise indicated, the term "full-time personnel", who are represented by the Association in the negotiating unit as defined above, when used in this Agreement, shall refer to such persons steadily employed by the Board and who work not less than 40 hours per calendar week in the case of custodial and maintenance personnel, and in the case of pupil transportation drivers, those steadily employed on regularly scheduled routes, who work not less than 40 hours per calendar week.

1-4

Limited Benefits to Part-Time Transportation Personnel

2/ "J" represents joint exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits. "T" represents the transcript, preceded by a "1" or "2", signifying the first or second day of the hearing, followed by the page number(s).

1-4.1

Pupil transportation drivers, steadily employed by the Board on regular routes, who work less than 40 hours per calendar week shall be included in the negotiating unit for all purposes and shall receive prorated leaves of absence benefits and sick leave benefits (based on 40-hour calendar week, under Article 35 and 36 and insurance benefits subject to the conditions of Article 33). [J-1]

"Cafeteria" or "lunch" aides are not specifically included in the list of recognized titles. They are included in the unit (2T90).

Article 12 governs "promotions" and provides in a pertinent part: "Notice of all open positions (except those of classroom teachers) in the Hillsborough Schools shall be posted in all schools and sent to the HEA president" (J-1; J-2).

Article 20 ("Salaries and Insurance") defines various health insurance coverages available to employees and dependents, contingent upon one's length of employment with the Board. Article 20-6 provides that "the Board shall provide health-care insurance protection designated hereafter":

20-6.1

Of the cost for hospital room and board and miscellaneous costs, maternity costs and surgical costs, the Board shall pay one hundred (100%) percent of the premium for recognized persons hired before July 1, 1996 and any dependents of said recognized persons. Employees hired for July 1, 1996 or thereafter will receive Board paid health insurance at the ElexCare Point of Service (CPP) rate for the first three years of employment. During the employee's first

three years of employment, said employee may elect coverages under the indemnity plan with the employee paying the difference between the DPP rate and the indemnity plan rate. After the first three years of employment, an employee may elect any of the coverages offered by the Board with no premium cost to the employee. [J-1]

Article 20-6.2 provides for "out-patient laboratory fee, technician's expenses, therapy treatment and major medical" under the same eligibility conditions set forth in Article 20-6.1.

Article 20-6.3 provides uniform dental treatment coverage (J-1).

The 2002-2005 collective agreement adds this sentence at the end of Article 20-6.1 and 6.2 which is otherwise repeated verbatim from the previous agreement: "Employees hired for July 1, 2003 or thereafter will receive Board paid health insurance in the [Point of Service] plan only and they shall not have the option to 'buy-up' or elect any of the other coverages offered by the Board" (J-2).

Both agreements set forth this provision:

Article 25
Clerical Assistants

25-1

The contract for Clerical Assistants shall be a ten (10) month contract from September 1 to June 30.

25-2

Clerical Assistants will report to work five (5) working days prior to new teachers orientation and shall be paid for these days, pro rata, based on annual salary.

25-3

Clerical Assistants work year and daily schedule will be regulated by the language of their personal contract.

25-4

All Clerical Assistants who are assigned a full day of work may leave their post on days of emergency closing when office personnel is dismissed. They will also not be required to report to work when school is closed due to inclement weather.

25-5

The duration of the lunch period will be at the discretion of the Building Principal or of the immediate supervisor, with the approval of the Superintendent. But in no case will the lunch period exceed one (1) hour in duration.

25-6

Salaries for Clerical Assistants shall be listed in Schedule G of this agreement.

25-7

Only the following articles of this agreement shall apply to Clerical Assistants:

- Article 1 ["Recognition"]
- Article 2 ["Agency Fee"]
- Article 3 ["Vandalism Reimbursement Fund"]
- Article 4 ["Negotiation Procedure"]
- Article 5 ["Management Rights"]
- Article 6 ["Miscellaneous"]
- Article 7 ["Grievance Procedure"]
- Article 12 ["Promotions"]
- Article 14 ["Sick Leave"]
- Article 15 ["Leaves of Absence"]
- Article 19 ["Subcontracting"]
- Article 20 ["Salaries and Insurance"]
(except 20-1, 20-9 and 20-9.1)
- Article 25 ["Clerical Assistants"]
[J-1; J-2]

Article 32 ("Insurance") describes the "health-care insurance protection" provided to certain "qualified employees"

(i.e., custodians, maintenance personnel, pupil transportation drivers, and mechanics), a group defined "in the context of this Article" as "full-time personnel, steadily employed by the Board who work not less than 27 hours per calendar week on a regular basis" (J-1, p.61).

