

P.E.R.C. NO. 85-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LIBERTY TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-84-132-64

LIBERTY TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Liberty Township Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally required teachers to work an extra half day without negotiating over compensation for that work.

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LIBERTY TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Harbourt and Duh, P.C.
(Boyd Harbourt, of Counsel)

For the Charging Party, Bernard Lelling, Field
Representative, NJEA UniServ Regional Office

DECISION AND ORDER

On November 9, 1983, the Liberty Township Education Association ("Association") filed an unfair practice charge against the Liberty Township Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5), ^{1/} when it unilaterally changed a ten year practice of scheduling a half-day of work on the day prior to

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."

winter recess and instead scheduled a full day of work for all employees on December 23, 1983, thereby increasing the teachers' working hours and workload for the 1983-84 school year.

On December 29, 1983, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing.

The Board has filed an Answer and counterclaim. The Answer does not specifically deny that the Board scheduled a full day of work for all employees on December 23, 1983. The Answer, however, asserts the following defenses: (1) the charge is untimely; (2) the appropriate forum for this dispute is the contractual grievance procedure, not an unfair practice proceeding; (3) the school calendar is a non-negotiable managerial decision and therefore changes in it are not unilateral changes in terms and conditions of employment; and (4) the Commission is without jurisdiction to grant the relief requested. The Board's counterclaim alleges that the Association violated subsection 5.4(b)(5) ^{2/} by filing this charge, allegedly to coerce the Board to grant a benefit not contained in the parties' negotiated agreement. ^{3/}

On March 28, 1984, Hearing Examiner Judith E. Mollinger conducted a hearing. The parties examined witnesses and

^{2/} This subsection prohibits employee organizations, their representatives or agents from: "(5) Violating any of the rules and regulations established by the commission."

^{3/} No Complaint or Notice of Hearing was issued on the Board's counterclaim. The Hearing Examiner thus considered it as a separate defense to the Association's charges. We shall treat the Board's counterclaim similarly.

introduced exhibits. They waived oral argument, but submitted post-hearing briefs by May 7, 1984.

On July 13, 1984, the Hearing Examiner issued her report and recommended decision, H.E. No. 85-4, 10 NJPER ____ (¶ ____ 1984). She concluded that the Board violated the Act when it unilaterally increased the hours of work from a half-day session to a full day session on December 23, 1983. She recommended that the Board be ordered to compensate all employees who worked the additional half-day^{4/} and to negotiate in good faith concerning compensation for the increased workload.

On July 25, 1984, the Board filed exceptions. The Board argues that the Hearing Examiner erred in: (1) treating the Association's charge as timely; (2) not finding that the Association's filing of a grievance barred it from filing its charge; (3) finding that there was a past practice of scheduling half-days on the day prior to winter recess; and (4) finding the change mandatorily negotiable under Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980).

On July 23, 1984, the Association filed an exception. It asks for a remedial order returning the parties to the status quo ante while they negotiate over appropriate compensation.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-10) are accurate. We adopt and incorporate them here.

^{4/} The Hearing Examiner found that school was not in session on December 23, 1983 due to inclement weather. At the time of the hearing, the Board had not decided how to schedule the makeup days, but it anticipated it would.

As a threshold matter, we reject the Board's contention that the charge was untimely or that the initial filing of a grievance foreclosed the subsequent filing of a charge. The charge was timely under In re Warren Hills Regional Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn. of Ed. Sec., 78 N.J. 1 (1978) which establish that the implementation, as well as the announcement, of a unilateral alteration of a term and condition of employment constitutes an unfair practice. The filing of a grievance does not foreclose the subsequent timely filing of an unfair practice charge, such as this one, claiming a unilateral alteration in an established term and condition of employment rather than a mere breach of contract.^{5/}

We next consider the Board's contention that a half day of classes on the day before winter recess was not an established past practice. For the reasons stated at pp. 12-13 of the Hearing Examiner's report, we disagree.

