P.E.R.C. NO. 85-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-83-159-84

NEWARK TEACHERS UNION, LOCAL 481, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Newark Board of Education did not violate the New Jersey Employer-Employee Relations Act when it unilaterally developed and implemented an Attendance Improvement Program. The Commission also holds, however, that the Board violated the Act when it unilaterally repudiated its contractual obligation to give ten non-accumulative sick days to teachers with 25 years of service; unilaterally enacted an incentive program for employees not using sick leave; and dealt directly with individual employees, rather than the majority representative, about that program.

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NEWARK TEACHERS UNION, LOCAL 481, AFT, AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Louis C. Rosen, Esq.

For the Charging Party, Tomar, Gelade, Kamensky, Klein, Smith & Lehmann, Esqs.
(Sidney H. Lehmann, of Counsel)

DECISION AND ORDER

On December 30, 1982, the Newark Teachers Union ("Union") filed a five-count unfair practice charge against the Newark Board of Education ("Board") with the Public Employment Relations Commission. The Union alleged that the Board violated subsections 5.4(a)(1),(2),(3), and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it developed

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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."

and implemented its Attendance Improvement Program ("AIP") without negotiations with the Union. Specifically, the charge alleged that the AIP unilaterally changed terms and conditions of employment such as sick, funeral, union and personal leave (Count One) and unilaterally rescinded the grievance procedure because it subjects employees to the loss of increments and termination which are not subject to binding arbitration (Count Two). The charge further alleged that the Board negotiated in bad faith when it agreed to terms and conditions of employment during contract negotiations although it knew the AIP would unilaterally alter these provisions (Count Three). The charge further alleged that the AIP discourages employees in the exercise of rights guaranteed by the Act (Count Four) and that the Board has bypassed the Union and dealt directly with employees regarding the AIP (Count Five).

The Board submitted an Answer. It admitted adopting the AIP without negotiations with the Union. It denied the remaining allegations of the charge and asserted that the AIP is "not negotiable because it embodies generally the managerial prerogative and responsibility to monitor, control and suspend the abuse of sick leave."

On January 19, 1983, the Union filed an application for interim relief seeking to enjoin enforcement of certain portions of the AIP. Following a hearing, Commission Designee Edmund G. Gerber issued his decision. In re Newark Bd. of Ed., I.R. No. 83-14, 9 NJPER 189 (¶14088 1983). He restrained the implementation

of that portion of the AIP which eliminated the contractual provision of ten non-accumulative sick days for teachers with 25 years of service. He declined to restrain the implementation of those portions of the AIP: (1) requiring employees to certify that their sick leave absences were due to illness, (2) requiring attendance at conferences after a certain number of absences, and (3) potentially subjecting employees to loss of increment and separation for excessive absences. Relying on In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 94 (¶13039 1983) ("Piscataway I"), he found that the Board has the managerial right to implement such measures to control abuse of sick leave and rejected the Union's claim that the signing of a certificate created an "undue burden" on individual employees.

On April 25, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On November 7, 9, 14, 15, December 20, 22, 1983 and January 9, 10, 13, 1984, Hearing Examiner Alan R. Howe conducted hearings. The parties entered into a partial stipulation of facts, examined witnesses, and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On May 3, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-57, 10 NJPER 300 (¶15146 1984) (copy attached). First, he found that portion of the AIP which rescinded the contractual provision of ten days of non-accumulative sick leave for teachers with 25 years of service to

constitute an unfair practice. The Hearing Examiner, however, recommended dismissal of the Complaint's remaining allegations. Citing Piscataway I, he found that the Board had a non-negotiable managerial prerogative to require employee certificates of illness and employee conferences after a certain number of absences as part of the establishment of a sick leave verification program. He further found that the Board did not violate the Act when its Executive Superintendent communicated with employees concerning the AIP or when it prepared the AIP during contract negotiations.

On May 29, 1984, after receiving an extension of time, the Union filed exceptions.[2/] It contends that the Hearing Examiner erred when he concluded that the Board had a managerial prerogative to require employees on sick leave to certify they were sick or, if absent more than a certain number of days, to attend a conference. The Union argues that these requirements unilaterally changed a mandatorily negotiable term and condition of employment -- entitlement to sick leave -- and deprived employees of their statutory right to sick leave. It also argues that the Hearing Examiner erred in not finding that the Board negotiated in bad faith when it failed to advise the Union of the AIP during negotiations; that it unlawfully solicited employee input into the incentive program, thereby impairing the Union's status as exclusive representative; and that it unilaterally altered terms and conditions of employment by instituting the employee incentive program.

2/ The Union has also requested oral argument. We deny this request.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. We adopt and incorporate them here.[3/]

We first consider the Union's claim that the Board did not have a managerial prerogative to require employees to certify that their absences were due to illness in order to receive sick leave.[4/] In essence, the Union is claiming that employees are contractually and statutorily entitled to sick leave when they are sick and that the Board may not unilaterally reduce those days on the sole basis that they have refused to submit certifications. The Union relies heavily on uncontroverted testimony that employees were not granted sick leave even though the Board did not suspect these employees of abusing sick leave. Rather, the Board's sole reason for refusing to grant leave was the employees' failure to complete the certification forms.[5/] We reject the Union's contention.

3/ The Union's exceptions, although nominally directed in part at the findings of fact, do not dispute these findings. Rather, the Union objects to the conclusions ultimately drawn from them. For example, it argues that the communications from the Board constituted "direct dealing," not merely an explanation. The other factual exceptions relate to essentially irrelevant issues, such as whether conferences are required after consecutive or cumulative absences, the reason the AIP clarification was issued or when the Department of Education first required a program to monitor absences. Since such findings are not relevant in resolving the issues raised in this proceeding, we do not address them.

4/ The Union makes a similar claim with respect to certification of funeral leave. The following analysis applies to that claim as well.

5/ The Board refused to grant paid leave to employees initially failing to sign the form, but granted paid leave to employees subsequently signing the form.