In the 2002-2005 agreement, Article 20 ("Salaries and Insurance") section 20.10.3 provides for the first time in a pertinent part:

A benefits waiver plan will be made available to any employee who desires to waive their medical and/or dental benefits on an annual basis in exchange for an annual cash incentive. Any employee who opts to waive their medical benefits must provide proof of coverage in order to be eligible for the cash incentive. The Board will develop a form for all eligible employees to complete on an annual basis to select their insurance coverage or to waive their right to coverage.
[J-2]

2. Barbara Parker has been employed as a teacher by the Board for about 20 years. She has been Association president since 2001 and has participated in all collective negotiations on its behalf since 1996 (1T28; 1T29). During negotiations for the 1999-2002 agreement, Board representatives did not inform the Association team that any unit employee had signed a waiver of health insurance benefits (1T32). No evidence indicates that the Association has ever demanded to negotiate health insurance benefits for part-time clerical assistants (2T61).

Near the end of September, 2002, part-time clerical assistant Lorma Spencer asked Parker why some part-time clerical assistants were entitled to health insurance benefits and others were not, even if they all worked the same number of hours (1T37). Sometime in the next several days, part-time clerical assistant Karen Cecchini asked Parker why two other clerical assistants, Gail Guido and Terri Mueller, working the same number of hours as she, received health insurance benefits and she did not (having signed a health benefits waiver) (1T37). When asked on the record if she knew of any part-time clerical employees receiving health insurance benefits at the time the charge was filed, Parker answered: "I would say, yes . . . there were Gail Guido and Terri Mueller. . . ." Parker did not know how many hours either of them worked (1T52; 1T53). No document or non-hearsay evidence indicates that Mueller receives health insurance benefits from the Board. Board Superintendent Robert Gulick acknowledged on the record that Guido is a part-time secretarial employee and a part-time clerical assistant. Although he denied knowing if Guido received health benefits, he believed such compensation was justifiable (2T87; 2T88; 2T89). He testified:

We thought that if both positions, although different in title, cobbled together, equaled a full-time clerical assignment--not clerical assistant--but a clerical function we thought it only appropriate that she be given benefits. [2T89]

Gulick's testimony indicates a detailed knowledge of employee Guido's terms and conditions of employment. I consider it an admission that she receives health insurance benefits.

3. In October 2002, Parker asked Board Superintendent Robert Gulick why Cecchini worked 6.5 hours per day and received no health insurance benefits. She also asked about "waivers" (1T38; 2T59). Gulick acknowledged that Cecchini had signed a waiver of benefits and that other part-time clerical assistants worked under the same arrangement (2T59). He said that Cecchini had worked a "morning" shift and was given the "afternoon" hours when the clerical assistant working the later shift left. He said that the arrangement was a "benefit to the women who wanted more hours but the [Board] was not going to pay for health benefits . . . [It] would divide the job in two rather than pay benefits" (1T39). He also told her that waivers were signed regularly and that the matter did not warrant discussion with the Association (2T78).

On October 31, Gulick issued a memorandum to Parker regarding "clerical assistants who signed a waiver [of] insurance benefits." The memorandum lists those clerical assistants:

<u>Name</u>	<u>School</u>	<u>Daily Hours</u>
1. Karen Cecchini	Hillsborough Elementary	6.5 hrs.
2. Linda Liscinski	Woods Road	5.5 hrs.
3. Pat Rodker	Sunnymead	5.5 hrs.
4. Peggy Wolferz	Woodfern	5.25 hrs.
5. Lorma Spencer	Triangle	5.5 hrs.

[CP-1]

4. Karen Cecchini was hired in August 1999 as a part-time clerical assistant working 3 hours per day at Hillsborough Elementary School (1T85; 1T86). In or about December 2000, Cecchini learned that the other (afternoon) part-time clerical assistant assigned to the building, Mary Persico, was about to transfer, thereby creating a vacancy (CP-3; 1T86; 1T87; 2T27). Cecchini asked Principal Edward Forsthoffer to consider hiring her for the 3.5 hours per day position (2T30). Forsthoffer asked Superintendent Gulick about hiring Cecchini (2T31).