We next consider the Board's contention that it had a managerial prerogative to change this past practice unilaterally, thereby increasing teacher workload, without negotiating compensation with the Association. The Commission and New Jersey's courts have consistently held that school boards do not have a managerial prerogative to increase teacher work hours and pupil contact time without negotiating compensation and that a refusal

^{5/} The Board does not assert that deferral is appropriate in this case. It is not. In this regard, we especially note the Board's scope of negotiations defense.

to negotiate constitutes an unfair practice. See, e.g., Bd. of Ed. of Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980); In re Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/26/80); In re Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶13071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82). Even if we assume the Board had a managerial prerogative to require a full day of classes before winter recess as an incident of its right to establish the school calendar, that prerogative does not enable it to mandate that teachers work the extra half day without any additional compensation. Accordingly, the Board, in the absence of a contractual defense, had an obligation to negotiate before it increased these teachers' work hours and pupil contact time. See In re New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978).^{6/}

Finally, we consider the appropriate remedy. We believe that an order to compensate all employees who worked an additional half-day during the 1983-84 school year is appropriate. Under all the circumstances of this case, we do not believe it is necessary or appropriate to order a return to a half day of school before the 1984 winter recess. In particular, there is ample time for the parties to negotiate over appropriate compensation for any decision to schedule a full day of classes.

ORDER

The Liberty Township Board of Education is ordered:

A. To cease interfering with, restraining or coercing

^{6/} The Board did not allege or prove a contractual defense. Moreover, since the charge was not filed in bad faith, we dismiss the counterclaim.

its employees in the exercise of the rights guaranteed to them by the Act, and refusing to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly increased workload.

B. Take the following affirmative action:

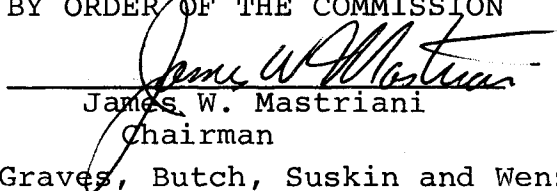
1. Compensate all employees who worked the additional half-day on any day scheduled during the school year 1983-84, as a make-up day for 12/23/83.

2. Negotiate in good faith over compensation for employees required to work any additional half-days during the 1984-85 school year.

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

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Butch, Suskin and Wenzler voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey

September 19, 1984

ISSUED: September 20, 1984

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 compensate all employees who worked the additional half-day on any day scheduled as a make-up day for December 23, 1983.

WE WILL negotiate in good faith over compensation for employees required to work any additional half-days during the 1984-85 school year.

LIBERTY TOWNSHIP BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____ (Title)

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

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

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

In the Matter of

LIBERTY TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-132-64

LIBERTY TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Liberty Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act. The Board unilaterally changed a ten year practice when it scheduled a full work day instead of the usual half-work day on the day before winter recess. It made this schedule change without prior negotiation with the Association thus increasing teachers' workload in violation of the Act.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
Harbourt & Duh, P.C.
Boyd Harbourt, Of Counsel

For the Charging Party
Bernard Lelling, NJEA UniServ Rep.

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On November 9, 1983, the Liberty Township Education Association ("Association") filed an Unfair Practice Charge against the Liberty Township Board of Education ("Board") with the Public Employment Relations Commission ("Commission") (C-1) alleging that 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. ("Act"). The charge was that the Board changed a ten year practice of scheduling a half-day of work on the day before the winter recess, thereby changing the teachers' working hours and workload for the school year 1983-84. Specifically the Board scheduled a full day of work for all employees on December 23, 1983.

On December 29, 1983, the Administrator of Unfair Practices

* Footnotes appear at the conclusion of this decision.

issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1 (C-1). 2/

On November 28, 1983, the Board filed an Answer and Counter-Claim to the unfair practices charges. It then submitted this answer as its response to the Complaint and Notice of Hearing. The Board denied violation of the Act and set forth the following defenses:

(1) the appropriate forum for resolution of the dispute is the contract grievance procedure, not an unfair practice procedure; (2) the subject of school calendar is a non-negotiable managerial decision and therefore changes therein are not unilateral changes in terms and conditions of employment; (3) the charge is untimely; and (4) the Commission is without jurisdiction to grant the relief requested by the charging party.

The Board's Counter-Claim alleges that the Association committed an unfair practice in violation of subsection 5.4(b)(5). It did so by filing an unfair practice charge as an attempt to coerce the Board into granting a benefit not contained in the parties' negotiated agreement. No Complaint or Notice of Hearing was issued on the Board's Counter-Claim. Therefore, it shall be considered as a separate defense to the Association's charges. A hearing was held on Wednesday, March 28, 1984 at which time the parties examined witnesses, presented evidence and waived oral argument. Both parties submitted post-hearing briefs and the record was closed.

