H.E. NO. 2003-1

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

In the Matter of

BOGOTA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-2001-111

BOGOTA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Bogota Board of Education violated the New Jersey Employer-Employee Relations Act by refusing to negotiate over the impact of the Board's decision to extend single session days by one-half hour. The Board's defense - that the Association did not effectively demand negotiations over the impact of the additional half hour - was not proven by a preponderance of the evidence.

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. 2003-1

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

In the Matter of

BOGOTA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-2001-111

BOGOTA EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Richard A. Broverone, attorney

For the Charging Party
Springstead & Maurice, attorneys
(Harold N. Springstead, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On October 26, 2000, the Bogota Education Association (Association or BEA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the Bogota Board of Education (Board), alleging that the Board refused to negotiate over the impact of its decision to extended single session days by one-half hour. These actions allegedly violate provision

5.4a(5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On August 16, 2001, a Complaint and Notice of Hearing issued. On December 3, 2001, the Board filed an Answer, denying that it engaged in an unfair practice, specifically refuting the claim that the Association made a demand to negotiate over terms and conditions of employment, and asserting that the extension of the workday was required by state education regulations. On December 7, 2001, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by March 1, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Association represents a negotiations unit of teachers, nurses, guidance counselors, librarians, coordinators, department heads, secretaries, a psychologist, social worker and learning disabilities specialist (J-1, at page 3).[2/] At the time of the hearing, the most recent agreement was effective from July 1, 1999 through June 30, 2001 (J-1).

1/ 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."

2/ "T- " refers to the transcript of the hearing on December 7, 2001; "J- " refers to joint exhibits; "C- " refers to Commission exhibits; and "CP- " refers to Charging Party's exhibits.

2. The parties' 1999-2001 collective negotiations agreement provides at Article VI, "School Year and Holidays," that ten-month professional employees will work the school calendar as scheduled, and that ten-month secretarial employees work from September 1 to June 30th. All ten-month employees' holiday schedule is set forth in the school calendar, "approved by the Board of education." Twelve-month employees' holidays are identified as listed, "if schools are not in session" (J-1, page 9). The agreement is silent as to the length of school days and the work year.

3. Single session days are half-days, often immediately before holiday periods (T63). There are no references to single session days in the collective agreement. N.J.A.C. 6:3-9.3, "School Attendance," at paragraph (e), states:

> A half-day class shall be considered the equivalent of a full day's attendance only if in session for four hours or more, exclusive of recess periods or lunch periods.

In the Bogota school district, there are approximately five scheduled single session days at the high school and seven at the lower grades (T13; CP-2). In the past, single session days included "passing time" (between-class time), recess, and may have included a full lunch period, shortened lunch period or no lunch period (T54).

Prior to September 2000, single session days were scheduled from 8:30 a.m. to 12:30 p.m. At the beginning of school year 2000-2001, the Board implemented a schedule wherein single session days were increased by one-half hour; schools are in session from

8:30 a.m. to 1:00 p.m. (T13, T20, T33, T54, T60). Unit members are paid for a full day on single session days (T56).

4. Superintendent John J. Petrelli, who came to the Board in August 2000, believed that the change was necessary to bring the Board's practices in compliance with state regulations (T58, T61, T64). Petrelli learned that the Board's single session days were four hours including recess and passing time (T64). Petrelli explained that in 1998 the Department of Education monitored all districts' time schedules and directed that those districts not in compliance with N.J.A.C. 6:20-1.3(b) and (e) would be required to change their schedules or face the loss of state aid (T61).3/

5. William Wolak is an english teacher employed by the Board for 17 years and the Association's chief negotiator (T13). On September 15, 2000, Wolak requested a meeting between the superintendent and the Association's negotiating committee to discuss the issue of the increased time for single session days (T14). Wolak simultaneously handed the superintendent a letter which reads:

> The extension of the working day on single session days must be negotiated with the BEA. Therefore, the BEA Negotiating Committee would like to meet with you to rectify this problem as soon as possible (CP-1; T14-T16, T21).