Gulick initially declined, saying that he was concerned that a "claim could be made for health benefits" which would be "very expensive" (2T31; 2T37; 2T49; 2T54). Forsthoffer informed Cecchini of Gulick's concern to which she replied that health insurance benefits were not an "issue" (because her husband's employer provided dependent coverage) and that she would like to "get the hours" (2T31). Forsthoffer called Gulick again and asked if he would reconsider his decision if "there was no claim

for medical benefits" (2T31; 2T54). Gulick consulted labor counsel and then informed Forsthoffer that "it's possible as long as there was a waiver signed by the employee to insulate the Board from any claims for medical benefits" (2T55).

On December 21, 2000, Cecchini signed a "waiver of health coverage" for the 2000-2001 school year. She "voluntarily relinquished [her] rights, . . . notwithstanding that [she] will be employed for more than the average number of hours per week which would otherwise entitle [her] to all health coverage offered by the Board," according to the waiver (CP-3). Cecchini understood that if she did not sign the waiver, she "would not be able to accept the position" (1T105). She signed the document because she "wanted to work the additional hours." She did not discuss the circumstances of her signing with the Association (1T107). Mary Davis, a Board personnel department employee, cosigned the document as a "witness" (CP-3; 1T94). Forsthoffer did not attend the signing (2T32).

On January 22, 2001, Cecchini signed an "employment contract" with the Board to work as a clerical assistant for 3.5 hours per day at an annual pro-rated salary of \$10,046. Cecchini had signed a similar pro-rated contract for \$8,611 annually (i.e., her 3 hour per day morning shift) on August 21, 2000 (CP-5). Cecchini never received health insurance benefits (1T96).

5. Gulick has been employed by the Board for 39 years and has been Superintendent for the past 12 years (2T47). He acknowledged on the record that the Board employs "full-time" clerical assistants who work 35 hours per week and receive health insurance benefits (2T52). Gulick was unaware of any instance in which a clerical assistant working less than 35 hours per week received health insurance benefits (2T52). Excepting the circumstance of employee Gail Guido (see finding no. 2), the record does not show that part-time clerical assistants receive health insurance benefits. He was also unaware that two other part-time clerical assistants, Patricia Rodker and Rosalind Johnson, signed health insurance waivers before Cecchini had signed one; he testified that he was not "involved in that decision-making process" (2T72). I do not fully credit his testimony. (See finding no. 7).

6. Patricia Rodker signed waivers of health insurance coverage for each upcoming school year on August 16, 1999, June 14, 2000 and May 10, 2001 (CP-13). She also signed employment contracts, agreeing to work 5.5 hours per day in the 1999-2000 and 2001-2002 school years (CP-13). (Her 2000-2001 employment contract was not proffered). Parker conceded that clerical assistants "themselves" negotiate their daily or weekly hours with their respective building principals; that their hours worked were "left to their discretion"; and that the Association

did not review the "individual contracts" (1T63; 1T64; 1T65). She also acknowledged that the proposed 2003-2004 school year budget was popularly defeated and that subsequent budget cuts totaled \$1,300,000 (1T65).

7. Rosalind Johnson signed a health insurance waiver on August 18, 1999. Triangle Elementary School Principal Charlene Weicksel was the signator "witness" to the waiver. She recalls it as the first occasion that a waiver had been solicited (CP-6; 1T113; 1T114; 1T115). I infer that Weicksel meant that it was the first occasion she had "witnessed" a waiver. Weicksel testified that she understood that Johnson had wanted to work "additional hours and didn't need medical benefits" (1T116). Weicksel's testimony was corroborated by Gerald Johnson, part-time clerical assistant Johnson's surviving widower, who testified credibly that for about 18 months, including the period of 1999 to 2000, his private employer provided him family health insurance coverage (1T148). I credit her testimony.