POSITION OF THE PARTIES

The Association maintains that the issue involved in this dispute predominately involved a mandatorily negotiable subject of work hours and compensation for increased workload. It argues that the

holding of the New Jersey Supreme Court in Board of Education of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980) ("Woodstown-Pilesgrove") is dispositive of this matter. It requests negotiations for compensation for the additional hours worked on December 23, 1983 which was scheduled as a full work day for employees instead of a half work day. The Association contends that the change in the length of the work day on December 23, 1983 represents a change in the ten-year practice by the Board. The Association acknowledges the Board's unfettered right to set the school calendar but claims that compensation for increased workload is a mandatorily negotiable matter. As a remedy, the Association requests that employees be paid an additional one-half day's pay to be determined by dividing the individuals' salary by 184.

The Board argues that any practice, if it existed, was broken by the Board's increase from a half-day session to a full day session on the day before winter recess in December 1980. The Association counters that, it did not question that 1980 change because the changes were with the assent of the Association.

The Board makes several arguments in its answer to the charge. Initially it claims there is no past practice which constitutes a term and condition of employment setting the day before winter recess as a half-day of work. It claims a non-negotiable management prerogative to establish the number of days in the school calendar. It admits that for a number of years employees did work a half-day the day before winter recess, and that it made no special agreement in 1980 when it scheduled a full day of work on the day before winter recess. Further,

it argues that if there was an increase in the workload it was de minimis. Further it contends that an "established practice" would require at least ten years of such a condition of employment, with the knowledge and consent of both parties. In re Denville, P.E.R.C. No. 81-147, 7 NJPER 359 (¶ 12162 1981) ("Denville"). The Board also argues that the Unfair Practice charge is untimely because the calendar for 1983-84 was first published in the spring of 1983 but the Association did not file its initial grievance until October 1983. Following the Board's denial of the Association's grievance, the Association filed its Unfair Practice charge in November 1983, more than six months after it had received notice of the schedule change in the school calendar. The Board adopted the new calendar in early May, 1983.

ISSUE

The question presented by this dispute is:

Did the Board violate subsection 5.4(a)(1) and (5) of the Act when it unilaterally increased teacher workload by an additional one-half day on the day before winter recess-specifically December 23, 1983.

FINDINGS OF FACT

Based on the entire record of these proceedings the Hearing Examiner makes the following findings of fact:

1. The Liberty Township Board of Education is a public employer within the meaning of the Act (T.7). ^{3/}
2. The Liberty Township Education Association is a public employee representative within the meaning of the Act (T.7.)

3. The Association and the Board are parties to a collective agreement covering the period July 1, 1982 through June 30, 1984 (J.1). (T.5).

4. The parties stipulated that the contract between the parties was silent with respect to the subject of school work year (T.18). ^{4/}

5. The parties stipulated that during the school year 1980-1981 the school day before winter recess was a full day both on the calendar and in actuality (T.8).

6. Article II - Grievance Procedure - of the parties' contract defines a grievance as follows: "The word 'grievance' when used herein shall mean any alleged injury, injustice or wrong which arises from the established policy or procedure or the lack of such policy or procedures."

7. The parties agree that from 1973, when the district elementary school first opened, until 1983 (except for the year 1980) all employees worked a half-day on the day before the Christmas recess (CP-11; T.32, 33, 86, 122).

8. In September 1983, after receiving information that December 23, 1983, the day before the winter recess, would be a full work day, the Association President, James McGovern, requested information concerning the change in the past practice (T.27, 31).

9. First, McGovern spoke with the Chief School Administrator, Thomas Reilly (T.31). McGovern requested copies of the school calendars beginning with school year 1973 (T.31, 57); secondly, he requested any other information available concerning the length of the work day

immediately preceding the winter recess for each of the school years between 1973 and 1983 inclusive (T.31, 60); thirdly, he requested copies of the individual monthly calendars on which special dates are usually circled (T.60). Reilly agreed to give all the information he had to McGovern (T.31, 121); however, the specific items requested were not available (T.32, 57, 67, 121). Mr. Reilly was able to provide copies of the school's weekly bulletins (CP.1-11; T.32, 57, 121).