3/ Petrelli cited N.J.A.C. 6:20-1.3(b) and (e) as authority for the change (T61-T63, T81). On cross examination, it was suggested that the cited rule had been repealed but Petrelli insisted that it had not been repealed (T81). That citation was not located by a search of the regulations. However, N.J.A.C. 6:3-9.3(b) and (e) appear to have succeeded the rule cited by Petrelli.

CP-1 contains a list of other recipients of the letter, including Board President Carpenter (CP-1; T29-T30). Wolak testified that Petrelli responded that he would not negotiate over the issue because he did not have a duty to do so (T14, T27). Wolak believed Petrelli spoke for the Board in denying the request to negotiate (T27-T28). By forwarding a copy of the letter to the Board president and speaking to Petrelli, Wolak believed he had effectively made a demand to negotiate over the issue (T27-T28).

Kenneth Dahse is an english teacher employed for 25 years and is the president of the Association (T33). In September 2000, Dahse also approached Petrelli to demand negotiations over the change in hours (T33-T34). Dahse was also told by Petrelli that "he didn't have to negotiate" (T34, T46). Dahse then consulted with an NJEA field representative who advised him that the Association would file an unfair practice charge (T34). After his aborted September meeting with Petrelli, in an attempt to resolve the issue and avoid legal processes, Dahse verbally proposed to Petrelli that the issue would be settled if the Board would grant compensatory time for the extended work hours, in lieu of additional compensation (T35).

Petrelli's testimony differs from Wolak and Dahse's. Petrelli testified that he told Wolak and Dahse only that he did not negotiate for the Board and denied saying that he would not negotiate, or that he did not have to negotiate (T65-T66, T74, T83-T84).

I do not credit Petrelli's version of these discussions. I credit Wolak and Dahse's testimony that when they approached him he informed them that he would not negotiate, nor was he required to negotiate over the issue. In other testimony, Petrelli emphasized that the single session days had to be extended to bring the Board's practices in compliance with the rule, and that he, as superintendent, had the duty and [managerial] prerogative to implement the change (T64-T65, T79). I find that his testimony reveals his belief that no component of the hours for single session days could legitimately be negotiated. His communication of his belief to the two Association officers is consistent with their versions of the exchanges.

6. Although Petrelli is not a member of the Board's negotiations committee, he often attends negotiations sessions in his role as advisor to the Board's negotiators (T23, T65-T66, T70, T74-T75). Petrelli testified that the union did not ask him to ask the Board to negotiate over the extended workdays (T85). The usual procedure for initiating negotiations is the sending of a letter to the Board secretary or president (T47, T67-T69). Petrelli further stated that it is not his responsibility to report every conversation with the Association to the Board and, in his tenure at Bogota, he has never presented the Association's request to negotiate to the Board (T66-T67). However, on at least two occasions Petrelli has negotiated directly with the Association over terms and conditions which resulted in two side-bar agreements (T24,

T41, T46, T48, T50, T70, T75-T76, T87-T89). One side-bar agreement dealt with the entitlement of retirees to increases in unused sick leave payouts and a second concerned payment for evaluation tasks related to the HSPT test (T87-T88). In both cases, proposals were developed between the superintendent, school business administrator and the Association's president, and then ratified and signed by both sides (T88-T89).

