P.E.R.C. NO. 85-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-82-172-84

EMPLOYEES ASSOCIATION OF WILLINGBORO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Willingboro Board of Education committed some unfair practices alleged by the Employees Association of Willingboro, but did not commit others. The Commission holds that the Board violated the New Jersey Employer-Employee Relations Act when it discriminatorily disciplined Association officials for their protected activity and when it unilaterally issued directives requiring grounds employees to receive permission prior to leaving school grounds to buy their lunches and denying a travel period to clock "in" and "out" for lunch. The Commission, however, finds that the Board did not violate the Act when it changed the lunch hour; disciplined employees for tardiness; changed a sick leave verification policy; required employees to fill out forms concerning equipment malfunctions; instituted a safety work rule requiring employees to wear hard hats; refused to assign two grounds employees to each school; required employees to work overtime to remove snow, and assigned additional job duties.

P.E.R.C. NO. 85-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-82-172-84

EMPLOYEES ASSOCIATION OF WILLINGBORO,

Charging Party.

Appearances:
For the Respondent, Barbour & Costa, Esqs.
(John T. Barbour, of Counsel)

For the Charging Party, Klausner & Hunter, Esqs.
(Stephen B. Hunter, of Counsel)

DECISION AND ORDER

On January 14, 1982, the Employees Association of Willingboro ("Association") filed an unfair practice charge against the Willingboro Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1),(3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it warned Association officials about discussing working conditions with unit employees and when it unilaterally changed employment conditions concerning lunch periods, sick

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

leave and tardiness, overtime and working hours, job duties, equipment malfunction forms, and safety rules.[2/]

On March 3, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board then filed an Answer denying that it had reprimanded Association officials because of their protected activity and further asserting that the changes in employment conditions did not constitute unfair practices since they were allegedly contractually authorized, consistent with past practice, or within managerial prerogatives.

On October 21 and 22, 1982, January 17, 25 and 28, 1983 and April 21, 1983, Chief Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. Both parties filed post-hearing briefs.

On June 6, 1984, the Chief Hearing Examiner issued his report and recommended decision, H.E. No. 84-63, 10 NJPER ___ (¶_____ 1984) (copy attached). He found that the Board committed unfair practices by: (1) reprimanding two Association officers for protected activity; (2) requiring unit employees to receive permission prior to leaving school grounds for lunch; (3) discontinuing a practice of allowing employees a travel period for lunch; (4) requiring employees to work overtime to remove snow; and (5) requiring employees to sign recently changed job descriptions which required them to perform "additional duties." The Chief Hearing Examiner found that the Board did not commit

2/ The charge also alleged that certain employees had been suspended or discharged for engaging in protected activities, but these aspects of the charge were later withdrawn.

unfair practices, inasmuch as it either exercised a management prerogative or contractual right with respect to the Association's allegations that it: (1) changed the lunch hour; (2) disciplined unit employees for tardiness; (3) changed a sick leave verification policy; (4) required employees tc return to their warehouses at 3:15 p.m.; (5) required employees to fill out forms concerning equipment malfunctions; (6) instituted a safety work rule requiring employees to wear hard hats; and (7) refused to assign two grounds employees to each school so if one employee was injured, the other employee could assist him and report the injury.

The Board has filed timely exceptions to the Chief Hearing Examiner's conclusions that it committed the above-enumerated unfair practices. It asserts that: (1) the Association did not prove by a preponderance of the evidence that the Board warned the Association officers because of their protected activity; (2) pursuant to past practice employees had to receive permission before leaving school grounds for lunch; (3) it had a contractual right to discontinue the employees' travel period for lunch; (4) it had a managerial prerogative to require employees to work overtime to remove snow; and (5) the Association did not prove that the Board illegally assigned additional job duties.