In a companion case decided today, In re Newark Bd. of Ed., P.E.R.C. No. 85-__, 10 NJPER ___ (¶_____ 1984), we held that the certification requirement and the withholding of sick leave benefits from employees failing to comply with this requirement constituted a non-negotiable and non-arbitrable managerial prerogative. In pertinent part, we said:

> Under Piscataway I, the Board had a managerial prerogative to adopt, as part of a sick leave verification program, the reasonable and unintrusive requirement that employees fill out a form certifying they were sick. The prerogative to adopt a sick leave verification form would be an empty one, however, if employees could not be expected or required to fill out the forms in order to receive sick leave pay. In short, the Board's ability to establish a certification requirement and the employees' obligation to comply with that requirement in order to obtain sick leave benefits are inseparable and fundamental aspects of the managerial prerogative which Piscataway I recognized. See also, Piscataway II; In re City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), appeal pending App. Div. Docket No. A-2397-83T3; In re Union County Regional High School Dist., P.E.R.C. No. 84-102, 10 NJPER 176 (¶15087 1984); In re City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983); In re Freehold Regional High School Bd. of Ed., P.E.R.C. No. 83-10, 8 NJPER 438 (¶13206 1982); In re Rahway Valley Sewerage Authority, P.E.R.C. No. 83-80, 9 NJPER 52 (¶14026 1982).
>
> While this case, unlike Piscataway I and subsequent cases, does involve an actual denial of sick leave benefits, that fact alone does not transform this case from one predominantly involving the establishment of a sick leave verification program to one predominantly involving its application. Again, the Board's right to establish a certification requirement necessarily includes a right to receive compliance with that requirement. Once an employee has submitted the certification requested, however, that employee may grieve any subsequent denial of sick leave benefits based on the Board's determination that he was not in fact sick. In short, a matter predominantly involves the application rather

> than the establishment of a sick leave verification policy when the employer has formulated the policy; the employees have complied with the policy; and the employer has then decided to withhold sick leave benefits from particular employees.
>
> We further believe that Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980) supports our holding. There the Court noted that in making a scope of negotiations determination "[t]he nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made." Id. at 591. See also In re IFPTE, Local 195 v. State, 88 N.J. 393, 404-405 (1982) (To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer). An application of the balancing test in this particular setting establishes that the instant dispute is not arbitrable. On the one hand, the Board has an important interest in insuring that sick leave is not abused and certification is an apparently reasonable means to use towards meeting that goal. On the other hand, the certification requirement has only a slight and unintrusive impact on the teachers' work and welfare. Thus, the scales clearly tip towards finding the Board's managerial prerogative to control possible sick leave abuse is the predominant interest implicated here. [Id. at ___ (footnote omitted)].

That analysis applies here and disposes of this issue.

We next consider whether the Board had a non-negotiable managerial prerogative to require employees on sick leave for a certain number of days to attend conferences with supervisory personnel. We hold it did.

There is no merit to the Union's claim that these conferences may not be imposed unilaterally where the Board does not suspect that an individual abused sick time. The dispositive fact is that the Board has made the managerial determination

to apply this policy on a uniform basis and the Union is challenging the establishment of this policy. Accordingly, this policy decision to require conferences for all employees after a certain number of absences is part of the employer's prerogative to establish a sick leave verification program under Piscataway I. Indeed, the uniformity of the program negates any possible contention that it is designed to harass any particular employee or retaliate against any employee's exercise of protected rights. See, In re City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983).6/

The Union has also objected to that portion of the AIP which indicates that after eight absences, the employee may be subjected to loss of increments, reduction of salary, or separation. Specifically, the AIP provides:

> Upon reaching the prescribed number of absences, the individual may be subject to loss of increment or reduction in salary, or if the two full years of prior history of absences, plus current year's history warrant such, separation from district.

The Union contends that by this provision the Board is disciplining employees who have exercised their statutory right to use sick leave. It notes that employees are guaranteed ten sick days in any school year, N.J.S.A. 18A:30-2, and have the contractual right to 15 sick days. We reject this contention.

This provision, as written, does not impose discipline. By its very terms, it only provides that after an employee reaches a certain number of absences, the Board may consider

6/ There is no indication in the record that the certification and conference requirements, uniform on their faces, were in any respect applied in a discriminatory manner.

whether to institute disciplinary proceedings in the event it determines that sick leave is being abused. Further, there is no indication in the record that any employees have, in fact, been disciplined as a result of this provision. Rather, it is quite clear from the record that an employee who uses eight days of sick leave is not automatically disciplined. Given this posture of the case, we do not find the mere establishment of this aspect of the AIP to constitute an unfair practice. See Rahway Valley Sewerage Authority, P.E.R.C. No. 83-80, 9 NJPER 523 (¶14026 1983).7/

We next consider the Union's contention that the Board refused to negotiate in good faith when during successor negotiations it did not disclose its intention to adopt subsequently the AIP. Under the totality of circumstances of this case, we do not believe that the Union has proved that the Board had an obligation to disclose this intention or that it otherwise negotiated in bad faith.

The Union has also objected to the Board's unilateral adoption of the "incentive program options" part of the AIP, claiming that such action violates our Act. We agree with the Union that the Board violated the Act when it enacted the incentive program.

7/ Although the mere establishment of this provision of the AIP is not an unfair practice, the application of this provision to discipline an employee may be contested in an appropriate forum. Since there is no indication in the record that employees have been disciplined under this provision, we intimate no opinion as to what the appropriate forum for such challenges would be.

The program in question granted employees with accumulated sick leave certain benefits including the continuation of health insurance following retirement, payment of certain sums of money to the employees' estate upon his or her death, and employment in a consulting capacity the year before retirement. This program was enacted unilaterally, despite well-settled law establishing that compensation and other benefits based upon accumulated sick leave are mandatory subjects for negotiations. See, e.g., Maywood Ed. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974); In re Union City Bd. of Ed., P.E.R.C. No. 84-79, 10 NJPER 46, 47 (¶15026 1983); In re Professional Fire Officers Ass'n Local 1860, P.E.R.C. No. 83-143, 9 NJPER 296 (¶14137 1983). The Hearing Examiner did not find a violation of the Act presumably because the Executive Superintendent eliminated the incentive program for sick leave on January 24, 1983. The unfair practice occurred, however, when the Board adopted the sick leave incentive program unilaterally, see Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 35 (1978) (Commission's authority to adjudicate unfair practices applies even where the offending conduct has ceased). Under all the circumstances of this case, we do not believe the subsequent rescission of the incentive program should be accepted as a defense. We note in particular that both the Union and the Board had each proposed alternative sick leave incentive plans during the 1982 negotiations and that both proposals were dropped and the parties reached agreement just prior to the commencement of the school year. Given these circumstances, the Board's unilateral action violated

its N.J.S.A. 34:13A-5.3 obligation to negotiate in good faith. The subsequent rescission does, however, establish that further affirmative relief is not required. In re Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173, 175 (¶15085 1984).

We next consider the Union's contention that the Board's solicitation of employee suggestions concerning the incentive program violated the Act. We agree.

The Board distributed a pamphlet regarding the AIP which, in pertinent part, provided:

> ...the AIP intends to offer direct and tangible rewards to those employees with outstanding attendance records. The executive superintendent is currently working on an incentive program which will attempt to provide salary bonuses for those employees who demonstrate exemplary attendance. Recommendations are also being accepted from employees themselves about the nature of the reward program.

As previously mentioned, the Board did not attempt to negotiate with the Union over possible rewards and bonuses.

N.J.S.A. 34:13A-5.3 provides, in pertinent part:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit.