10. The parties stipulated that each Thursday a bulletin announcing the school events for the coming week was sent to the students' parents (T.25). Reilly arranged to have the originals made available to the Association; the Association made reproductions of those bulletins for the weeks prior to the winter recess for each of the years 1973 through 1983 (T.20, 22, 23). Theresa Braun, an Association Officer, made the copies from the originals (T.21, 23).

11. In December 1980, the day before the winter recess was a full work day (T.33). The Association participated in the scheduling of that day (T.33). When the School Administrator (T.35, 36) left in 1979, a month or so before the winter recess, McGovern was appointed "Acting Administrator" serving from January through May 1980 (T.33, 35-36, 39, 47-55). The school calendar for the coming year (1980-81) had not been completed. McGovern was required to participate in this planning. His participation included scheduling the winter recess and planning the work days. Because the Liberty School District bussed its seniors to the Hackettstown High School in 1980, Liberty coordinated its winter recess with that of Hackettstown. This necessitated closing

for a full two weeks, which was longer than usual. Therefore McGovern submitted a school calendar which provided for a full work day before the winter recess (T.33, 36, 39, 41, 119, 120, 163). This schedule also contributed to the School District's goal of heat conservation, since the building would not need to be opened for one day, Friday, January 2nd. That day was scheduled for the Friday before the winter recess, December 19, 1980 (T.119, 147, 148, 163). The Board's stated reason for the scheduled change was "energy conservation" (T.147).

This calendar, however, was not adopted in the beginning of 1980. McGovern presented this proposed school calendar to three consecutive Board Meetings between January and May 1980 (T.41 and 42); it was adopted in May 1980.

12. Although Reilly had not yet been hired by the Board, he did in fact attend several Board Meetings during the same period that McGovern was Acting Administrator (T.42-45). Therefore, he was privy to information concerning the 1980-1981 school calendar. Reilly was appointed Chief School Administrator in May 1980 (T.33 and 39, 118).

13. All the weekly bulletins submitted as evidence by the Association for weeks in December 1973 through 1983, include announcements of early dismissal for students on the day before the winter recess, except for the bulletins in December 1980. The record evidence establishes that decisions regarding half-days were usually announced in that manner. (The copies of individual monthly calendars were not available as they were routinely discarded (T.60)).

14. In September 1983, when teachers received an information packet for the coming school year a calendar was enclosed (T.45). This calendar did not indicate which school days would be half-days or full days, it merely showed when school would be open and when it would be closed (R-1 Pg. 2 & 3).

15. On October 10, 1983, McGovern filed a Level Two group grievance protesting the change in a past practice (T.61). On October 27, 1983 the Board denied the grievance (T.37). In answer, the Board wrote: "the Board has the right to set the school calendar. Therefore, your grievance has been denied." (T.62, 76).

16. Subsequent to the Board's denial of the Association's grievance and the Association's service of an unfair practice charge on November 4, Reilly and Susan Kenny, the School Board President, met with McGovern to discuss the unfair practice charge. (T.37, 64, 139, 14950). Since the Board had received the unfair practice copy served by the Association, no instructions for filing an answer were attached (Cl docketed 11/9/83; T.100, 101, 102, 138).

The discussion among McGovern, Reilly and Kenny (who joined the two men shortly after the meeting commenced) initially concerned the processing of the unfair practice charge (T.64, 101, 102, 138). However, as the meeting progressed, Reilly and Kenny expressed their dissatisfaction with the Association's grievance. McGovern understood the Board to explain that the scheduled change of work hours on 12/23/83 was an "oversight" (T.37) and that the Association did not have to file "formal papers" with P.E.R.C. (T.50-52). McGovern further under-

stood Kenny to acknowledge that it was not the intent of the Board to schedule a full day on 12/23 (T.53). Further, McGovern believed that at this meeting, the Board offered to reinstate the half-day because it felt there was no real question about it (T.53-55). However, this offer was not made in the context of "past practice". Despite McGovern's understanding of this discussion, the employees did not receive the half-day schedule (T.54) ^{5/}

17. In April 1983, Reilly prepared a proposed calendar to submit to the Board at its meeting on the first Wednesday of May (T.123, 125). On the Monday of the prior week, Reilly discussed this proposed calendar (R-1) with the staff (T.124, 156) and asked for input. There was discussion among the staff concerning a week off in February and thus no day off for Columbus Day (T.124); however, there was no discussion, according to McGovern, concerning a half-day schedule for 12/23/83. Reilly believed that the staff members at the meeting each received a copy of the proposed calendar marked April 1983. This proposal did not show a scheduled half work day on the day before Christmas recess (T.126). Reilly understood that the Commissioner of Education would disprove school calendars which included too many scheduled half-days. He got this understanding from discussions with other School Administrators at their monthly meetings ("County Round Tables") (T.90, 92, 93, 127, 163, N.J.C.A. 6:20-1.3B and 6:20-1.3E). Ordinarily the students have a party on the day before Christmas recess. Reilly did not think "a party" would qualify as "instructional time" to meet the four-hour requirements of the Education Code (T.129, 131, 149).