The Association filed timely exceptions to the Chief Hearing Examiner's conclusions that the Board did not commit the above-enumerated alleged unfair practices. The Association asserts that: (1) employees who took lunch periods of 30 minutes or less were illegally docked pay if they failed to clock in and out between noon and 12:30 p.m.; (2) the Board illegally docked

all late employees a minimum of 15 minutes pay, even if they were late only one or two minutes; (3) employees who left work because of sickness were improperly docked a minimum of four hours pay for failure to produce a doctor's certificate; (4)the Board illegally refused to permit groundskeepers to return to their warehouses before 3:15 p.m. and required employees to work overtime in order to clean their equipment; (5) the Board illegally required employees to fill out forms concerning equipment malfunctions; and (6) the Board illegally required employees to wear hard hats and disciplined them for failure to do so. In addition, the Association contends that the Chief Hearing Examiner should have recommended certain remedies for the unfair practices he found. Thus, the Association asserts that the Board should be ordered to: (1) remove the letters of warning from the files of the two Association officials; (2) negotiate over possible compensation for employees who lost the benefit of a lunchtime travel period; (3) rescind its policies requiring employees to work overtime to remove snow; and (4) rescind its job description requiring employees to perform "additional duties"

The Board and the Association filed responses to each other's exceptions.

We have reviewed the record. The Chief Hearing Examiner's findings of fact are accurate. We adopt and incorporate them here.

We also adopt his conclusions that the Board committed unfair practices when it reprimanded two Association officials;

when it required employees to receive permission before leaving school grounds for lunch; and when it discontinued the employees' lunchtime travel period. We dismiss the remaining portions of the Complaint and specifically find that the Board did not commit any unfair practices when it required employees to work overtime to remove snow and changed their job descriptions. We finally modify the Chief Hearing Examiner's recommended remedial order to require that the reprimands be removed from the personnel files of the two Association officials.

We first hold that the Board violated subsections 5.4(a)(3) and, derivatively 5.4(a)(1), when it placed letters of warning in the personnel files of Association officials. We defer here to the credibility determination of the Chief Hearing Examiner (slip opinion p. 9) and the record evidence which demonstrates an underlying animus on the part of foreman John Horn towards Association President Booth and shop steward Cartier because of their protected activities and no legitimate business justification for the warnings. We hold that the appropriate remedy is the removal of the letters from the personnel files of Booth and Cartier.

We agree also with the Chief Hearing Examiner's conclusions concerning the lunch period. The Chief Hearing Examiner correctly held (pp. 4-5) that the Board had the contractual right to commence the lunch period at 11:00 a.m., after the employees' fourth hour of work.[3/] The Chief Hearing Examiner also correctly

3/ We agree with the Chief Hearing Examiner that the Board did not violate the Act when it disciplined an employee for clocking in outside the lunch period for all employees.

held (p. 5) that the Board violated subsection 5.4(a)(5) when it required employees to receive permission prior to leaving school grounds for lunch. The contract clearly does not require such permission. Finally, the Chief Hearing Examiner correctly held (pp. 5-6) that the Board violated subsection 5.4 (a)(5), when, in the absence of a clear contractual provision and contrary to an established practice, it abolished the employees' travel period. We order the Board to stop requiring employees to receive permission prior to leaving school grounds for lunch and to allow employees a reasonable travel period at lunchtime.[4/]

We adopt the Chief Hearing Examiner's conclusion concerning the Board's sick leave verification, tardiness, equipment malfunction and vehicle reports, and safety policies for the reasons set forth in his opinion (pp. 6-7, 9-11 and 12-13).[5/] We disagree with the Chief Hearing Examiner's conclusion that the Board committed an unfair practice when it ordered employees to work overtime to remove snow. The public employer's right to require employees to work overtime in an emergency is well-settled. In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211

4/ The Chief Hearing Examiner found that the five-minute travel period did not extend the lunch period. We accept this finding. On this record, we do not believe that an order to negotiate compensation for this change is warranted.

5/ With respect to the sick leave verification and tardiness issues, we stress that the application of the Board's new policies may be challenged through binding arbitration. We are not approving the Board's determinations to impose particular amounts of discipline for certain infractions, but merely holding that the justness of any discipline must be contested through negotiated grievance procedures.

1982); In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). We note that the Board fulfilled its duty to negotiate compensation for the overtime work which it required.[6/]

We also disagree with the Chief Hearing Examiner's conclusion that the Board committed an unfair practice when it changed the employees' job description to require them to perform "any additional duties." The Board has a right to establish job descriptions and to require employees to perform additional duties related to their normal duties. In re West Deptford Bd. of Ed., P.E.R.C. No. 80-96, 6 NJPER 56 (¶11030 1980); In re Rutgers University, P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983); In re City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983). There is no evidence in the record that the Board has required employees to perform any unrelated duties, and we will not presume that the Board will in fact make such assignments.