We have consistently emphasized that this exclusivity principle is a "cornerstone of the Act's structure for regulating the relationship between public employers and public employees." In re Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983); In re New Jersey Dept. of Law & Public Safety,

I.R. No. 83-2, 8 NJPER 425, 427 (¶13197 1982). See generally, Lullo v. Inter. Assoc. of Fire Fighters, 55 N.J. 409, 426 (1970). It is quite clear that the Board's solicitation of suggestions from individual employees about the nature of the reward program violated the Act. These matters, as already noted, are mandatory subjects for negotiations. The Board, however, unilaterally altered these terms and conditions by creating the incentive program. It further violated the Act when, rather than negotiate, it solicited individual employee input and thus undermined the Union's right to exclusive representative status.[8/]

Finally, we agree with the unchallenged conclusion of the Hearing Examiner that the Board violated the Act when it unilaterally repudiated that provision of the parties' collective negotiations agreement which provided that teachers with 25 years of service shall receive ten non-accumulative sick days after the exhaustion of all accumulative leave. It is well-settled that such a provision is legal and not preempted by statute. In re Hoboken Bd. of Ed., P.E.R.C. No.81-97, 7 NJPER 135 (¶12058 1981), aff'd App. Div. Docket No. A-3379-80T2 (1982), pet. for certif. dismissed (after oral argument) as improvidently granted.

ORDER

IT IS HEREBY ORDERED that:

A. The Respondent Board cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by

8/ We do not, however, agree with the Union that the general explanation of the AIP distributed to individual employees violated the Act.

this Act by (a) repudiating the provision of the current agreement of the contract (Article X, Section 2, paragraph B) that grants teachers with 25 years experience in the system ten additional non-cumulative sick days per year after their accumulative leave has been exhausted, and (b) soliciting suggestions from individual employees concerning compensation for accumulated sick leave.

2. Changing sick leave and compensation for accumulated sick leave without negotiations with the Union.

B. Take the following action:

1. Rescind that portion of page 52 of the Attendance Improvement Program which conflicts with Article X, Section 2, Paragraph B of the collective negotiations agreement and make whole any teacher with 25 years of service for losses incurred.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Board to insure 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 Board has taken to comply herewith.

In addition, the Commission finds that the Board further violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally instituted the incentive program for sick leave. However, in view of the Board's rescission of this program, affirmative relief is not required.

All other allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 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 employees in the exercise of the rights guaranteed to them by this Act by repudiating the provision of the current agreement of the contract (Article X, Section 2, paragraph B, that grants teachers with 25 years experience in the system 10 additional non-cumulative sick days per year after the accumulative leave has been exhausted.

WE WILL NOT change sick leave and compensation for accumulated sick leave without negotiations with the Union.

WE WILL rescind that portion of page 52 of the Attendance Improvement Program which conflicts with Article X, Section 2, Paragraph B of the collective negotiations agreement and make whole any teacher with 25 years of service for losses incurred.

WE WILL negotiate over terms and conditions of employment such as incentive programs for not using sick leave with the employees' majority representative, the Newark Teachers Union, and will not deal directly with individual employees over such matters.

NEWARK 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

NEWARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-83-159-84

NEWARK TEACHERS UNION, LOCAL 481, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally established an Attendance Improvement Program (AIP) for the purpose of monitoring and verifying the use of sick leave and other leaves by all employees of the Board. Although the AIP is considerably more complex than other sick leave verification programs, which the Commission has considered, its basic objective was to monitor the use of sick and funeral leave and to improve employee attendance. This the Hearing Examiner found was the exercise of a legitimate managerial prerogative. The Hearing Examiner rejected the contention of the Charging Party that the Board was obligated to negotiate disciplinary criteria established by the AIP. The Hearing Examiner found that the case was governed by Piscataway Township Board of Education (Piscataway I), P.E.R.C. No. 82-64, 8 NJPER 95 (1982) and New Providence Board of Education, P.E.R.C. No. 83-88, 9 NJPER 70 (1982).

The Hearing Examiner did however recommend that the Commission find that the Board violated Subsection 5.4(a)(1) and (5) of the Act when through the AIP it attempted to negate a provision in the current collective negotiations agreement, which provides that teachers with 25 years of experience shall receive 10 non-accumulative sick days per year after the exhaustion of all accumulated leave. In reaching this result the Hearing Examiner relied upon Hoboken Board of Education v. Hoboken Teachers Association, P.E.R.C. No. 81-97, 9 NJPER 135 (1981), aff'd. App. Div. Docket No. A-3379-80T2 (1982), appeal dismissed 93 N.J. 263 (1983).

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. 84-57

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

In the Matter of

NEWARK BOARD OF EDUCATION,[1/]

Respondent,

-and-

Docket No. CO-83-159-84

NEWARK TEACHERS UNION, LOCAL 481, AFT, AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Louis C. Rosen, Esq.

For the Charging Party
Tomar, Gelade, Kamensky, Klein, Smith & Lehmann, Esqs.
(Sidney H. Lehmann, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 30, 1982 by the Newark Teachers Union, Local 481, AFT, AFL-CIO (hereinafter the "Charging Party" or the "NTU") alleging that the Newark Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act") -- Count I: that on November 29, 1982, after the conclusion of negotiations in September 1982 for the current collective negotiations agreement, which is effective July 1, 1982 to June 30, 1985, the Board unilaterally and without negotiations with the NTU adopted a resolution providing for the implementation of an "Attendance Improvement Program" (hereinafter the "AIP"), which, it is alleged, revokes and modifies terms and conditions of employment of employees represented by the NTU in such areas as personal leave, funeral leave, leave for union business and the conditions for receipt of accumulated sick leave reimbursement; Count II: that the AIP unilaterally rescinds the grievance procedure,

1/ The official name for the Respondent is "Board of Education of the City of Newark," which the Hearing Examiner has condensed to conform to prior captions involving this Respondent before the Commission.

including binding arbitration, for breaches of the agreement covering sick leave, personal leave, accumulation of sick leave, and for other grievances arising from the application of the AIP, i.e., the AIP provides that if sick time is misused an individual is subject to the loss of increment or reduction in salary, and for a second offense, termination; Count III: that negotiations for the current agreement commenced in October 1981 and, during these negotiations, the NTU made concessions with respect to wages, hours and other conditions in order to convince the Board to drop its proposals on sick leave, personal leave, evening meetings, funeral leave and other matters, all the while the Board was in the process of developing the AIP, which would alter and abridge provisions of the agreement previously agreed to, supra, which conduct is alleged to constitute bad faith negotiations by the Board; Count IV: that the employees represented by the NTU are entitled to have their conditions of employment governed by the agreement; the adoption of AIP is intended to discourage these employees in the exercise of the rights guaranteed to them by the Act; and Count V: that the Board has attempted to deal directly with employees represented by the NTU with respect to the AIP by encouraging them to bypass the NTU, such communications by the Board for example being a memorandum dated December 6, 1982 to all employees from the Superintendent. All of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[2/]

The Unfair Practice Charge was followed by an application for interim relief, which was heard by Hearing Examiner Edmund G. Gerber on February 10, 1983. On February 23, 1983 a decision issued, which denied the request for interim relief in all respects

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2/ 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.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(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."

except one[3/] (I.R. No. 83-14).