Weicksel also testified that in the spring or early summer of 1999, Superintendent Gulick met with the Board's elementary school principals, presented them unsigned waiver forms, and said that "they needed to be executed in order for [clerical assistants] to work additional hours" (1T119; 1T122). She testified that Gulick advised that:

These were two part-time positions and it was the district's position that [it] wanted to

keep them two part-time positions [and] that clerical assistants just wanted to work the additional hours. Bob Gulick worked with our Board attorney in order to create the waiver. [1T120]

I credit Weicksel's testimony, which is largely corroborated by the August 1999 waivers executed by part-time clerical assistants Rodker and Johnson, the latter of which was also signed by Weicksel. I do not credit Gulick's testimony (in finding no. 5) to mean that he was "not involved" in securing health insurance waivers before December, 2000. He may not have specifically known that Rodker and Johnson signed health insurance waivers in August 1999. Gulick conceded that he had not contacted the Association about the waivers of health insurance coverage because "there was no need to do so" as it was a "[managerial] prerogative" (2T71; 2T77).

Johnson also signed an "employment contract" on May 21, 2001, providing that she agreed to work 5.5 hours per day during the 2001-2002 school year (CP-7). She had likely worked the same number of hours per day in the 2000-2001 school year (1T116-1T117). She became ill and stopped working in March 2002, and was hospitalized from April through June 2002, at which time her sick leave benefits were exhausted. A 2002-2003 employment contract purporting to show Johnson's signature was marked into evidence (CP-8). Her signature is misspelled, and does not appear to resemble her signature on other signed documents, the

authenticity of which was not contested. Principal Weicksel also disputed the authenticity of the signature on the 2002-2003 employment contract (1T125; 1T128). I do not find that Johnson signed it.

7. Lorma Spencer was hired by the Board in 1999 as a cafeteria aide and worked 1 hour and 40 minutes per day (1T195). She also substituted for Johnson as a part-time clerical assistant in the spring of 2002 (1T130-1T131; 1T190). In or around August 2002, Principal Weicksel offered Spencer the part-time clerical assistant position (held by Johnson) for the 2002-2003 school year. She told Spencer that the position did not include health insurance benefits, a prospect she "ought to think about" (1T132; 1T186). She told Spencer that if she wished to work in two part-time clerical assistant positions (totaling 5.5 hours per day), "she would need to waive her benefits" (1T132). Spencer considered the proposal and knew "at the time that [she] didn't need the benefits" (1T186). She agreed; Weicksel gave her the waiver form and directed her to the Board personnel office (1T187).

On August 16, 2002, Spencer signed a "voluntary waiver of health coverage", forfeiting those rights for the 2002-2003 school year (CP-14; 1T188). In that school year, Spencer worked 5.5 hours per day as a clerical assistant and 40 minutes per day

as a cafeteria aide, receiving a comparatively lower wage in the latter title (1T185; 1T186). She worked about 31 hours per week.

8. In 1985, Peg Wolferz was hired by the Board as a cafeteria aide for 2 hours and 15 minutes per day and as an "office" aide for 1 hour and 45 minutes (1T199; 1T200). On some unspecified date, the "office" aide title was changed to "clerical assistant" (1T200). From September 1999 through June, 2001, Wolferz worked 4 hours and 15 minutes per day as a clerical assistant and 2 hours and 15 minutes per day as a cafeteria aide (1T202). On July 8, 2002, Wolferz signed a "health and dental coverage" waiver for the first time (1T201; CP-16). The form was also signed by Sharon Kay of the Board's personnel department (1T207; CP-16). Wolferz had been advised earlier by her principal that if she wanted to work an additional hour as a clerical assistant in 2002-2003 (increased from 4.25 hours in 2001-2002), she would have to sign the waiver (1T208).

In 2002-2003, Wolferz worked and was paid for 5.25 hours per day as a clerical assistant and 1.25 hours per day as a cafeteria aide (1T205-1T206). She worked a total of 32.5 hours per week (2T56). In practice, Wolferz worked as a cafeteria aide only when a substitute was needed (2T10; 2T11). She never complained to any Board representative that she was paid in part as a cafeteria aide while she performed clerical assistant duties (1T216). Throughout her employment with the Board, Wolferz

worked at least 20 hours per week and never received health insurance benefits (1T221; 1T213). She received family health insurance coverage from her husband's employer (1T211).

Wolferz did not sign a health insurance waiver form for the 2003-2004 school year (1T210). Her daily hours as a clerical assistant were reduced from 5.25 to 4.25 and she was not employed as a cafeteria aide (1T205; 1T210). The principal of her assigned school told her that her work hours were reduced "until everything was settled" (1T210). I infer that "everything" refers to the litigation of this unfair practice charge and complaint.

