P.E.R.C. NO. 98-145

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROSELLE BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-96-115
& CO-H-96-116

ROSELLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Roselle Board of Education violated the New Jersey Employer-Employee Relations Act when it changed the dismissal time of eighth grade teachers represented by the Roselle Education Association from 2:45 p.m. to 3:10 p.m. The Commission dismisses the allegation that the Board violated the Act when it designated the period following student dismissal as a time for "staff development/in-service" activities. The Commission also dismisses the allegation that the Board violated the Act when it unilaterally changed an employment condition by assigning the Association president a duty period in 1995-96 depriving her of a free period to conduct union business. The Commission orders the Board to negotiate in good faith before changing the dismissal time of eighth grade teachers.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Docket Nos. CO-H-96-115
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ROSELLE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gill & Cohen, attorneys
(Neil M. Cohen, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Randi Doner April, of counsel)

DECISION

On October 24, 1995, the Roselle Education Association filed two unfair practice charges against the Roselle Board of Education. CO-96-115 alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1),(3) and (5)[1/] by unilaterally changing the

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

staff schedule at Abraham Clark High School. CO-96-116 claims that the Board violated 5.4a(1) and (3) when it assigned Association president Sally Corvinus a lunch duty period in place of a union business period. The Association seeks an order directing the Board to negotiate over the schedule change and to reinstate the Association president's union business period.

On April 19, 1996, an order consolidating the charges and a Complaint and Notice of Hearing issued. On July 5, 1996, the Board filed an Answer denying that it had violated the Act. As affirmative defenses, the Board asserts that any actions it took were an exercise of managerial prerogative, were authorized by the parties' contract, and were consistent with prior contracts and practices.

On August 1 and 6, 1996, Hearing Examiner Perry O. Lehrer conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On May 29, 1997, the Hearing Examiner issued his report and recommended decision. H.E. No. 97-33, 23 NJPER 361 (¶28170 1997). He found that the Board violated 5.4a(1) and (5) when it: required eighth grade teachers to work until 3:10 p.m.; imposed staff development/in-service obligations on high school teachers during previous duty-free time; and eliminated the Association president's union business period. He recommended that the Board be required to restore its previous dismissal time for eighth

grade teachers, reinstate the Association president's union business period, reduce the amount of in-service time for high school teachers, and negotiate in good faith if it desired to change any of those working conditions. Absent any supporting evidence, the Hearing Examiner recommended dismissing the 5.4a(3) allegation.

On June 11, 1997, the Board filed exceptions urging that the Complaint be dismissed. It challenges several factual findings and legal conclusions. It specifically asserts that the Association president was not authorized to have a free period each day to conduct union business and that assigning her a duty period was within its contractual rights and managerial prerogative. It maintains that since there was no change in the dismissal time for teachers in grades 9-12 and no additional pupil contact time, no working conditions for teachers in those grades were altered. It also asserts that it had a right to require that eighth grade teachers remain in the building until 3:10 p.m. and that the contract authorized the change in their dismissal time from 2:45 p.m. in 1994-1995 to 3:10 p.m. in 1995-1996.

On August 18, 1997, the Association filed an answering brief. The Association urges acceptance of the Hearing Examiner's findings and conclusions.

Many of the exceptions assert that the Hearing Examiner should not have based findings of fact on the Association president's testimony about her conversations and interactions

with various administrators because the Association did not call those administrators to testify and confirm her version of such events. We reject those exceptions. The president's testimony was competent evidence and the Association was not required to call additional witnesses to corroborate such testimony. The Board could have called its administrators as witnesses if their versions of those events differed from the president's accounts.2/

We have reviewed the record. We adopt the Hearing Examiner's findings of fact as supplemented and modified in our footnoted factual summary.