18. In May 1983, the Board adopted its final school calendar for 1983-84 (R-1; T.156, 158). There was not further discussion about the children's Christmas parties (T.110-114) at that Board Meeting. The first page of R-1 lists only that winter recess should last from December 26, through December 30; it specifies, in a separate paragraph, several half-day sessions - November 23rd, April 19th, and four unspecified partial days for professional in-service. Neither the second or third page indicates which days are half-day sessions (T.44, 123).

19. McGovern did not recall seeing page one of R-1 at the April 19, 1983 meeting, (T.36, 170); he does recall receiving a copy of the school calendar during September 1983. Although teachers attended the May Board Meeting, there was not sufficient agenda material available for them (as was usual at Board Meetings) (T.70-71).

20. On 12/22/83 the school in fact was closed due to a snow storm, it remained closed on 12/23/83 as well (T.82, 84, 90, 91). As of the time of the Hearing, the Board had not decided how to schedule the makeup days (T.84) although, the Board anticipated that it would be a full day session.

21. In the past the parties have been able to negotiate agreements over changes in the work day, for example, an extension of forty-five minutes for teachers' meetings without additional compensation (T.48, 49).

ANALYSIS

In the instant dispute, the Association does not contest the Board's right to set the school calendar. However, the Association does

claim the right to negotiate over teachers' increased workload on 12/23/83, when the Board unilaterally scheduled that day as a full day session thus changing a long established practice to schedule half-day sessions on the day before winter recess.

In Woodstown-Pilesgrove, a case concerning the number of hours of employment on a particular school day, the New Jersey Supreme Court said:

...Rather the narrow issue here concerns payment for the hours worked due to the extension of the work period on a day before a holiday from that which previously existed. No statute or regulations dealing with teachers' working hours or compensation would have been violated if the additional two hours had not been scheduled or if the teachers had been compensated for having worked those extra hours. There being no demonstration of a particularly significant educational purpose, and the budgetary consideration being the dominant element, it cannot be said that negotiation and binding arbitration of that matter significantly or substantially trespassed upon the managerial prerogative of the board of education. Id. at 594.

Having determined that the subject matter of compensation for the additional hours worked is negotiable, I now direct my attention to the question of whether an established practice existed which the Board unilaterally changed.

In Denville, the case cited by the Board, the Commission did not determine that a ten-year history was necessary to find an established practice concerning a term and condition of employment. The Commission merely said:

"...Respondent, apparently without any ordinance on the books, routinely paid ill, injured or disabled officers full salary, without deducting

sick leave, where such officers endorsed compensation payments over to the Respondent for a period of at least ten years."

Slip Op. Page 4

Implied terms and conditions of employment arise from long-standing practices of the parties. Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, Motion for Reconsideration granted, P.E.R.C. No. 77-8, 2 NJPER 285, Decision on Reconsideration, P.E.R.C. 77-18, 2 NJPER 295 (1976), affirmed 157 N.J. super 74 (1977); South River Board of Education, P.E.R.C. No. 81-108, 7 NJPER 156 (¶ 12069 1981); In re County of Morris Park Commissioners, Docket No. A-795-82TT, Appellate Decision affirming P.E.R.C. No. 83-31, 8 NJPER 561 (¶ 13259 1982), petition for cert. pending; In re Wharton Board of Education, P.E.R.C. No. 83-35, 8 NJPER 570 (¶ 13263 1982); In re Spotswood Board of Education, H.E. No. 84-60.