9. Linda Liscinski was hired as a cafeteria aide in 1991. In 1999, she was hired to work 4 or 4.5 hours per day as a clerical assistant (1T156). On August 17, 1999, Liscinski signed a "waiver of health coverage" for the 1999-2000 school year (CP-9). On or around that date, Principal Bill Lyons advised her that she would be allowed to work one more hour per day (totaling 5.5 hours) as a clerical assistant in the upcoming school year if she signed the waiver (1T158; 1T159-1T160). She received health insurance coverage from her husband's employer (1T171). Liscinski did not speak with any Association representative before signing the waiver (1T162).

Liscinski also signed a waiver of health coverage for the 2001-2002 school year in April, 2002 (CP-10; 1T165). She signed

employment contracts each school year (1T168; CP-11). She has worked from 20 to 27.5 hours per week in any given year and has never received health insurance benefits (1T169; 1T176; 1T177). In the 2003-2004 school year Liscinski worked 4.25 hours per day as a clerical assistant and did not sign a waiver of health insurance benefits (1T170).

10. On January 14, 2003, Board counsel mailed a letter to a Commission staff attorney regarding the unfair practice charge upon which the Complaint in this matter later issued. A copy was also sent to an Association representative (CP-2). The letter provides in pertinent parts:

The agreement requires that the Board provide certain employees medical and dental health insurance benefits. It is the practice of the Board to only provide benefits to employees who work more than 20 hours per week.

The agreement recognizes that the Association represents clerical assistants and the agreement provides that an annual individual contract is to be entered into between the clerical assistants and the Board regarding their work year and daily schedules. Traditionally, the Board has employed clerical assistants for less than 20 hours per week.

. . . Prior to negotiating the complainants' individual contracts it was suggested to Superintendent Gulick, through some of the elementary school principals that some of the clerical assistants wished to be allowed to work more than 20 hours per week. It was suggested that in consideration for the increased hours, they would have to waive any medical and dental health insurance coverage

that may come with the increased hours. Some of the clerical assistants agreed to this condition and signed waivers. . . [CP-2]

On June 25, 2003, Board counsel wrote again to the Commission staff attorney regarding the Board's position on the Association's amended charge. The letter provides in pertinent part:

The HEA asserts that under the parties' collective negotiations agreement, Board policy and past practice, employees working more than two-thirds of a full weekly work schedule are entitled to health benefits. For clerical assistants a full weekly work schedule is considered 35 hours per week and, accordingly, clerical assistants working more than 23.5 hours per week would be entitled to health benefits. Prior to waiving the health benefits in return for increased hours, all of the clerical assistants worked 20 hours or less per week. Therefore, clerical assistants were not entitled to health benefits. [R-2]

A copy of the letter was also sent to Association counsel (R-2). Superintendent Gulick testified that the quoted portion of the letter summarizes the Association's view about the number of hours a clerical assistant works in order to qualify for health insurance benefits (2T60). The letter further provides:

As a result of the filing of the Original UPC by the HEA and the uncertainty regarding whether such waivers of health benefits will be considered valid for the 2003-2004 school year, the Board decided to reduce all clerical assistants hours below 23 1/2 hours per week. The Board's decision to return the clerical assistants back to their original hours (i.e., before they waived the health benefits in return for additional hours) was

based on the uncertainty regarding the validity of the waivers. For example, if the waivers are eventually held to be invalid, the Board will be required to reimburse the clerical assistants for health benefits not only for the 2002-2003 school year at issue in the Original UPC, but also any subsequent school years that the clerical assistants worked more than 23 1/2 hours per week.

The Board's decision to return the clerical assistants back to their original weekly schedules is merely an attempt to return to the previous schedule and avoid any future litigation on the waiver of benefits issue. Simply stated, by reducing the clerical assistants hours the Board wishes to avoid a situation in which, pending on the outcome of the Original UPC, it may become financially responsible for the cost of the clerical assistants health benefits for the 2003-2004 school year (in addition to the 2002-2003 school year). [R-2]

I do not credit Gulick's testimony to mean that the Association's view was perceived by the Board as invalid.