The high school houses students in grades 8 through 12. Beginning with the 1992-1993 school year, the Board required eighth grade students to take their lunch within the school. Students in grades 9-12 were permitted to continue to leave the school for lunch. Eighth grade students were also dismissed earlier and eighth grade teachers were permitted to leave school at 2:45 p.m. rather than 3:10 p.m., the dismissal time for high school teachers. The Association's president testified without contradiction that there was an agreement by all parties, after

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2/ The Board does not assert that those potential witnesses were unavailable. A trier of fact could infer that the administrators' testimony would not have supported the Board's position. See State v. Clawans, 38 N.J. 162, 1170-171 (1962); Wild v. Roman, 91 N.J. Super. 410, 414 (App. Div. 1966); International Automated Machines, 285 NLRB No. 139, 129 LRRM 1265, 1266 (1987).

eighth grade students went to an in-school lunch, that eighth grade teachers would be dismissed at 2:45 p.m.

Collective negotiations agreements for years before 1991 treated teachers in grades 8-12 the same and specified in an appendix that their dismissal time was 3:10 p.m. However, the 1991-1993 contract has a different schedule for eighth grade and does not specify dismissal times. The contract appears to have been entered into after the start of the 1992-1993 school year and thus after the change in dismissal times for eighth grade students and teachers.3/

Beginning with the 1995-1996 school year, the Board required high school students (except seniors) to eat lunch at school and dismissed all students at 2:25 p.m. But it continued to require ninth through twelfth grade teachers to remain until 3:10 p.m. and it changed the dismissal time for eighth grade teachers from 2:45 p.m. to 3:10 p.m.

3/ We clarify finding 5. The open lunch recess before the 1991-1992 school year started at 12:15 p.m. and lasted for teachers until 1:05 p.m. Students in grades 8-12 could report back at 1:10 p.m. and were deemed late after 1:15 p.m. We clarify finding 6. The work hours clauses of both the 1991-1993 (J-2) and the 1993-1996 (J-1) contracts state that teachers will be on duty at the times specified in appendices A and A-1. The only listing of teacher hours is found in Appendix A. That appendix states that elementary and middle school teachers arrive at 8:30 a.m. and are dismissed at 3:10 p.m. Excerpts from Appendices A and A-1 of contracts covering the years 1984-1991 (J-4) explicitly define the high school teacher workday as starting at 8:05 a.m. and ending at 3:10 p.m.

The time following student dismissal at 2:25 p.m. until teacher dismissal at 3:10 p.m. was allotted for staff development/in-service training.4/ However, the time was not always used for such purposes. Before 1995-1996, there were only 16 minutes between student dismissal and the end of the teachers' day. Teachers could not leave the school building but were not given any structured responsibilities. The change in schedule did not increase pupil contact time for the teachers and the change to an in-school lunch for all students except seniors did not deprive teachers of their duty-free lunch or their ability to leave the building during their lunch period.

After instituting the in-school lunch requirement for grades 9-12, the Board assigned various teachers to lunch duty. Among them was Corvinus. Before 1995-1996, Corvinus, an English teacher, would customarily use an unassigned period on her schedule to conduct Association business. She called this time slot her "REA" (Roselle Education Association) period. She would use this period to meet with administrators, make and receive phone calls, and visit teachers in other buildings. She did so

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4/ We supplement finding 9. The 1995-1996 Staff Handbook (R-2), in addition to listing "Staff Development/In-service 2:30-3:10," also retains language found in the 1991-1992 Staff Handbook (R-1). That provision states: "The time before 8:45 p.m. and after 2:55 p.m. should be kept available for pupil assistance, parent conferences, preparation for the next day, gathering materials for use in lessons, room housekeeping, correcting papers, extracurricular activities, etc."

openly, with the knowledge of the administration and the clerical staff who would answer phone calls made to her during this period and either leave a message in her mailbox or contact her immediately. On signing in and out of the building, Corvinus might indicate "REA business" or "BOE" (Board of Education) as her reason for leaving.5/ During her prior three school years as Association president, Corvinus had not been given a duty assignment.6/

The contract allows the Association president and/or vice-president up to 10 days of release time per year for Association business. Five days advance notice must be given to use any such day. Corvinus testified that the purpose of such release time is to attend administrative or court hearings involving all or a substantial part of a day. The contract does

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5/ We supplement and clarify finding 25 to reflect that Maxine Howard, a high school secretary, would receive copies of teachers' class schedules at the beginning of the year and would discard those schedules after the school year ended. As found by the Hearing Examiner, Howard knew that Corvinus had an REA period through her observations of the teacher's activities while Howard was answering phone calls, keeping the sign-in book, and maintaining a file of staff schedules. No one told Howard that Corvinus had an REA period.