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 25, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held November 7, 9, 14, 15 and December 20, 22, 1983 and January 9, 10 and 13, 1984[4/] in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 23, 1984.

An Unfair Practice Charge having been filed with a Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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

2. The Newark, Teachers Union, Local 481, AFT, AFL-CIO is a public employee representative within the meaning of the Act, and is subject to its provisions.

3. The NTU represents approximately 5500 employees in two collective negotiations units: Teachers[5/] and Clerks (contracts J-4 & J-5) and Aides and Per Diem Substitutes (contracts J-6 & J-7). The contracts cover the period July 1, 1980 through June 30, 1985.

4. The Board's Executive Superintendent is Dr. Columbus Salley.

3/ The Board was restrained from implementing the AIP to deny non-cumulative sick leave for employees with 25 years of seniority, i.e., 10 additional days.

4/ The delay in the commencement of the hearing in this matter is attributable to accomodating the schedules of counsel for the parties and allowing an opportunity for discovery.

5/ The employees herein involved.

5. In November 1981 negotiations commenced for the agreement, which ultimately became effective July 1, 1982 through June 30, 1985 (J-5 & J-7). The agreement which is material hereto is Exhibit J-5, which covers, in particular, the teachers who are the subject of this proceeding. Under date of December 22, 1981 the NTU and the Board submitted to one another their contract proposals covering teachers (CP-5 and CP-6). The collective negotiations concluded with a memorandum of agreement on August 20, 1982 (CP-9). The Board's ratification occurred on August 26, 1982 (CP-8) and the NTU ratified on September 7, 1982.

6. Of the Board's 26 proposals for contract changes six of them pertained to sick leave (CP-6, pp. 1, 3, 3a, 3b, 6 and 20). The memorandum of agreement of August 20, 1982 indicates that only one item out of the six items set forth pertains to sick leave (CP-9, Agreement #1). This provision was incorporated into Exhibit J-5. The Board's other sick leave proposals were abandoned or withdrawn.

7. Sometime immediately prior to July 1982 Superintendent Salley directed Anthony Megaro, the Special Assistant to the Executive Superintendent, to work with the Policy Review Committee (J-1, p. ii) and to develop a proposed AIP. Megaro was the Chairman of the Committee, which worked during July and August 1982 and completed its proposal in late August 1982. This document was then submitted to Salley and the Board's counsel. The document was reproduced under date of September 1982 and received in evidence as Exhibit J-1.

8. The NTU first learned of the existence of the AIP when it received a copy of J-1 under date of November 16, 1982 (CP-1). Shortly after receiving J-1, representatives of the NTU spoke to Beverly A. Williams, the Board's Executive Director of Labor Relations, in an effort to negotiate regarding the proposed AIP, but Williams stated that it was "not negotiable." Other collective negotiations units in the Newark School District were solicited by the Board for comment and discussion regarding the proposed AIP. However, none of those units sought to negotiate with the Board on the subject. The NTU elected not to participate in informal discussions with the Board regarding the AIP.

9. The Board, at a special meeting on November 29, 1982, approved the proposed AIP by a vote of 8-1 (CP-3, p. 4 and CP-4, p. 51).

10. On December 6, 1982 Superintendent Salley issued a memo to all employees regarding the AIP, which reassured the employees that the Board would "continue to respect and recognize the rights of personnel to absent themselves, in an appropriate manner, from work in cases of illness or other valid reasons..." He added that it was hoped that employees would be encouraged to "...accumulate unused sick days..." He concluded by stating that each site administrator would receive a copy of the AIP program prior to its implementation on January 3, 1983. (CP-12).

11. In January 1983 the Board's Office of Public Information issued a brochure to students, the community and employees explaining the AIP, how it came about and how it works (CP-13). See also, Exhibit CP-14.

12. The AIP (J-1, ultimately succeeded by J-2 in 1983) is a 78 page document, portions of which are intended to improve and standardize the Board procedures for reporting and recording employee absences. The NTU does not contest the Board's managerial prerogative to attempt to improve the recording of employee attendance, nor does it dispute its right to monitor employee absences and take action against employees who are misusing or abusing sick leave. What the NTU objects to is the Board's effort to improve employee attendance by unilaterally altering terms and conditions of employment established by law, agreement (J-5) and/or past practice.[6/] The Board counters that its purpose, in adopting the AIP, was to monitor the use of sick leave, and other types of leave, and to impose progressive discipline for abuse of leave thereby effectuating very substantial savings.[7/] The Board argues that there was never any intent to limit the taking of legitimate sick leave or any other kind of leave.[8/]

6/ See NTU's Brief, p. 4.

7/ The Board offered in evidence a series of computer printouts comparing the 1981-82 school year with the 1982-83 school year to show a savings in expeditures for sick and funeral leave and improved attendance in the 1982-83 year (R-1 through R-11).

8/ See Board's Brief, p. 3.

13. Article X, Section 2, Sick and Personal Leaves, Para. A of the current agreement (J-5,p. 41) and the prior agreement (J-4, p. 44) provides that teachers "...shall be granted sick leave for illness for fifteen (15) days in each school year..." and, further, in Para. C that "Unused sick leave shall be accumulated without limit..." Section 5 of the same Article X provides in each agreement that "No deduction of salary of a regular employee shall be made for absences as follows: A. Death in immediate family or household - absence not to exceed the four (4) consecutive calendar days immediately following the death. B. Funeral of near relative other than member of immediate family - absence not to exceed one (1) day..." (J-5, p. 43; J-4, pp. 46, 47).

14. It was stipulated that the past practice of the Board has been to require medical certification of illness commencing with the sixth consecutive day of absence, no medical certification having been required for the first five consecutive days of absence (1 Tr. 73-75). Article V, Section 3E, Para. 1 (J-5, p. 20) provides that all teachers are required to report their absence one hour prior to their scheduled sign-in time and failure to do so will result in the deduction of one day's pay.

15. The AIP in its Policy Statement (J-1, p. 2) notes a concern about the high incidence of absenteeism and tardiness throughout the school district. It next states that it is reasonable to expect that staff attendance can be maximized if an attempt is made to improve the work environment. To this end, it is stated, an attendance improvement program shall be implemented, maintained and reviewed periodically. The Executive Superintendent is delegated the responsibility for implementing, monitoring and maintaining the program, the primary purpose of which is to improve the attendance of "all Board employees."