11. In the 2003-2004 school year, unit employees Cecchini, Liscinski, Spencer, Rodker and Wolferz each worked 4.25 hours per day (21 hours per week) as clerical assistants (1T97; 1T170; 1T179; 1T191; 1T206). Spencer and Wolferz were not employed as cafeteria aides that year. Each employee's daily work hours were reduced one hour (or slightly more) from the 2002-2003 school year (1T45; 1T97; 1T170; 1T191; 1T210).

Superintendent Gulick conceded in his testimony that sometime after the unfair practice charge in this matter was filed, he recommended to the Board that it resolve to reduce the

daily work hours of part-time clerical assistants (2T65). He testified that he wished:

. . . to insulate the Board in a very difficult economy to make certain that there was no claim made by the [clerical] assistants for benefits that would cost \$7500 per individual. I recommended to the Board that the hours be reduced so there could be no connection between their work schedule and a certificated person's part-time schedule that would result in benefits. [2T65-2T66]

Certificated employees working two-thirds of the regular school year of full-time teachers receive health insurance benefits (2T79).

ANALYSIS

The Association contends that the Board has a contractual obligation to provide health insurance benefits and unlawfully "attempted to artificially preserve the employees' part-time status by allocating their daily hours among two or more separate employment contracts . . . despite the fact that the employees' total daily hours were sufficient to [qualify for the benefits]" (brief at p.19). It further contends that the individual waivers are superceded by the parties' collective agreement, citing Troy v. Rutgers, the State University, 168 N.J. 354 (2001). The Association also alleges that the Board reduced the work hours of clerical assistants in the 2003-2004 school year in retaliation for the filing of the unfair practice charge. Finally, it

alleges that the Board paid clerical assistants a lesser rate of pay than they were contractually entitled to receive.

N.J.S.A. 34:13A-5.3 provides that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. Our Supreme Court has upheld exclusive representation as the cornerstone of the Employer-Employee Relations Act. D'Arrigo v. N.J. State Board of Mediation, 119 N.J. 74 (1990); Lullo v. Int'l Assn. of Fire Fighters, Local 1066, 55 N.J. 409 (1970).

N.J.S.A. 34:13A-5.4a(5) prohibits a public employer from refusing to negotiate with the majority representative concerning terms and conditions of employment of unit employees. The Commission has found that an employer violated this subsection and 5.4a(1) by dealing directly with certain unit employees and signing memoranda of agreement affecting their terms and conditions of employment. Matawan-Aberdeen Reg. Schl. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) [app. dismiss. App. Div. Dkt. No. A-6054-88T5 (12/5/89)]; Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). See also, Wright v. East Orange Bd. of Ed., 194 N.J. Super. 181 (App. Div. 1984), aff'd. 99 N.J. 112 (1985).

Health insurance benefits are mandatorily negotiable unless preempted. West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd App. Div. Dkt. No. A-5196-91T2 (3/2/93); Tenafly Bd. of Ed., P.E.R.C. No. 93-83, 19 NJPER 210 (¶24100 1993). (No preemption issue was raised in this case). Receipt of health insurance benefits is an integral component of compensation packages negotiated by the parties. See Eaddy v. Dept. of Transp., 208 N.J. Super. 156, 162-163 (App. Div. 1986).

In the summer of 1999, Superintendent Gulick directed elementary school principals to require signed health insurance waivers from part-time clerical assistants wishing to work more hours per day than they were working at that time. Part-time clerical assistants Rodker, Liscinski and Johnson signed the waivers in August 1999, relinquishing coverage, "notwithstanding that [they each] will be employed for more than the average number of hours per week which would otherwise entitle [them] to all health coverage offered by the Hillsborough Board of Education." Identical waivers were obtained in succeeding school years from these and other part-time clerical assistants. The Board did not inform the Association of its conduct until October, 2002.

In Troy v. Rutgers, our Supreme Court affirmed that a "collective agreement may reserve certain issues to be resolved by individual agreement." 168 N.J. 375. Article 25 of the

parties' collective agreements specifically limits clerical assistant individual agreements to the subjects of "work year" and "daily schedules", which have been memorialized in their individual "employment contracts."