7. On January 22, 2001, after the filing of the original charge and before the amended charge was filed, NJEA Field Representative Raymond Skorka sent a letter (CP-2) to Board Attorney Richard Broverone stating in pertinent portions:

> As you are aware, the BEA has filed grievances and ULP claims relative to several issues. On behalf of the BEA, I am suggesting possible settlements as indicated below.
>
> Issue #1 - Extension of the One-Session (Half) Days
>
> The district extended the school day on one-session days in order to comply with state regulations. At the high school, there are five (5) days affected by the change: Back to School Night, Election Day, Wednesday prior to Thanksgiving Day, the day prior to the December recess, and Holy Thursday. These days were extended by thirty minutes. At the elementary schools, there are seven days so affected: the same as above, plus two parent conference days. The elementary school days were lengthened by ten minutes, for a total of seventy (70) minutes.
>
> To resolve this issue, the B.E.A. suggests that staff members be given equal comp time. High school staff would be permitted to depart at student dismissal time on 5 days. Elementary teachers would be permitted to leave with students on 2 days, plus 10 minutes on one other day.

> The B.E.A. would be amenable to utilizing a sign-out sheet for the purposes of keeping track of teachers' available and used comp time.
>
> * * * * * *
>
> In closing, we are hopeful that the Board can accept these positions to settle the above matters. Finally, should the Board desire modifications regarding the above issues for the future, those items can be addressed during contract negotiations. (CP-2)

8. To date, the Board has declined to negotiate with the Association over the subject matter of the extended single session days implemented in September 2000 (T12).

ANALYSIS

The Association alleges that the Board refused to negotiate over the impact of the decision to extend single session days by one-half hour, in violation of section 5.4a(5) of the Act. The Board argues that the Association never made a proper demand to negotiate the impact of the extended workdays and thus, it had no duty to negotiate over this issue. Because I disagree with the Board about the sufficiency of the Association's "demand," I find that the Board violated the Act by refusing to negotiate over the impact of its decision to extend single session days.

The duty to negotiate over terms and conditions of employment is set forth in N.J.S.A. 34:13A-5.3:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

This principle embodies the policy of the Act prohibiting employers from unilaterally establishing working conditions. In Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978) the Court noted that the duty to negotiate is continuing:

> We note that by its express terms, the statutory proscription of any unilateral implementation of a change in any of the terms and conditions of employment is not limited in its applicability to the period of negotiation for a new collective agreement. Rather, it applies at all times . . . 78 N.J. at 48.

The Board asserts that during the period from Fall 2000 until the hearing, the parties were in negotiations for a successor agreement and yet the Association never put a specific demand on the table, or sent a letter to the Board secretary or president seeking negotiations over compensation for the single session days. The Board also asserts that a demand made to the superintendent is not valid because he is not on the negotiations committee. The facts do not support these assertions.

The Association does not dispute the Board's right to extend single session days unilaterally. In September 2000, after the change was announced, Association Member Wolak approached the superintendent and stated in person and in writing that he wished to set up a meeting between the superintendent and the negotiations committee to rectify the problem of the Board's failure to first negotiate over the extension of the single session days (CP-1). The letter was also sent to Board President Carpenter. I find that this statement and the letter properly conveyed to the superintendent and

the Board President a demand to negotiate. The demand could have been interpreted to mean that the Association wanted to negotiate the implementation of the extra half-hour rather than compensation for those who worked the extra time, ie., negotiations over the impact of the decision. However, when in a second meeting with Superintendent Petrelli, Association President Dahse conveyed a proposal which only addressed compensatory time in lieu of extra pay for the extra hours, it became clear that the Association's demands related solely to impact negotiations. Thus, I find that at that point, prior to the filing of the charge, Superintendent Petrelli was placed on notice that the Association accepted the Board's imposition of additional work time, but that it wanted to negotiate the severable and negotiable subject of compensation, or, in this case compensatory time off. Finally, CP-2, dated January 22, 2001, the NJEA's letter proposal to Attorney Broverone, corroborates that the Association was interested in negotiations over additional time as a substitute for extra money. Even if I were to accept the argument that Petrelli was not a proper party to receive a negotiations demand (which I do not), both the Board president and attorney were made aware of a demand for compensation.