In the instant case, the employees traditionally worked a half-day session on the day before winter recess; this practice existed since 1973, the year Liberty School District commenced operation. In one year - 1980-81 - employees worked a full day session on the day before winter recess. That year, because the Board desired to "conserve energy" its winter recess corresponded with that of Hackettstown - especially since Liberty seniors were bussed there. Since the recess lasted a full two weeks, longer than any in Liberty's history, it was necessary to schedule a full work day on the day before the recess to insure 180 instructional days for students. Additionally, January 2nd occurred on the Friday of the second weeks of the recess. Therefore the better plan was to close that Friday rather than to open

the schools for one day. Therefore, the necessary full day session was appropriately scheduled on 12/19/80, the day before the recess. This schedule was developed with the cooperation of the Association in the person of its President who was at that time also serving as Liberty's Acting Administrator.

I am not persuaded by the Board's argument that the 1980 exception to the practice of half-day schedules serves to void an otherwise established practice of long duration. Therefore, I find that an established practice exists for scheduling half-day work session the day before the winter recess.

When an employer, during the term of an elected agreement, desires to alter an established practice governing an implied term and condition of employment, that employer must first negotiate those proposed changes with the employees' representative. Section 5.3 of the Act. In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶ 3030 1978). Further, it is the employer's burden to initiate negotiations prior to the implementation of the proposed changes. *Id* at page 85.

In the case at hand, the Board adopted a school calendar which it increased the length of the work day on December 23, 1983, the day before the winter recess. In so doing, it unilaterally changed the terms and conditions of employment over which it was bound to negotiate. Woodstown-Pilesgrove.

The Hearing Examiner's decision must take into account three crucial elements:

1. The contract between the two parties is silent on this subject, as acknowledged by each party. In other words, the parties did not negotiate a provision to cover this particular situation.

2. The record evidence supports the finding that the Board refused to negotiate with the Association compensation for the additional hours worked. It also refused to grant a return to the half-day schedule.

3. The fact that the schools were closed on the day in dispute - due to inclement weather - is irrelevant. The Board clearly stated its intention to schedule a full make-up day in June. Thus the issue of compensation for the extra half-day of work for teachers still remains.

CONCLUSION OF LAW

Based upon the entire record in this matter, the Hearing Examiner concludes that the Board violated N.J.S.A. 43:13A-5.4(a)(5) and derivatively (a)(1) by unilaterally increasing the hours of work from a half-day session to a full day session on 12/23/83.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Board cease from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and refusing to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly increased workload.


B. That the Board take the following affirmative action:

1. Engage in good faith negotiations with the Association regarding compensation for the increased workload.

2. Compensate all employees who worked the additional half-day on any day scheduled during the school year 1983-84, as a make-up day for 12/23/83,

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

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



Judith E. Mollinger
Hearing Examiner

DATED: July 13, 1984
Trenton, New Jersey

Footnotes

- 1/ N.J.S.A. 34:13A-5.4(a) prohibits 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."
- 2/ Commission exhibits will be designated as "C", Joint exhibits as "J", the Association's exhibits as "CP" and the Board's exhibits as "R".
- 3/ References to the Transcript of Proceedings for March 28, 1984 are "T-".
- 4/ Article III of the parties' contract concerning hours of work reads as follows: "Teachers will be required to report to work ten minutes before the scheduled arrival of students and to remain five minutes after the last students depart." (T.29, 30, 48, 67.)
- 5/ Reilly and Kenny concurred with the Association's position that the Board was to offer 12/23 as a day off but it would be made-up at the end of the school year if necessary to meet with required instructional time of 180 days (T.90, 91, 140, 141, 151, 168). However, Reilly understood that McGovern had not raised the issue earlier than October 1983 because the Association had "overlooked it". Reilly claimed that he first knew of the Association's complaint when the Level Two grievance was filed in October 1983 (T.133).

Since the disputed work day did not fall until December, it is not necessary to determine whether the Association had knowledge in May or September or October of 1983 of the increased work day. The grievance as well as the unfair practice charge complained of a prospective change. The grievance was timely filed under the parties' contract, which simply required that the grievant "must file (the) alleged grievance within ten working days". The unfair practice charge was timely filed because the change complained of was anticipatory. The Association, if unable to effect a resolution with the Board before December 1983 could have filed the charge after the employees actually worked the full day on December 23, 1983.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL NOT refuse or fail to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly, by failing to negotiate over compensation for the additional half-day worked during the school year 1983-84.

WE WILL compensate all employees who worked the additional half-day on any day scheduled as a make-up day for December 23, 1983.

Liberty Board of Education

(Public Employer)

Dated _____

By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780