6/ We clarify finding 27. The Hearing Examiner discussed administrator Peter Kowalsky's assertion that he thought Corvinus had been assigned hall duty in 1994-1995. Kowalsky could not explain why Corvinus' schedule (J-7) did not show a duty period. That inability is relevant only to whether Corvinus had actually been assigned hall duty for the 1994-1995 school year. We concur that Kowalsky did not establish that Corvinus had a duty assignment in 1994-1995.

not grant an Association official a daily time slot for routine business.

While speaking with administrators and suggesting a time to meet about Board-Association matters, Corvinus sometimes referred to the time slot as her REA period. Corvinus was not told that she had no right to pursue Association business during that period, nor was she disciplined for signing out of school at those times. Corvinus's predecessor as president was a basic skills instructor who had a more flexible schedule. He did not have a designated period to conduct union business.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

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

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

This case involves three alleged unilateral changes: (1) extending the workday for eighth grade teachers from 2:45 to 3:10

p.m.;[7/] (2) imposing staff development duties on high school teachers following student dismissal; and (3) eliminating the Association president's unassigned period during which she could pursue Association business.

The Commission has generally considered three types of cases involving allegations that an employment condition has been changed: (1) cases where the majority representative claims an express or implied contractual right to prevent a change; (2) cases where an existing working condition is changed and neither party claims an express or implied right to prevent or impose that change; and (3) cases where the employer alleges that the representative has waived any right to negotiate, usually by expressly or impliedly giving the employer a contractual right to impose a change. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), appeal pending App. Div. Dkt. No. A-2351-97T5; see also Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992).

In the first type of case, the representative alleges that the employer agreed to provide a benefit by an express contractual commitment or by an implied contractual commitment based on an established practice. Hill and Sinicropi, Management Rights, 20-22

7/ The Association also sought to have the dismissal time for other high school teachers moved up based on its assertion that teachers had always been dismissed 16 minutes after the students' day ended. The Hearing Examiner rejected that assertion and the Association did not except to it.

(1986). To prove an implied commitment, the representative must show that the practice has been "(1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Id. at 23-24. If it succeeds, the employer will be bound to maintain the established past practice during the life of the contract. Section 5.3's duty to negotiate over proposed modifications is not at issue because there is nothing to negotiate -- the representative claims it already has a binding contractual right. The Commission therefore usually defers such contractual claims to the parties' negotiated grievance procedures to resolve. State v. Council of N.J. State Coll. Locals., 153 N.J. Super. 91 (App. Div. 1977), certif. den. 78 N.J. 326 (1978). In any event, the Commission will not find a violation in this type of case unless the charging party proves that an employer has repudiated rather than simply breached a contractual commitment. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

This is not the first type of case. The Association concedes that the contract does not provide its president with daily duty-free time to pursue Association business, set eighth grade teacher dismissal times, or require unassigned time after the student day ends.

In the second type of case, an existing working condition is changed and the majority representative does not claim an express

or implied contractual right to prevent that change while the employer does not claim an express or implied contractual right to impose that change without negotiations. Such a change triggers the duty to negotiate under section 5.3. As stated in Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983):

> [A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment ... even though that practice or rule is not specifically set forth in a contract.... Thus, even if the contract did not bar the instant changes, it does not provide a defense for the Board since it does not expressly and specifically authorize such changes.

Unlike in the first type of case, the representative need not show an actual contractual entitlement or a binding past practice.[8/] Indeed, if an entitlement or binding past practice could be shown, what would be left to negotiate? To prove a violation, absent an applicable defense, the representative need show only that the employer changed an existing employment condition without first negotiating. If a violation is found, an employer ordinarily will be obligated to negotiate in good faith before that employment condition is changed again but will not be obligated to maintain the employment condition until the end of the contract.

8/ Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981), imprecisely stated that an established practice arises from the parties' mutual consent, implied from their conduct. For purposes of ascertaining whether negotiations must precede a change, an employment condition need only exist and need not arise by the parties' agreement, expressed or implied.

This is the second type of case. The Association contends that its president's "R.E.A." period, the 2:45 p.m. dismissal time for eighth grade teachers, and the unassigned time following student dismissal were all existing working conditions changed without negotiations.