The Court cautioned that individual contracts are void, ". . . to the extent that they conflict with collective agreements or interfere with principles of collective negotiations." Id. at 168 N.J. 376. I recommend that the Hillsborough Board's direct and undisclosed solicitations and securements of health insurance waivers from part-time clerical assistants are incompatible with the principle of exclusive representation. Eligibility for health insurance benefits is a subject which "intimately and directly affects an employee's working terms and conditions." Burlington Cty. College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). The Board's posited intent is set forth in each waiver the unit employees were required to sign; employees "relinquished" health insurance benefits which they acknowledged were their contractual entitlement.^{3/}

That these clerical assistants sought the additional work hours and voluntarily waived health insurance benefits because they were covered under their separate spouse's employer-provided

^{3/} In Troy v. Rutgers, the professors' individual agreements provided a greater benefit to them than did the collective agreement negotiated by their majority representative.

health insurance plans is not a defense. Article 25 does not indicate that the Association waived its right to negotiate health insurance benefits for part-time clerical assistants. The Board was obligated to negotiate that term and condition of employment with the Association and its failure to do so violates 5.4a(5) and derivatively a(1) of the Act.

Voiding the individual waiver agreements does not prove that part-time clerical assistants were entitled to health insurance benefits, despite the Board's expressed and posited belief to the contrary. The record must demonstrate that part-time clerical assistants' receipt of health insurance benefits was "an existing rule governing working conditions." Section 5.3; Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-72, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

The collective agreements have no provision specifying a minimum number of weekly work hours entitling clerical assistants to health insurance benefits. The Association has conceded this fact (brief at p.14). The agreements specifically provide health insurance benefits to part-time custodians, maintenance employees, mechanics and bus drivers (Article 1-4.1; Article 32). I must infer that the benefits are not similarly provided to part-time clerical assistants. Nor do the facts show that any part-time clerical assistant working less than 35 hours per week

received health insurance benefits. Gail Guido, who was employed as a part-time clerical assistant and received health insurance benefits, also worked as a secretary, her two positions totaling 35 hours per week. Although the Association contends that the clerical assistants who testified at the hearing were "part-time in name only" (brief at p.19), none ever worked more than 32.5 hours per week, even when their individual clerical assistant work hours were added to their cafeteria aide work hours. Accordingly, I do not find on this record that the Board unilaterally changed a term and condition of employment by not providing health insurance benefits to part-time clerical assistants working less than 35 hours per week.

The Association contends that the Board's decision to reduce part-time clerical assistant work hours in the 2003-2004 school year ". . . was in direct retaliation for, or as a direct consequence of the filing of the unfair practice charge" (Association reply brief at p.4). The Board argues that the decision to reduce the hours ". . . was based on the financial and legal uncertainty regarding the outcome of the unfair practice charge, not its filing" (Board reply brief at p.9). I read the Association's charge of discrimination and the Board's

defense as an allegation that the Board violated 5.4a(4)^{4/} of the Act.

In Hunterdon Cty. and CWA, 116 N.J. 322, 334 (1989), the Supreme Court approved the Commission's use of In re Bridgewater Tp., 95 N.J. 235 (1984), in assessing whether a public employer violated 5.4a(4) of the Act. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can

^{4/} This provision prohibits public employers, their representatives or agents from: "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The Court in Hunterdon Cty. found sufficient evidence for the Commission's determination that anti-union animus was a substantial or motivating factor in the County's decisions to unilaterally implement and later terminate a safety incentive program. The Commission found that the County's motive for terminating the program was ". . . to punish CWA for filing the charge." P.E.R.C. No. 87-35, 12 NJPER 768, 771 (¶17293 1986). The Court also affirmed the Commission determination that both the unilateral implementation and termination of the program were "antithetical to the statutory duty to negotiate" and that

an employer which unilaterally grants favorable benefits contrary to its statutory duty to negotiate may not unilaterally terminate such benefits absent a request to do so by the union; rather, it is obligated to negotiate with the union before again unilaterally changing such benefits.
[116 N.J. 337, citing 12 NJPER 772]

The Court affirmed the Commission's finding that the County violated 5.4a(5) of the Act.

Superintendent Gulick admitted that after the charge was filed he recommended the reduction of part-time clerical

assistant work hours in the 2003-2004 school year "to insulate the Board in a very difficult economy [from a] claim by the assistants for benefits that would cost \$7,500 per individual" (see finding no. 11). Board counsel more pointedly acknowledged in earlier correspondence that: "As a result of the filing of unfair practice charge and the uncertainty regarding whether such waivers of health benefits will be considered valid for the 2003-2004 school year, the Board decided to reduce all clerical assistant hours below 23.5 hours per week" (see finding no. 10). Board counsel wrote that the number of hours triggering eligibility equaled "two-thirds of a full weekly work schedule."^{5/} In the late spring or summer of 2003, part-time clerical assistant Wolferz was told by her building principal that her hours were reduced "until everything was settled" (see finding no. 8). The Association contends that these admissions prove animus.