16. The AIP provides for a Form 2.1A (CP-11), which must be completed and executed by every Board employee upon return from absence due to personal illness.

A certification to that effect is made by each employee. The form is placed in the employee's personnel folder for future reference (J-1, pp. 3, 14).

17. The AIP also provides for a Form 5.0 for use on the occasion of funeral leave. In its original form the employee was to "swear and affirm" regarding the absence, including the name of the decedent and relationship, following which the employee executed the form (J-1, pp. 56, 57). In a clarification by Salley on January 24, 1983, Form 5.0 was amended to insert "certify" in place of "swear and affirm," and providing further that NTU members do not require verification beyond the completion of Form 5.0 (CP-15, p. 2). The AIP also provides for penalties for abuse of funeral leave, commencing with the loss of an increment or reduction of salary upon the first offense and termination upon the second offense (J-1, p. 56).

18. A written stipulation was received in evidence as Exhibit J-3, which notes, initially, that under the AIP employees are required to execute Form 2.1A upon return to work from illness and to execute Form 5.0 upon return from funeral leave. Failure to execute these forms results in non-payment of salary for each day of absence. In January and February 1983 a number of teachers represented by the NTU refused to sign Forms 2.1A and 5.0 and, even though they had not exhausted their sick days or funeral leave days, they were docked a day's pay for each day of absence.[9/] Thereafter the NTU filed a series of group grievances seeking pay for each affected employee and ultimately the NTU filed for arbitration. The Board then filed a Petition for Scope of Negotiations Determination (Docket No. SN-84-21) and sought to restrain the arbitration. The instant Hearing Examiner, on an application for interim relief, restrained the arbitration pending a Commission decision.

9/ Six teachers testified regarding their denial of sick leave or funeral leave, the nature of their absences and the implementation of the AIP in their schools (3 Tr. 10-140). These teachers were docked one or more day's pay for having refused to sign Forms 2.1A or 5.0 upon return from sick or funeral leave, notwithstanding that they were not suspected or charged with abuse of leave or being excessively absent. Four of the teachers were the subject of group grievances and included in J-3: Diane Astor-Forbes, Maxine Leak, Francine Tedman and Carolyn Gontarz.

19. By way of the implementation of Form 2.1A and 5.0, supra, the AIP provides for employee conferences with administration of both an informal and formal nature (J-1, pp. 40-48). It is first provided that after any three-day absence for ten-month employees an informal conference is to be held in the administrative office (J-1, pp. 40-43). The NTU offered in evidence a series of informal conference reports for three-day absences (CP-16, CP-17, CP-19, CP-23 and CP-28). If, thereafter, five days of absence occur then a formal conference is convened with the employee and his or her administrator (J-1, pp. 44, 45). The NTU offered Exhibits CP-18 and CP-20 as evidence of five-day conferences having been held. Finally, the AIP provides for the holding of a formal conference after eight absences have occurred (J-1, pp. 46, 47). One eight-day conference report was received in evidence (CP-21). In connection with the eight-day conference, a Form 4.2 is utilized by the administrator in conducting the conference, which sets forth, inter alia, the date of the informal conference (3-day) and the first formal conference (5-day). In the case of eight days of absence the individual "...may be subject to loss of increment or reduction in salary, or, if the two full years of prior history of absences, plus current year's history warrant such, separation from district..." (J-1, p. 54). However, the AIP then goes on to provide that the submission of a clearly written, dated medical certificate for any single day's absence "will negate the effect of said absence for purposes of this section..." (J-1, p. 54). Thus, upon the submission of a valid medical certificate, the penalty of a loss of increment, a reduction in salary or termination is obviated.

20. Article X, Section 2, Para. B (J-5, p. 41) provides that: "Teachers with twenty-five (25) years' experience in the system shall receive ten (10) additional non-cumulative days per year after accumulated (sick) leave has been exhausted..." The AIP, on the other hand, provides, under a heading "Exhausted Sick Time," that:

"All clerks are hereby notified that no additional paid sick-time is to be credited or given to individuals who have exhausted their annual and accumulated sick time without prior application to, and approval by, the Board on an individual basis." (J-1,p. 52). 10/

21. The NTU proposed in contract negotiations for the current agreement that upon retirement with 20 years of service application might be made for payment in lieu of accumulated sick leave at the rate of one day's pay for every three days of accumulated sick leave up to a maximum of $1,000. (CP-6, p. 1). The Board refused to agree to this proposal and it was not included in the current agreement (J-5). However, the AIP provided for certain incentives in the case of employees who have accumulated large numbers of unused sick days (J-1, p. 78). This provision of the AIP was deleted by Salley in a clarifying memo of January 24, 1983 (CP-15, p. 3). 11/

22. In and around the effective date of the AIP, January 3, 1983, Marvin W. Wyche, the Board's Chief of Staff, undertook with Salley the clarification of certain provisions of the AIP, based upon the input from other collective negotiations units. This resulted in Salley's memorandum of January 24, 1983 to all administrators (CP-15). This memo made the following pertinent clarifications and changes in the AIP:

a. Providing the manner in which Form 2.1A is be completed by the administrator in the case of employees who refuse to complete and execute the form.

b. Eliminating the requirement of "swear and affirm" from the funeral leave Form 5.0 and providing that NTU members do not require verification beyond the completion of the form.

10/ This matter was considered by Hearing Examiner Gerber in the interim relief proceeding brought in connection with the instant case, supra, and the Board was enjoined from negating the provisions of Article X, Section 2, Para.B of the current agreement (J-5, supra) by the implementation of the AIP provision with respect to Exhausted Sick Leave, supra: Newark Board of Education, I.R. No. 83-14, 9 NJPER 189, 190 (1983). The instant Hearing Examiner concurs with Hearing Examiner Gerber and will make a recommendation to this effect in his Order.

11/ The NTU challenges the authority of Salley as Executive Superintendent to make modifications to the AIP absent Board action. Other clarifications by Salley in his memo of January 24, 1983 will be referred to hereinafter. The Hearing Examiner finds and concludes that Salley has the authority to modify or clarify the AIP pursuant to certain Board policies and procedures, which were received in evidence. See in particular, Exhibits R-20 and R-23.

c. Providing that the AIP has no effect on an employee's use of personal days - personal days are to be used in exactly the same manner as prior to the AIP.

d. Clarifying that sick days utilized by an employee for which the employee produces a doctor's certificate are not to be counted toward the number of days which trigger an informal or formal conference under the AIP.

e. Eliminating the incentive program for sick leave (J-1, p. 78).

f. Clarifying the right of an employee to file a grievance under his or her collective negotiations agreement as a result of the application of the AIP.

23. The Board, in support of its reasons for adopting the AIP, offered several witnesses and documents to establish that both the County and the State Department of Education require a program to monitor the absences of staff in order to obtain a satisfactory evaluation for the district (6 Tr. 111-151, 8 Tr. 2-35, R-12, R-12A and R-13).