In the third type of case, the employer asserts that the representative has clearly waived any right to negotiate. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). A waiver will be found, for example, if the representative had expressly agreed to a provision authorizing a change or accepted similar actions without protest. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). A representative need not show that a contract or practice entitled employees to a benefit; the employer must instead show that a contract or past acquiescence constituted a waiver of the right to negotiate. If the employer carries that burden, it had the right to make the change unilaterally.

This is also the third type of case. The employer asserts that the contract and teacher handbooks recognize its right to have all teachers remain in school until 3:10 p.m. and that other sections of the contract, including the management rights clause, allow it to assign a duty period to the Association president and staff development duties to teachers following student dismissal.

We first consider whether the Board unilaterally extended the workday for eighth grade teachers. We hold that it did.

Before 1992, all teachers in grades 8-12 were dismissed at 3:10 p.m. Contracts covering the school years before 1992 specified a uniform teacher dismissal time of 3:10 p.m. Beginning with the 1992-1993 school year, however, eighth grade students were required to remain in the building for lunch, their school day ended earlier, and their teachers were dismissed at 2:45 p.m. And the contract covering the 1991-1992 school year differentiates between teachers in grade 8 and those in grades 9-12 and omits any reference to dismissal time for those teachers. Although that contract covers the year before the change in the eighth grade dismissal time, the contract's signature page suggests that it was entered into after the start of the 1992-1993 school year. Thus, it appears that an earlier dismissal time existed for eighth grade teachers since the 1992-1993 school year and that the parties' contract no longer contemplated a uniform dismissal time. We thus conclude that the Board had to negotiate before lengthening the workday for eighth grade teachers. Hunterdon Cty. and CWA, 116 N.J. 322 (1989)(employer violated Act both when it unilaterally established and then unilaterally discontinued safety incentive program). Given the timing of this decision, we will not order the Board to restore the eighth grade teachers' dismissal time for the balance of this school year.

We next consider whether the Board violated the Act when it designated the period following student dismissal as a time for "staff development/in-service" activities. We hold it did not.

The Board had a right to maintain a 3:10 p.m. dismissal time for teachers in grades 9-12 even after reducing the lunch period and setting an earlier dismissal time for students. Teachers did not lose any preparation time, did not lose their 30 minute duty-free lunch or freedom to leave the building, and did not have additional student contact time as a result of the change. Prior to the 1995-1996 school year, teachers had an unstructured 15 minute period which, according to teacher handbooks, they were free to use for "pupil assistance, parent conferences, preparation for the next day, gathering materials for use in lessons, room housekeeping, correcting papers, extracurricular activities, etc." The 1995-1996 daily schedule indicates that the 45 minute period between student dismissal and teacher dismissal was designated as time for "Staff Development/In-Service." Given the particular facts of this case, we decline to find that the designation altered existing working conditions. The record indicates that the Board did not provide or require structured in-service or staff development programs

each day after this schedule took effect. Thus, with occasional exceptions, the teachers presumably could have engaged in the same unstructured activities they had pursued in prior years. The contract (J-1, Article XIII, ¶5) gives the superintendent a right to schedule a "reasonable" number of teacher in-service programs. If the Association believes that the Board has violated that clause, it can file a grievance.

We next address the allegation that the Board unilaterally changed an employment condition by assigning Corvinus a duty period in 1995-1996 and thus depriving her of a free period to conduct Association business. We hold that it did not.

Although this charge, when filed, alleged no violation of N.J.S.A. 34:13A-5.4a(5), we agree with the Hearing Examiner that the parties fully and fairly litigated that issue. We caution, however, that under most circumstances, an allegation must be pleaded, either in an original charge or an amendment, and that the "fairly and fully" litigated exception should be reserved for those presumably rare occasions where the parties' attention has been concentrated on an issue and the parties have mutually treated that issue as if it had been pleaded.

Release time for a union official to perform representational functions is a mandatorily negotiable term and condition of employment. See City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Orange Tp.,

P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980). The parties' contract allows up to 10 days leave for union business with five days advance notice. That provision does not apply.