I disagree. From the outset, the Board did not wish to provide health insurance benefits to part-time clerical assistants and to part-time clerical assistants also employed as part-time cafeteria aides. No facts suggest that those employees had received such benefits. The (direct dealing and) unlawfully solicited and secured waivers did not alter the Board's motive.

^{5/} I infer that this proportion is equal to that which triggers the eligibility for health benefits of part-time custodians, mechanics, bus drivers and maintenance employees.

Nor did its motive appear to change after the charge was filed. No evidence suggests that the Board's 2003 rescission of the added hour per day for each named part-time clerical assistant in 2003-2004 and capping their total weekly hours was intended to punish or discriminate against the employees or the Association for filing the charge. It is apparent that after years of soliciting and securing signed waivers, the Board would not have reduced the part-time clerical assistant work hours if the charge had not prompted doubt about the validity of the waivers. Considering the Board's consistent efforts to restrict benefits, its surmise about the number of weekly work hours triggering eligibility for coverage, and its contractual right to independently negotiate "daily schedule" and "work year" with each part-time clerical assistant, I recommend that the facts do not show that the Board violated 5.4a(3) or (4) of the Act.^{6/}

Finally, the Association contends that the Board unlawfully paid clerical assistant Wolferz "a lower salary rate for time actually worked at a higher-paying job classification"

^{6/} The Board's contractual right to set "daily schedules" and "work year" with each part-time clerical assistant did not obligate the Board to negotiate collectively over a reduction in work hours (See also finding no. 6).

The Association contended in its reply brief that the rescission of work hours independently violated 5.4a(1) of the Act. It did not allege that violation in the charge. I decline to rule on the Association's argument. Ocean Cty. Coll., P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982).

(Association brief at p.31). The record indicates that Wolferz was paid a cafeteria aide rate for about 11 hours per week while she was working as a clerical assistant, except when she worked as a substitute cafeteria aide (see finding no. 8). Wolferz never complained to the Association or the Board. I recommend that this allegation is merely a breach of contract claim that does not warrant the exercise of unfair practice jurisdiction. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

RECOMMENDATION

The Hillsborough Board of Education violated 5.4a(5) and derivatively a(1) of the Act by directly and unilaterally soliciting and securing health insurance waiver agreements from part-time clerical assistants. The Board did not discriminate against employees of the Hillsborough Education Association in violation of 5.4a(3) or (4) of the Act by rescinding an added hour per day award to part-time clerical assistants in the 2002-2003 school year and capping part-time clerical assistant/cafeteria aide weekly work hours. The Board did not violate 5.4a(5) of the Act by paying a part-time clerical assistant/cafeteria aide a lesser rate of pay than she was contractually entitled to receive for a portion of her work week.

RECOMMENDED ORDER

I recommend that the Commission **ORDER:**

A. That the Board cease and desist from:

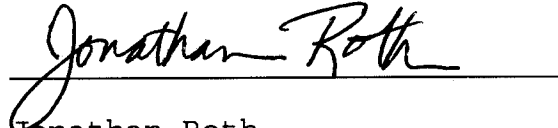
1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act by dealing directly with part-time clerical assistants regarding mandatorily negotiable terms and conditions of employment; specifically, health insurance benefits.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning mandatorily negotiable terms and conditions of employment by dealing directly with part-time clerical assistants regarding health insurance benefits.

B. That the Board take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notices marked as Appendix "A". Copies of such notice shall, after being signed by the Board'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.

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



Jonathan Roth
Hearing Examiner

Dated: October 7, 2004
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 21, 2004.



RECOMMENDED



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 employees in the exercise of rights guaranteed to them by this Act, particularly by dealing directly with part-time clerical assistants regarding mandatorily negotiable terms and conditions of employment; specifically, health insurance benefits.

WE WILL negotiate in good faith with a majority representative of employees in an appropriate unit concerning mandatorily negotiable terms and conditions of employment, particularly regarding health insurance benefits for part-time clerical assistants.

Docket No. _____

(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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372