THE POSITIONS OF THE PARTIES

The Charging Party

The NTU's first point is that the AIP unilaterally changes terms and conditions of employment, which must be negotiated before being implemented, citing Section 5.3 of the Act with respect to proposed new rules or modifications of existing rules: Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25, 48, 49 (1978). The Charging Party then cites a series of cases, which hold that sick leave is a negotiable term and condition of employment.[12/] The Charging Party then cites and urges reversal of Piscataway Township Board of Education (Piscataway I), P.E.R.C. No. 82-64, 8 NJPER 95 (1982) and subsequent like decisions

12/ Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10, 14 (1973); Piscataway Township Board of Education v. Piscataway Maintenance and Custodial Employees, 152 N.J. Super. 235, 243 (App. Div. 1977); Maywood Education Association v. Maywood Board of Education, 131 N.J. Super. 551 (Ch. Div. 1974); City of Camden v. Dicks, 135 N.J. Super. 559 (L. Div. 1974) and Hoboken Board of Education v. Hoboken Teachers Association, P.E.R.C. No. 81-97, 9 NJPR 135 (1981), aff'd. App. Div. Docket No. A-3379-80T2 (1982), appeal dismissed 93 N.J. 263 (1983).

of the Commission[13/] with the Charging Party contending that the cases subsequent to Piscataway I do not recognize the right of the employer to impose discipline except in cases of abuse of sick leave. The Charging Party next cites decisions of the New York State Public Employment Relations Board (PERB), two of which the Commission had relied upon in Piscataway I,[14/] and additional decisions of PERB for the proposition that requiring teachers to document, upon demand, absences due to illness is an unfair practice.[15/] Finally, the Charging Party cites decisions of the NLRB, enforced by the Circuit Courts, for example, Murphy Diesel Co. v. NLRB, 454 F. 2d. 303 (7th Cir. 1971).

The Charging Party in its second point argues that the Board violated N.J.S.A. 18A:30-2 when it established eight days as a standard for excessive absenteeism. This section of Title 18A provides that teachers should be allowed sick leave with full pay for a minimum of 10 school days in any school year. It is contended that the three, five and eight-day conferences interfere with the right to take 10 days sick leave per year. Thereafter the Charging Party cites Commissioner of Edcuation decisions which deal with excessive absence and tenure charges in support of its contention that the imposition of discipline for other than excessive absence is a violation of N.J.S.A. 18A-30-2.

The Charging Party next argues that the unilateral imposition of the AIP by the Board contravenes the Board's obligation to negotiate mandatorily upon "disciplinary disputes, and other terms and conditons of employment" as provided in Section 5.3 of the Act, as amended July 30, 1982.

13/ Freehold Regional High School District Board of Education, P.E.R.C. No. 83-10 8 NJPER 438 (1982); Rahway Valley Sewerage Authority, P.E.R.C. No. 83-80, 9 NJPER 52 (1982); City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (1983) and City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (1983).

14/ City of Rochester, 12 PERB 3015 (1979) and PBA of Nassau County, 14 PERB 4625 (1981).

15/ City of New Rochelle, 13 PERB 3129 (1980); Boces 1 Suffolk County, 15 PERB 4721 (1982) and Triboro Bridge and Tunnel Authority, 15 PERB 4621 (1982).

The NTU contends, additionally, that the AIP's attempt to negate Article X, Section 2, Para.B in J-5 is contrary to Hoboken, supra. That case implicitly upheld the instant clause, which provides for an additional 10 days of non-cumulative sick leave after accumulated sick leave has been exhausted for teachers with 25 years' experience and is consistent with N.J.S.A. 18A:30-7.

Finally, the Charging Party contends that the Board cannot avoid the finding of an unfair practice, or a cease and desist order, by the Executive Superintendent's clarification of the AIP on January 24, 1983 (CP-15).

The Board

The Board, citing Piscataway I, supra, argues that it had a unilateral right to adopt the AIP as a lawful exercise of a managerial prerogative to monitor and control the performance of its work force. The Board, too, cites Rahway, Freehold, East Orange and Elizabeth, all of which were cited by the Charging Party, supra.

The Board next argues that the criteria for disciplinary action are non-negotiable and non-arbitrable, citing State of New Jersey v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), pet. for certif. den. _ N.J. (1982). Also cited is New Providence Board of Education, P.E.R.C. No. 83-88, 9 NJPER 70 (1982).

Finally, the Board contends that it may not grant sick leave in excess of 15 days as a blanket policy without making a determination on a case-by-case basis, citing Piscataway Township Board of Education v. Piscataway Maintenance & Custodial Association, 152 N.J. Super. 235 (App. Div. 1977). That case, according to the Board, holds that by granting extended sick leave benefits "as a matter of right" the Board surrenders its statutory obligation to deal with each case on an individual basis. By this argument the Board attacks Article X, Section 2, Para. B, supra.

DISCUSSION AND ANALYSIS

The AIP, As Implemented, Illegally Conflicts With Article X, Section 2, Para. B Of The Current NTU Agreement

The Board in its Brief (pp. 26-28) argues that the AIP provision, which instructs clerks that no additional paid "sick time" is to be credited automatically to indivuduals who have exhausted their annual and accumulated sick leave (J-1, p. 52), is lawful and consistent with the Appellate Division decision in Piscataway Township Board of Education v. Piscataway Maintenance & Custodial Association, 152 N.J. Super. 235, supra. In Piscataway the Court first noted that: "Unquestionably, sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment..." (152 N.J. Super. at 243, 244). The Court was there confronted with the contractual grant of extended leave for "total disability" arising from injury in the course of employment. The contract provided for benefits not to exceed one calendar year or 260 working days. The Board there relied on N.J.S.A. 18A:30-6 and 30-7, 16/ in particular the former, to support its contention that the contractual provision was ultra vires.

The Court said that its concern was over the payment of salary "...for prolonged absence beyond the allowable annual and accumulated sick leave. As to such payment, the controling statute, N.J.S.A. 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary... for such length of time as may be determined by the board of education in each individual case." (152 N.J. Super. at 246; emphasis by the Court). The Court then held that by granting its employees extended total disability leave benefits "as a matter of right" the Board surrendered its statutory obligation to deal with each case on an individual basis.

16/ N.J.S.A. 18A:30-6 provides, in pertinent part:

> "When absence... exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute... for such length of time as may be determined by the board of education in each individual case..."

N.J.S.A. 18A-30-7 provides, in pertinent part:

> "Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year."