ORDER

A. The Respondent Board shall cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed by the Act, particularly by placing letters of warning in the personnel files of Association officials Booth and Cartier for discussing Association

6/ In regards to the other "overtime" issue in this case, we agree with the Chief Hearing Examiner that the Board did not commit an unfair practice when it refused to allow employees to return to their warehouses before 3:15 p.m. This refusal, standing alone, did not extend the employee's work day and there is no competent evidence that the Board required employees to continue working beyond 3:30 p.m. without compensation.

business with employees during work hours, when the discussions in fact occurred outside of working hours;

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment, particularly by unilaterally adopting directives which: (1) required grounds employees to receive permission prior to leaving school grounds to buy their lunch; and (2) denied, contrary to an established practice, a reasonable travel period in order to clock "in" and "out" for lunch.

B. The Respondent Board shall take the following affirmative action:

1. Rescind the directives described in paragraph A(2) and permit employees to leave school grounds for lunch and to use a reasonable travel period in order to clock "in" and "out" for lunch;

2. Remove the letters of warning described in paragraph A(1) from the personnel files of Association officials Booth and Cariter;

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 Respondent's authorized representative, shall be maintained by it for at least 60 consecutive days thereafter. Respondent Board shall take reasonable steps to insure that the notices are not altered, defaced or covered by other materials; and

4. Notify the Chairman of the Commission within 20 days of receipt what steps the Board has taken to comply with this Order.

All other allegations contained in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained. Commissioner Suskin was not present at the time of the vote.

DATED: Trenton, New Jersey
December 19, 1984
ISSUED: December 21, 1984

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed by the Act, particularly by placing letters of warning in the personnel files of Association officials Booth and Cartier for discussing Association business with employees during work hours, when the discussions in fact occurred outside of working hours.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment, particularly by unilaterally adopting directives which: (1) required grounds employees to receive permission prior to leaving school grounds to buy their lunch; (2) denied, contrary to an established practice, a reasonable travel period in order to clock "in" and "out" for lunch.

WE WILL rescind the directives described in the preceding paragraph and permit employees to leave school grounds for lunch and to use a reasonable travel period in order to clock "in" and "out" for lunch.

WE WILL remove the letters of warning from the personnel files of Association officials Booth and Cartier.

WILLINGBORO 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.

H.E. No. 84-63

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

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-172-84

EMPLOYEES ASSOCIATION OF WILLINGBORO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Willingboro Board of Education committed an unfair practice when it promulgated two regulations which controvened the language of its contract with the Employees Association of Willingboro. One regulation altered a travel period to clock "in" and "out" at lunch time and the other was a general directive which impliedly required employees to work overtime. Other regulations promulgated by the Board were also disputed by the Association. These regulations were either managerial prerogatives or did not contravene the contract. Accordingly, it was not an unfair practice for the Board to promulgate them. These included the hour which lunch was to be taken, sick leave verification, discipline for tardiness and an equipment cleanup period at the end of the day. It was further found that the Board committed an unfair practice when it disciplined certain Association officers for discussing Association business with employees. The Board maintained these discussions were during work time. It was found, however, that these meetings occurred on the employees own time.

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

H.E. No. 84-63

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

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-82-172-84

EMPLOYEES ASSOCIATION OF WILLINGBORO,

Charging Party.

Appearances:

For the Respondent
Barbour & Costa, Esqs.
(John T. Barbour, Of Counsel)

For the Charging Party
Hunter & Klausner
(Stephen B. Hunter, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 14, 1982, the Employees Association of Willingboro ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission. The Association alleged that the Willingboro Board of Education violated N.J.S.A. 34:13A-5.4(a)(1)(3) and (5) of the New Jersey Employer-Employee Relations Act, 1/ N.J.S.A. 34:13A-1 et seq. ("Act"), when it reprimanded Association officials because they

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

allegedly discussed working conditions with unit employees during work hours and unilaterally changed rules concerning lunch period, sick leave, safety, job descriptions (resulting in increased work loads), filing of daily equipment reports, and the time period at the end of the day when employees could return to the maintenance yard to clean their equipment.