For three years preceding the assignment of lunch duty, Corvinus had an unassigned duty period during which she was permitted to conduct Association business. Administrators heard Corvinus refer to that period as her REA period and did not suggest to her that she was acting improperly. Corvinus' teacher schedules for those three years had either a blank space or "REA" during that period, but no witness could explain the source of the REA designation. Beginning with the 1995-1996 school year, high school students were no longer permitted to leave the school building during lunch and teachers were needed to supervise the lunchroom. Corvinus, who previously had an unassigned duty period, was now assigned lunch duty.

We find that the Board had a practice of permitting Corvinus to conduct Association business during her unassigned period and that the Board would have had to negotiate if it had barred Corvinus from conducting Association business during an unassigned period. But that is not what happened. Instead, because of changed lunchtime staffing needs, the Board assigned Corvinus to lunch duty during what had been an unassigned period. Nothing in the contract grants the Association president an REA

period. We decline to convert the Board's willingness to permit Association business during an unassigned period into an obligation to negotiate before assigning duties during that period once her services were needed.

We dismiss the other allegations of the Complaint.

ORDER

The Roselle Board of Education shall:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the dismissal time of eighth grade teachers from 2:45 p.m. to 3:10 p.m.

2. Refusing to negotiate in good faith with the Roselle Education Association concerning terms and conditions of employment of employees in that unit, particularly by unilaterally changing the dismissal time of eighth grade teachers from 2:45 p.m. to 3:10 p.m.

B. Take this action:

1. Negotiate in good faith with the Roselle Education Association before changing the dismissal time of eighth grade teachers.

2. Beginning with the 1998-1999 school year, restore a 2:45 p.m. dismissal time for eighth grade teachers, unless good faith negotiations have set a different dismissal time.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

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

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by changing the dismissal time of eighth grade teachers from 2:45 p.m. to 3:10 p.m.

WE WILL cease and desist from refusing to negotiate in good faith with the Roselle Education Association concerning terms and conditions of employment of employees in that unit, particularly by changing the dismissal time of eighth grade teachers from 2:45 p.m. to 3:10 p.m.

WE WILL negotiate in good faith with the Roselle Education Association before changing the dismissal time of eighth grade teachers.

WE WILL, beginning with the 1998-1999 school year, restore a 2:45 p.m. dismissal time for eighth grade teachers, unless good faith negotiations have set a different dismissal time.

Docket Nos. CO-H-96-115
CO-H-96-116

ROSELLE BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 97-33

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

In the Matter of

ROSELLE BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-96-115
& CO-H-96-116

ROSELLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Roselle Board of Education violated the New Jersey Employer-Employee Relations Act by unilaterally lengthening the work day of eighth grade teachers, requiring all High School teachers to attend staff development during duty-free time and eliminating the Association President's union business school period. The Hearing Examiner, however, did not find the unilateral changes to be motivated by union animus.

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 Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 97-33

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ROSELLE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gill & Cohen, attorneys
(Neil M. Cohen, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys
(Randi Doner April, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On October 24, 1995, the Roselle Education Association ("Association" or "Charging Party") filed two unfair practice charges against the Roselle Board of Education ("Board" or "Respondent"). The first charge alleges that the Board violated subsections of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 et seq., 5.4(a)(1), (3) and (5)[1/] by

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating

Footnote Continued on Next Page

unilaterally changing the staff schedule at Abraham Clark High School. The second charge claims that the Board violated subsections 5.4(a)(1) and (3) of the Act when it unilaterally assigned Association President Sally Corvinus a lunch duty period in place of a union business period. The Charging Party seeks an order directing Respondent to negotiate the schedule change and to reinstate the Association President's union business period.

On April 19, 1996 the Director of Unfair Practices ordered the consolidation of the two charges and issued a Consolidated Complaint and Notice of Hearing. The Board filed an Answer on July 5, 1996 denying it violated the Act. The Board asserted as an affirmative defense that its actions were supported by contract and practice.

Hearings were held on August 1 and 6, 1996. 2/ The parties filed post-hearing briefs by October 21, 1996.

Based upon the entire record, I make the following:

1/ Footnote Continued From Previous Page

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.

2/ The transcripts from the hearing will be referred to as 1T for August 1, and 2T for August 6.