The Association is entitled to regard Petrelli as an agent of the Board for purposes of conveying proposals for negotiations. Petrelli appears at most negotiations sessions as an advisor. He is generally involved in the negotiations process and under the facts here, he is an agent of the Board for the purpose of receiving

notice of negotiations demands. In other matters, Petrelli has directly negotiated with Association members on side-bar agreements covering terms and conditions of employment. Even if I accepted the Board's assertion that negotiations demands must be directed to the Board's negotiations committee, I would find that under the circumstances of this case, the Association had fulfilled that obligation. See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div Docket No. A-1642-82T2 (1983)(finding superintendent an agent of the Board); Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990)(Commission rejected argument that clerk and adminstrator acted outside their scope of authority finding Board had duty to negotiate before rescinding sick leave conversion practice).

Under Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980), the compensation due employees whose work days are extended is mandatorily negotiable. The duty to negotiate is a continuous one. Galloway. The Board is not excused from the duty to negotiate mandated by N.J.S.A. 34:13A-5.3 and 5.4, unless the specific term or condition has already been negotiated, even if the first attempt to deliver the demand were flawed. (I have found under the facts in the record that the demand was made.) Additional compensation for an extension of the work day is mandatorily negotiable. In Hunterdon Cty. and CWA, 116 N.J. 322, 331-332 (1989) our Supreme

Court observed:

> It is clear that employer actions that arguably affect compensation may be mandatorily negotiable. Although the clearest example of such effects is provided when the disputed actions concerns rates of pay and working hours, see, e.g., In re IFPTE Local 195 v. State, 88 N.J. at 403;. . ., Woodstown-Pilesgrove, . . . , 81 N.J. 582, 589 (1980), our courts have upheld findings by PERC that modest amounts of compensation, or even seemingly minor non-economic benefits, can sufficiently affect the work and welfare of employees to trigger mandatory negotiability. See, e.g., In re Byram Township Bd. of Educ., 152 N.J. Super. 12 (App.Div.1977) (mandatory negotiability of proposed pay phone; mirror and shelf in teacher's lounge); Bridgeton Educ. Ass'n v. Bridgeton Bd. of Educ., 132 N.J. Super. 554 (Ch. Div. 1975) (unilateral withdrawal of $100 stipend to special education teachers violated Act).

In Woodstown-Pilesgrove, the teachers sought compensation for an extra 120 minutes worked as a result of the extension of the work day on the day before Thanksgiving. Here, the Association is entitled to negotiations on the extended single session days implemented in September 2000.

Accordingly, I find that the Board violated provision 5.4a(5) when it refused to negotiate over the impact of the decision to add one-half hour to each single session day in September 2000.[4/] Accord, Passaic Bd. of Ed., P.E.R.C. No. 2001-54, 27 NJPER 182 (¶32059 2001)(Commission finds that the Board's decision not to compensate teachers for extension of single session days by 17 minutes was mandatorily negotiable).

4/ I do not find negotiations are required over the implementation of the extra half-hour in order to reflect the Association's demand.

RECOMMENDED ORDER

I recommend that the Bogota Board of Education:

A. Cease and desist from:

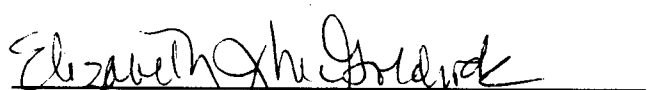
1. Refusing to negotiate in good faith with the Bogota Education Association over the impact of the decision to add one-half hour to each single session day in September 2000.

B. Take the following affirmative actions:

1. Immediately negotiate with the Association over the impact of the decision to add one-half hour to each single session day in September 2000.

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 and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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



Elizabeth J. McGoldrick
Hearing Examiner

DATED: July 12, 2002
Trenton, New Jersey

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 refusing to negotiate in good faith with the Bogota Education Association over the impact of the decision to add one-half hour to each single session day in September 2000.

WE WILL immediately negotiate with the Association over the impact of the decision to add one-half hour to each single session day in September 2000.

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

APPENDIX "A"