Unfortunately for the Board Piscataway is not the last word on the matter. For next came Hoboken, supra, which, while it dealt with the method of calculating sick leave, arose under a contract which allowed teachers 10 to 25 sick leave days per year, depending upon length of service. Teachers who were allowed 10 or 15 days per year were permitted to accumulate all unused days for use in the future. Teachers who were allowed 20 to 25 days were permitted to accumulate to a maximum of 15 unused days each year under N.J.S.A. 18A:30-7, supra. Prior to 1978-79, the Board in Hoboken did not differentiate between sick days above or below 15 as a teacher used up his or her annual sick leave in any given year. Beginning in the 1978-79 school year the Board unilaterally changed the method of calculating the number of accumulated sick days by which a teacher could increase his or her total in any one year. Thus, the Board divided annual sick leave into accumulative sick leave, the first 15 days of each year, and non-accumulative sick leave, all sick days over 15 for any given year. The Board then deducted from a teacher's sick leave as follows: first, from the 15 accumulative days, then from the bank of accumulated sick days from past years, and finally, from the teacher's annual allotment of non-accumulative days.

Notwithstanding several Commissioner of Education decisions, cited by the Board in Hoboken, the Commission found that N.J.S.A. 18A:30-6 and 30-7, supra, do not preemptively specify the method of utilizing sick leave days,[17/] and held that the Board's unilateral change in sick leave policy was negotiable and arbitrable.

17/ See State v. State Supervisory Employees Association, 78 N.J. 54, 80-83 (1978). Not only did the Appellate Division squarely affirm the Commission in Hoboken but, most significantly, it addressed an additional issue not raised by the Board to the Commission. In the Appellate Division the Board had claimed that it was without authority "...to accord an escalated schedule of annual sick leave based on length of service." Without citing or discussing Piscataway, the Appellate Division stated that it had considered the Board's argument on the merits and found its claim "...to be entirely lacking in legal support..." (Slip Opinion, p. 6).

In reaching its decision the Commission held that:

> "...(T)he parties... (are) free to negotiate that non-accumulative days be used first, or vice-versa, or to develop by mutual agreement any other formula regarding the reduction of sick days... What the statutes do mandate is that no more than 15 days per year may be 'banked'
>
> "...We thus conclude that N.J.S.A. 18A:30-6 and 18A:30-7 do not mandate or even suggest a 'set' procedure requiring the exhaustion of accumulative before non-accumulative sick days..." (7 NJPER at 136, 137).

While N.J.S.A. 18A:30-2 fixes a minimum of 10 days of sick leave per year, N.J.S.A. 18A:30-7 permits a board to "fix... by rule" sick leave over the minimum,[18/] provided only that the total accumulation may not be increased "by more than 15 days in any one year." This appears to leave the total number of non-accumulative days open to negotiations by the parties. Thus, the Hearing Examiner finds and concludes that the AIP (J-1, p. 52) unlawfully alters a term and condition of employment by unilaterally rescinding the 10 days of non-accumulative sick leave for teachers with 25 years of experience (J-5, p. 41). In so concluding, it is noted that the 10 additional non-accumulative days of sick leave can only be taken after accumulated leave has been exhausted. The fact that the 10 non-accumulative days are based on length of service was recognized as legal by the Appellate Division in Hoboken, supra. The Hearing Examiner will hereinafter order that the foregoing provision of the AIP (J-1, p. 52) be rescinded.

The AIP's Unilateral Establishment Of Three, Five And Eight-Day Conferences To Monitor Sick Leave Did Not Violate The Act

As noted in Finding of Fact No. 12, supra, the NTU in its Brief does not contest the Board's managerial prerogative to improve the recording of employee

18/ CF. N.J.S.A. 18A:30-6, which permits a board to pay additional sick leave "for such length of time... in each individual case" when absence exceeds the annual sick leave and accumulated sick leave.

attendance, nor does it dispute the Board's right to monitor employee absences and take action against employees who are misusing or abusing sick leave. What the NTU objects to is the Board's effort to improve employee attendance by unilaterally altering terms and condition of employment, established by law, agreement or past practice.

Bearing in mind that the AIP provides that the submission of a clearly written, dated medical certificate for any single day's absence negates the effect of the absence vis-a-vis a three-day, five-day or eight-day conference, it is difficult to perceive how the provision for such conferences constitutes other than the exercise of a managerial prerogative to monitor the use and possibly the abuse of sick leave or other leave. Thus, the employee is in complete control of the situation by the mere requirement of having to submit a clearly written, dated medical certificate for any single day's absence. Obviously, if an employee was out for three days or more due to illness, a single medical certificate covering those days would suffice. It is true, however, that if an employee was out for one day only due to illness he or she would have to produce a medical certificate for that single day in order for that day not to count in the triggering of a three-day, five-day or eight-day conference. The Hearing Examiner finds that the Board is not bound by its past practice of having required a doctor's certificate only after five consecutive days of absence (Finding of Fact No. 14, supra).

It appears to the Hearing Examiner that the Board's unilateral establishment of the three-day, five-day and eight-day informal and formal conferences constitutes the valid exercise of a managerial prerogative which "...serves a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits..." (Piscataway I, 8 NJPER at 97).[19/] As noted by the Commission in

19/ The NTU makes much of the fact that at the various conferences it attended no teacher was accused of "abuse" of sick or funeral leave. The Hearing Examiner does not read Piscataway I as precluding verification in the absence of abuse. Sick leave is for illness, which may be verified. The same applies to funeral leave.

that decision the "mere establishment " by the Board of a sick leave policy "...does not impinge on the Association's ability to negotiate sick leave benefits or on an individual's ability to utilize sick leave for proper purposes..." (8 NJPER at 96, 97).[20/]

The Commission in Piscataway I made it clear that if an employee believes that the Board erred in determining that the employee was not actually sick the Association (here the NTU) may file a grievance and, if necessary, take the matter to binding arbitration. In other words, the Board may legitimately attempt to verify the bona fides of a claim of sickness but may not prevent the Association (NTU) from contesting its determination in a particular case. The subsequent decisions of the Commission in like cases confirm and reaffirm Piscataway I: see Freehold, Rahway, East Orange and Elizabeth, supra.[21/]

In Piscataway II, P.E.R.C. No. 83-111, 9 NJPER 152 (1983), the Commission, in a scope of negotiations determination, held that a grievance alleging that the Board violated the collective negotiations agreement by rejecting a teacher's claim for sick leave pay was arbitrable. The Board there had contended, inter alia, that the grievance was not arbitrable because it concerned a disciplinary determination. This contention was rejected by the Commission along with another contention by the Board, i.e., that the Commissioner of Education had jurisdiction to enforce statutory sick leave provisions.

Accordingly based on the foregoing Commission precedent, the Hearing Examiner finds and concludes that the Board has not violated the Act by its unilateral establishment of three-day, five-day and eight-day informal and formal conferences to monitor sick leave and other leave.

20/ The Hearing Examiner agrees with the two PERB decisions cited with approval by the Commission in Piscataway I (see footnote 14, supra) but does not concur with the additional PERB decisions cited by the NTU (see footnote 15, supra).