It appearing that the allegations of the charge, if true, might constitute an unfair practice, a Complaint and Notice of Hearing was issued on March 3, 1982. A Hearing was held on October 21 and 22, 1982, January 17, 25, and 28, 1983 and April 21, 1983, at which time the parties examined witnesses, presented evidence and argued orally.

The parties stipulated to withdraw charges filed under subsection 5.4(a)(1) and (3) except as they related to letters of reprimand sent to Association officials. Both parties filed post-hearing briefs by February 23, 1984.

The Association and the Board were parties to a collective negotiations agreement from July 1, 1980 to June 30, 1982. The contract contains provisions relating to hours of work, sick leave, discipline of employees and uniforms.

The Association challenges rules that the Board instituted or modified after it appointed John Horn and Jack Cullen foremen of the grounds employees on or about July 15, 1981. The Association also alleges that Charles Booth, President of the Association, and David Cartier, a shop steward, were disciplined in violation of the Act because they actively participated in union activities protesting rules changes.

The Board maintains that it has both the contractual and managerial right to make said changes, PERC has no jurisdiction over portions of the charge, and the Association failed to carry its burden of proof regarding the alleged disciplinary reprimand.

The allegations shall be treated individually.

Article XII of the contract contains the following provision:

"Each employee whose work day exceeds four (4) hours shall receive a one-half hour lunch period upon the completion of his first four hours of work. (Lunch periods not paid for by the Board) Employees may leave the school premises for their lunch period provided that they card out and card in."

David Cartier supervised grounds employees from 1974 to July, 1981. Grounds employees worked from 7:00 a.m.-3:30 p.m. and their lunch period ran from 12:00 to 12:30 p.m. Employees who wanted to buy lunch off school grounds were permitted to leave their respective posts at 11:55 a.m. and return to the warehouse where they "clocked out" their time cards. Employees then drove their cars from the warehouse yard, purchased lunch, returned to the yard and "clocked in" by 12:30 p.m. Cartier did not discipline employees who "clocked in" a few minutes past 12:30 p.m. provided they did not exceed a one-half hour lunch period.

On July 15, 1981, John Horn and Jack Cullen replaced Cartier and issued a memorandum prohibiting grounds employees from leaving their assigned schools except for emergencies.

Employee Jack Gall testified that after Horn and Cullen were appointed foremen, employees had to clock out and in for lunch period at their respectively assigned schools. On September 24 and

28, 1981, the foremen issued memoranda stating that lunch period was changed to 11:00-11:30 a.m. and requiring employees to get permission to leave school grounds. In late October or early November, 1981, the foremen switched the lunch period back to 12:00-12:30 p.m. Horn disciplined employee Jack Gall for "clocking in" past the designated one-half hour lunch period even though he did not "clock out" for more than one-half hour. (R-1)

Horn admitted giving some but not all grounds employees a "grace period" for travel time but did not know the justification for any exceptions. He admitted that the periods were three or four minutes or five or ten minutes.

It is undisputed that the Board did not attempt to negotiate the alterations in the procedure for taking lunch. Rather, it argues that the alterations do not constitute a unilateral change in terms and conditions of employment. It claims that it was applying existing unit-wide lunch period practices to grounds employees. The Board also claims that these alterations were a managerial prerogative and further, the change in schedule is expressly permitted by the terms of the contract and impliedly permitted by a "zipper" clause in the contract.

If the language of the contract is clear and unambiguous and the central intent of the parties can be discerned from a simple reading of the contract then the language is controlling over past practice. New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (¶ 4040 1978), aff'd App. Div. No. A-245-707 (April 2, 1979), Township of Irvington, P.E.R.C. No. 84-97, 10 NJPER 165 (¶ 15081 1984). In re Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶ 14066 1983).

Here, the contract language specifies that employees will receive a one-half hour lunch period after their fourth hour of work. Since the shift began at 7:00 a.m. during the school term, the Board acted within the terms of the contract by changing the lunch period to 11:00 a.m. Similarly, the contract provides that lunch period will be "one-half hour" and the Board acts within the contract terms if it disciplines employees who clock in past the designated lunch period.

However, the Board violated that portion of the contract providing that employees may leave school grounds to buy their lunch, when, effective July 15, 1981, it prohibited employees from leaving school grounds to buy lunch and later required them to receive "permission" before leaving.