FINDINGS OF FACT

1. The Roselle Education Association is an employee representative within the meaning of the Act (1T9-1T10). The Association represents all non-supervisory school personnel including classroom teachers (J-1).

2. The Roselle Board of Education is a public employer within the meaning of the Act (1T9). The Association and the Board are parties to a collective negotiations agreement effective from July 1, 1993 through June 30, 1996 (J-1). As of the date of the hearing, there was no successor agreement in place.

3. The High School consists of grades 8-12 (J-1).

Change in Staff Schedule:

4. For at least the last twenty years, teachers for grades 9-12 at the High School were dismissed at 3:10 p.m. (1T91, 2T6). Pertinent parts of prior contracts between the Board and the Association indicate that from July 1, 1984 through June 30, 1991, teachers for grades 8-12 were dismissed at 3:10 p.m. (J-4). The 1990-1991 Staff Handbook also indicates a 3:10 p.m. teacher dismissal time (R-1).

5. The prior contracts covering the period from July 1, 1984 to June 30, 1991 (J-4) clearly indicate that the last class for students in grades 8-12 ended at 2:54 p.m., and that teacher dismissal was at 3:10 p.m., or sixteen minutes after the students' last class (J-4). During this time, grades 8-12 had a uniform lunch period that started at 12:15 pm. and ended at 1:05 p.m. (J-4).

6. The daily time schedules contained in the 1991-1993 contract between the parties (J-2), and J-1 are identical. They show that the schedule for eighth grade students and teachers was changed from that of the remaining High School students and teachers.

Of significance here, the lunch period for grade 8 ran from 11:28 a.m. to 12:13 p.m. or 45 minutes in duration while the lunch period for grades 9-12 went from 12:15 p.m. to 1:10 p.m. or 55 minutes in duration (J-1 and J-2). Neither J-1 nor J-2 designates student or teacher dismissal times.

7. Prior to the 1995-1996 school year, eighth grade students were dismissed at 2:34 p.m. while students in grades 9-12 were dismissed at 2:54 p.m. (1T91-1T92). Once eighth grade teachers went to a shorter lunch than the teachers for grades 9-12, approximately during the 1992-1993 school year, they were dismissed at 2:45 p.m. (1T92, 1T108-1T109). Teachers for grades 9-12 continued to be dismissed at 3:10 p.m. (1T91).

8. Article VII, subsection A(3) of J-1 provides: "Teachers shall be on duty in accordance with the times specified in Appendix A and Appendix A-1." Appendix A concerns elementary and middle schools and Appendix A-1 is the daily time schedule for the High School (J-1). In Appendix A-1, the latest time specified for grade 8 is 2:34 and the last time specified for grades 9-12 is 2:54 (J-1).

9. For the 1995-1996 school year, the Board unilaterally changed the daily schedules for students and teachers of the High School. The Board instituted a closed school day for all High School students. Before the closed school day, students were permitted to leave the school premises for lunch. With the closed school day, students must stay on school grounds during lunch period (1T87, 2T7).3/ Lunch period became 43 minutes long for all grades in the High School (1T87).

Student dismissal time for all grades in the High School was changed to 2:25 p.m. in 1995-1996. Since then, eighth grade teachers have been dismissed along with teachers for grades 9-12 at 3:10 p.m. (1T92-1T93).

This new schedule is memorialized and reflected in the 1995-1996 Staff Handbook (R-2). R-2 also states "Staff Development/In-service 2:30-3:10."

10. As a result of the daily schedule changes, eighth grade teachers are dismissed at 3:10 p.m. instead of 2:45 p.m. Lunch period for grades 9-12 teachers went from 55 minutes to 43 minutes.

In the past, teachers were not accountable to the Board after the students left but simply could not leave the school building. Now, all High School teachers are accountable for 45 minutes after students are dismissed for the day (3:10 p.m.

3/ Twelfth grade students have the option to leave school for lunch (2T7-2T8)

teacher dismissal time versus 2:25 p.m. student dismissal time). The 45 minutes are reserved for staff development when teachers are supposed to be available for workshops, training sessions or anything a department chair or principal may design for teachers to attend. Teachers are no longer able to roam free in the building or stay in the teachers room during this time. They are now accountable for their whereabouts within the building (1T 94-96).