21/ See also, Barnegat Twp. Board of Education, P.E.R.C. No. 84-123, 10 NJPER ___ (April 18, 1984).

The AIP's Provision For Disciplinary Criteria In Connection With The Eight-Day Conference Does Not Violate The Act

The AIP provides, in connection with the eight-day conference, that an individual "...may be subject to loss of increment or reduction in salary, or, if the two full years of prior history of absences, plus current year's history warrant such, separation from district..." (J-1, p. 54). The NTU argues strenuously that this provision of the AIP constitutes a negotiable disciplinary dispute and/or disciplinary review procedure, which the Board must negotiate under Section 5.3 of Act, as amended, July 30, 1982. Cf. Local 195, IFPTE, supra.

The same Section 5.3, as amended, provides that: "Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance." The Hearing Examiner is of the opinion that the above-quoted language from the AIP (J-1, p. 54) involves "standards or criteria for employee performance." The key word in the AIP is "may," which provides a wide area of discretion in the Board in determining whether or not there is to be a loss of increment or a reduction in salary or separation from the district. It is noted that there is nothing in the AIP, or the Act, which would prevent the NTU from seeking to negotiate with the Board "disciplinary review procedures" short of binding arbitration, which is precluded by Section 5.3, as amended, since the teachers herein involved have statutory protection under the tenure laws, See New Providence Board of Education, supra, at 72. The Commission said there that "...the parties may negotiate a clause consistent with N.J.S.A. 34:13A-5.3 which would make disciplinary determinations reviewable through the negotiated grievance procedures, but would exempt such determinations from binding arbitration if the affected employee had statutory protection under the tenure law or alternate statutory appeal procedures..." (9 NJPER at 72).[22/]

22/ The Hearing Examiner applies the same reasoning and conclusions to the provision in the AIP for penalties for abuse of funeral leave (J-1, p. 56).

Thus, does the Hearing Examiner find and conclude that the Board did not violate the Act when it established disciplinary criteria in connection with the eight-day conference regarding sick leave and funeral leave.

There Is No Illegality In The Provision Of The AIP Which Results In the Docking Of A Day's Pay For Each Day Of Absence In The Case Of An Employee Who Refuses To Execute Forms 2.1A And 5.0 Upon Return To Work

Exhibit J-3 was offered in evidence to demonstrate the effect of the implementation of the AIP in cases where employees refused to execute Forms 2.1A and 5.0 upon return to work from illness or funeral leave. Those employees who had acquainted themselves with the AIP must have understood that the failure to execute whichever form was applicable would result in non-payment of salary for each day of absence. In January and February 1983 a number of teachers represented by the NTU refused to execute Forms 2.1A and 5.0 and, even though they had not exhausted their sick or funeral leave days, they were docked a day's pay for each day of absence. Group grievances were filed by the NTU and arbitration was sought. As noted in Finding of Fact No. 18, supra, arbitration has been restrained pending the disposition by the Commission of a Scope of Negotiations Determination Petition.

It is interesting to note that following the initial response by teachers represented by the NTU there have been no further instances of docking since the teachers have executed Forms 2.1A or 5.0 on and after February or March 1983.

The Hearing Examiner finds and concludes that the provision in the AIP for docking a day's pay for each day that a Form 2.1A or 5.0 is not executed after a return from absence is a legitimate exercise of a managerial prerogative.

Miscellaneous

1. The Hearing Examiner has previously found that the Executive Superintendent had the authority to modify or clarify the AIP (footnote 11, supra). Thus, everything contained in Salley's memorandum of January 24, 1983 (CP-15) is valid and operative. The Hearing Examiner here notes that Salley there provided for: (a) the AIP

would have no effect on an employee's use of personal days; (b) the sick days utilized by an employee for which an employee produces a doctor's certificate are not to be counted toward the days which trigger a formal or informal conference; (c) the elimination of the incentive program for sick leave; and (d) the right of an employee to file a grievance as a result of the application of the AIP.

2. Further, the Hearing Examiner rejects the NTU's contention that the Board illegally communicated directly with its employees when Salley issued a memo to all employees regarding the AIP on December 6, 1982 and thereafter in January 1983 caused a brochure and a newspaper to be issued, inter alia, to all employees (CP-12, CP-13 and CP-14). The Hearing Examiner finds that the Board's action in issuing this type of communication to its employees was completely lawful and not in derogation of the NTU's rights as the collective negotiations representative.

3. Finally, the Hearing Examiner finds nothing illegal in the conduct of the Board in preparing the AIP in the Summer of 1982 during a period when contract negotiations with the NTU had not been concluded. Plainly, if the Board has a managerial prerogative to establish a verification program to monitor sick leave and funeral leave then its failure to negotiate that with the NTU during the Summer of 1982, or even to apprise the NTU that the proposal was being undertaken, does not constitute a violation of the Act.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it implemented the AIP (J-1, p. 52) in a manner which negated Article X, Section 2, Para. B (J-5, p. 41) pertaining to the use of 10 non-accumulative sick days for teachers with 25 years in the system.

2. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) by establishing and implementing the AIP in all other respects, with the

exception of J-1, p. 52, supra, including the provision for three-day, five-day and eight-day conferences; the provision for disciplinary criteria in connection with the eight-day conference and the abuse of funeral leave; the docking of one day's pay for each day of absence in the case of teachers who refused to execute Forms 2.1A and 5.0; and the clarifying of the AIP by the Executive Superintendent's memorandum of January 24, 1983 (CP-15).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by attempting, through the AIP (J-1, p. 52), to negate the provisions of Article X, Section 2, Para. B of the current agreement (J-5, p. 41).

2. Unilaterally making changes or modifications in the collectively negotiated agreement unless and until agreed upon by the NTU.

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

1. Forthwith rescind those provisions of the AIP which conflict with or negate the provisions of Article X, Section 2, Para. B of the current collective negotiations agreement (J-5), particularly, J-1, p. 52, and make whole any teacher with 25 years of service for losses incurred as a result of the implementation of p. 52 of the AIP.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Board to insure 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 Board has taken to comply herewith.

Alan R. Howe
Hearing Examiner

Dated: May 3, 1984
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by attempting, through the Attendance Improvement Program (AIP) (J-1, p. 52), to negate the provisions of Article X, Section 2, Para. B of the current agreement (J-5, p. 41).

WE WILL NOT unilaterally make changes or modifications in the collectively negotiated agreement unless and until agreed upon by the Newark Teachers Union.

WE WILL forthwith rescind those provisions of the AIP which conflict with or negate the provisions of Article X, Section 2, Para. B of the current collective negotiations agreement (J-5), particularly, p. 52 of the AIP. WE WILL make whole any teacher with 25 years of service for losses incurred as a result of the implementation of p. 52 of the AIP.

NEWARK 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 Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780