When the plain language of the contract does not reveal the intent of the parties past practice may be used to define the intent. New Brunswick, supra. Here, the contract did not specify whether employees leaving school grounds to buy their lunch would receive a travel period in order to comply with the clocking "out" and "in" rules at the warehouse. Thus past practice may be used to define the parties' intent. Cartier and Gall testified that employees were given a minimum travel period of 5 minutes from 1974-1981. Horn admitted that he also provided a travel period to some employees after July, 1981. This inconsistent application of the contract provision calls into question the Board's otherwise colorable interpretation of the contract. Thus the Board's own practice in this case requires a finding that the Board violated Section 5.4 (a)(5) of the Act when it discontinued the travel period for employees who wanted to buy their lunch off school grounds. There is no indication that the Association "waived" its rights to the

past practice and the zipper clause lacks the particularity to constitute a "clear and unmistabable" waiver. Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 122, 140, 4 NJPER 4167 (1978). This finding does not extend the lunch period five minutes but assures that employees leaving school grounds to buy their meals do not forfeit part of their one-half hour lunch period complying with Board clocking "out" and "in" rules.

Article VII of the contract contains the following provision:

"The term "sick leave" as used herein is defined to mean the absence from one's position due to illness, injury or exclusion by the school district's medical authorities due to quarantine or contagious disease."

Pursuant to an arbitrator's decision in 1980, the Board could require a doctor's certificate from employees who reported absent more than five "sick" days. The Board did not require certificates for one or more one-half day absences. Grounds employees who went home sick in the afternoon could elect to have their pay reduced by the actual number of hours missed.

After September, 1981, Horn and Cullen counted two one-half day absences as one "sick" day. They required employees to submit a certificate for any absence of two or more hours after their fifth "sick" day. Horn recommended that employees who did not provide the certificate for a two-hour absence should be docked in pay by the amount payable for four hours work.

In In re Piscataway Township Board of Education, P.E.R.C. No. 82-64, 8 NJPER 95 (¶ 13039 1982) the Commission determined that the mere establishment of a sick leave verification policy is the

prerogative of the employer. Regardless of the prior arbitration provision, the Board here had the right to alter sick leave verification policy. 2/

Before July, 1981, Cartier did not discipline any grounds employee who reported to work one to seven minutes late if he was late fewer than five times per month. The record does not reveal if foremen Horn and Cullen maintained this policy from July, 1981, to March, 1982. After March 22, 1982, Horn recommended to the payroll department that an employee's pay should be docked fifteen minutes if he reported to work late by one or two minutes. The Board did not negotiate the change with the Association.

The Act, as amended, provides that grievance and disciplinary review procedures (emphasis added) are negotiable. The decision to discipline and the discipline itself are non-negotiable subjects of bargaining.

Here, the Board unilaterally determined that unit employees will be disciplined for reporting late to work. Its decision is non-negotiable and does not violate § 5.4(a)(5) of the Act. This finding does not prohibit any employee whose pay was disproportionately reduced for reporting late one or two minutes from seeking an appropriate remedy through the contractual grievance procedure. 3/

2/ It is noted that a policy that was not originally mandatorally negotiable at its inception does not become mandatorally negotiable when it is changed and applied in a non-discriminatory manner. See City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶ 15015 1983).

3/ Even though these violations of the Act were not specifically pleaded in the charge, they were fully and fairly litigated at the hearing. The Hearing Examiner is empowered to make findings of fact and law in this situation.

Article XII, Section 8 of the Agreement provided that "No employee shall be discriminated against or disciplined for failure to work overtime". On October 6, 1981, Horn and Cullen issued a memorandum requiring that "all grounds employees will work to remove snow from school grounds". It was undisputed that the Board did not confer with the Association before issuing the memorandum.

The Association contends that the directive in the memorandum violates subsection 5.4(a)(5) of the Act by requiring that employees work overtime to remove snow. Horn admitted that grounds employees may have to work overtime to remove snow. The Hearing Examiner finds that insofar as the memorandum requires employees to work overtime, the Board unilaterally changed a condition of employment in violation of subsection 5.4(a)(5) of the Act. The Board may, of course, require grounds employees to remove snow during their normally scheduled work week. 4/

On October 13, 1981 and November 9, 1981, John Horn issued written "warnings" to EAW President Charles Booth and Shop Steward, David Cartier, respectively. (CP-40,41). The basis of the warnings was that each man talked with grounds employees during working hours without permission. The warnings contain identical language except for the names and dates. Under the terms of the Agreement, Association leaders were required to seek and receive Board permission to discuss Association business with employees during work hours. Booth and Cartier denied that they talked with grounds employees during Board hours

4/ Even though these violations of the Act were not specifically pleaded in the charge, they were fully and fairly litigated at the hearing. The Hearing Examiner is empowered to make findings of fact and law in this situation.

and allege that they spoke with them before the 7:00 a.m. starting time. Booth testified that he was warned because he was speaking with grounds employee Jack Gall about a safety rule. Cartier similarly testified that he was not discussing Association business during the conversation for which he was warned.

In this case, the Hearing Examiner credits the testimony of Cartier and Booth and finds that they spoke with grounds employees before their work shift began. In light of John Horn's evasiveness in answering questions pertinent to the resolution of issues in this case, the Hearing Examiner discredits his testimony that Cartier and Horn spoke with most employees after the work shift began. Accordingly, the Association has demonstrated by a preponderance of evidence that the Board by its agent, John Horn, violated subsection 5.4(a)(3) and derivatively 5.4(a)(1) of the Act when it discicplined Cartier and Booth for engaging in protected activity. See Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984)

Article XII, Section 14 of the Agreement provides:

> ...It shall be the obligation of all employees to report known defects in machinery or equipment, failure to do so shall be considered on a case by case basis to determine if disciplinary action is warranted. Employees shall at the end of their respective shift report all equipment defects which are not of an emergency nature in writing to the director of plant facilities and to the association safety officer.

Before July, 1981, Supervisor Cartier sometimes required grounds employees to file written reports about machinery they used which broke down during their shifts. He required the reports when he suspected that employees were negligently operating the equipment.

In July and August, 1981, John Horn issued memoranda to named employees requiring them to submit written reports concerning

equipment breakdowns and advising them that a copy of the notice will be placed in their personnel file. (CP 16-29) Horn recommended in some memoranda that the named employee was not qualified to perform his job and should be disciplined (CP 20-25).

The contract provision in this case permits the Board to discipline employees for failure to file equipment reports and must prevail over Cartier's discretionary application of the provision. New Brunswick Board of Education, supra. 5/ Moreover, the memoranda implicitly alleged that the employees had failed to file equipment reports concerning defective equipment at the end of their work shifts. In this case, Board discipline of unit employees for their ommissions did not constitute a unilateral change in the terms and conditions of employment because it complied with the collective negotiations agreement. See Pascack Valley Board of Education, P.E.R.C. No. 81-61, 6 NJPER 554 (¶ 11281, 1980).

On September 23 and October 13, 1981, the Board issued memoranda to grounds employees setting out an extensive list of job duties. (CP 8,9) Included in the list are the allegedly unlawful requirements that drivers submit daily vehicle reports and all employees were responsible for "any additional duties prescribed by [the] foremen." It was undisputed that the Board did not attempt to negotiate the contents of the proposed list.

Employee Jack Gall could not identify any newly assigned duties on the list. Horn testified that the list included duties grounds employees previously performed and added a few new ones. The list shows very little change in actual job requirements. It was

5/ Contrary to the issue as to travel time for lunch, the contract language concerning equipment reports is clear and unambiguous. Therefore, past practice is not controlling, for it would contradict the contract.

undisputed that the vast majority of duties listed had been previously assigned to grounds employees.

In West Deptford Bd. of Ed., P.E.R.C. No. 80-96, 6 NJPER 56 (¶ 11030 1980), the Commission held that an employer may change a job description when done in a legal manner and consistent with managerial prerogatives. In this case, the Board's requirement that drivers submit daily vehicle reports is rooted in a managerial right to monitor equipment safety. The Board's action did not change the grounds employees' negotiable terms and conditions of employment.

However, the requirement that employees perform "any additional duties" is overly broad. Assignment of duties is in the abstract, non-negotiable. However, certain assignments can effect terms and conditions of employment and, pursuant to Woodstown-Pilesgrove, 81 N.J. 582 (1980) [6/], in such a case a balancing test must be employed to determine which of these rights in conflict will prevail. It is possible, that, in a given situation, the predominate interest would be the term and condition of employment. Accordingly it is an unfair practice to assign such additional duties without good faith negotiations. Thus, the Board's requirement that the grounds employees sign a job description containing the provision in question violates Section 5.4(2)(5) of the Act.

On October 8, 1976 and October 16, 1978, the Board issued memoranda requiring grounds employees not to return to the warehouse to clean their equipment before 3:15 p.m. Cartier permitted employees to return to the warehouse about 3:00 p.m. if he believed they needed more than fifteen minutes to clean a particular piece of equipment. He authorized overtime pay to employees who worked past 3:30 p.m.

6/ See also IFPTE Local 195 v. State, 88 N.J. 393 (1982).

After July, 1981, Horn and Cullen strictly enforced the 3:15 p.m. rule and, as a policy matter, refused to authorize overtime wages to employees who worked past 3:30 p.m. cleaning their equipment. It was undisputed that the Board did not confer with the Association before making its decision. There was no testimony that any employees were forced to work overtime as a result of this memo. There was evidence that certain employees were disciplined because of their failure to properly clean and wax equipment. There was hearsay testimony by an Association Representative that the equipment in question was not properly cleaned because these employees no longer had the time to do so under Horn's directive.

However, N.J.A.C. 1:15.8(b) provides:

> Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

This rule, know as the Residuum Rule means that a case cannot turn on hearsay evidence, yet hearsay evidence is the only evidence adduced linking the discipline to the reduction in cleaning time. Accordingly, that part of the charge relating to the cleaning of equipment must be dismissed.

Finally, the Association alleges that the Board unlawfully changed rules affecting the safety of grounds employees. Before 1981, Cartier assigned two grounds employees to a school so that if one employee was injured, the other could assist him or report the injury. He did not require employees to wear hard hats.

On September 28, 1981, Horn issued a memorandum requiring all employees to wear hard hats during work hours. On October 14, 1981,

Horn issued warnings to three unit employees who were found not wearing hard hats during work hours. (CP 34-36) Horn also assigned one employee to a school. On another occasion, Horn required grounds employees to try on fall rain gear on a clear summer day.

The Board has a contractual and managerial right to promote employee safety and require grounds employees to wear uniforms. Thus the Board's requirements that employees wear hard hats during work hours and that they try on rain gear do not violate Section 5.4(a)(5) of the Act. Article IV, Section 3 provides that the Board has the "right to determine the size of the work force at any given level of activity, including all types and classifications." Thus the Board did not violate the Act when it assigned one grounds employee to a school.

Recommendations

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by disciplining Willingboro grounds employees because they discussed personal and Association matters before the work day began.

2. Refusing to negotiate in good faith with the Employees Association of Willingboro Public Schools concerning terms and conditions of employment of grounds employees in the unit, particularly by unilaterally adopting policies in July, 1981 through March, 1982, without notice to or negotiations with the Association, which required that:

I) grounds employees not leave school premises to buy their lunch or required them to first seek Board permission to leave or denied a

reasonable travel period in order to clock "in" and "out"

II) issuing general directive which require that all grounds employees work overtime to remove snow from school grounds

III) grounds employees sign a job description containing a provision purporting their agreement to perform any job assigned by the Board

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

1. Rescind directives 2) I, II and III listed above in this order.

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

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

Edmund G. Gerber
Chief Hearing Examiner

DATED: June 6, 1984
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by disciplining Willingboro grounds employees because they discussed personal and Association matters before the work day began.

WE WILL NOT refuse to negotiate in good faith with the Employees Association of Willingboro Public Schools concerning terms and conditions of employment of grounds employees in the unit, particularly by unilaterally adopting policies in July, 1981 through March, 1982, without notice to or negotiations with the Association and WE WILL RECIND those directives issued by the Board which required that:

I) grounds employees not leave school premises to buy their lunch or required them to first seek Board permission to leave or denied a reasonable travel period to clock "in" and "out"

II) all grounds employees work overtime to remove snow from school grounds

III) grounds employees sign a job description containing a provision purporting their agreement to perform any job assigned by the Board

WILLINGBORO BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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

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