The schedule changes "elongated the eighth grade teachers' working day from 2:45 to 3:10" and made the teachers accountable from 2:25 to 3:10 (1T96-1T97).

11. There has been no increase in pupil contact time as a consequence of the schedule changes (1T93-1T94).

12. Article VII subsection A(2) of J-1 provides that "Teachers and aides shall have a daily duty-free lunch period of at least thirty (30) minutes." Even after the schedule changes, the 43 minute lunch period is greater than the contractually guaranteed 30 minutes, and hence, is not a subject of dispute in this case (1T111).

13. Elementary and middle school teachers are dismissed 16 minutes after students, but High School teachers are dismissed 45 minutes after their students (1T97-1T98).

14. There is no language in any of the parties contracts that links teacher dismissal time to student dismissal time (1T109-1T110).

Elimination of Union Business Period

15. Sally Corvinus has been a High School teacher since 1970. She became the Association President in September of 1992 (1T78-1T79).

16. Since becoming Association President, Corvinus was allowed one school period a day where she could conduct union business. She referred to this period as the REA period. This period was in substitution of her duty period (1T86, 1T88-1T89).

During this REA period, Corvinus would do whatever was needed to be done for the Association such as meeting with Association members, principals, assistant superintendents, the superintendent or N.J.E.A. representatives, and make telephone calls on behalf of the Association (1T82, 1T89-1T90).

17. In a regular duty period a teacher is assigned an administrative function such as lunchroom supervision, hallway supervision, the processing of tardy students and library duty (2T47). During duty period, a teacher is expected to exclusively attend to that duty. For example, a teacher assigned to attendance duty must stay in the attendance office and perform that duty the entire time. There is no latitude to conduct union business during a true duty period (2T62).

If a duty is being performed by a team or partnership of teachers, the partners do not have the authority to excuse one another from the duty. Only an administrator can excuse a teacher from a duty (2T63).

18. Corvinus' teacher schedules for the school years 1992-1993 through 1995-1996 were introduced into evidence (J-5, J-6, J-7 and J-8). Teacher schedules are also referred to as recitation schedules. Corvinus had lunch during period 6 every year until the schedule changes of 1995-1996 (1T80-1T81).

Her 1992-1993 recitation schedule (J-5) shows classes filled in for all periods except periods 3, 4 and 6. These periods appear blank, but period 3 was her REA period and period 4 was her prep period for that year (1T80). The REA period was held during what would have been her duty period (1T81-1T82).

Corvinus' 1993-1994 teacher schedule has classes designated for all periods except periods 1, 4 and 6 (J-6). They appear blank, but period 1 was her prep period, period 4 was her REA period and period 6 was her lunch period (1T85).

Corvinus' 1994-1995 recitation schedule (J-7) is completely filled out except for period 3, which is blank. Period 3 was her prep period. Period 6 has the word "Lunch" handwritten in and period 8 has typed into it the acronym "R.E.A." "R.E.A." designated Corvinus' REA period also known as her union business period (1T86).

The 1995-1996 recitation schedule (J-8) reflects several of the changes the Board unilaterally made to the High School staff schedule. Prior to 1995-1996, there was one uniform lunch period for all teachers and students grades 9-12 because the High School closed for lunch. Lunch was taken during period 6. For

1995-1996, the school no longer closed for lunch and teacher and students were assigned to lunch over the course of periods during the school day. This change generated the need for teacher supervision of the students during lunch periods called "lunch duty" (1T87-1T88).

J-8 has all of the periods filled in except period 3. Period 3 was Corvinus' prep period (1T87). Period 6 is labeled "Lunch Duty.". Unlike the previous year's schedule, the designation "R.E.A." does not appear anywhere on the 1995-1996 schedule. The Board eliminated her REA period and instead assigned her lunch duty (1T88-1T89).

19. Corvinus did not know who created or authorized the REA period. Once she became Association President, her recitation schedule had REA written on it in place of a duty period. She never requested the REA period. It just appeared on her recitation schedule (1T85-1T87 and 1T117-1T119).

20. None of the parties contracts guarantees the Association President the right to a period solely to conduct union business (1T113). The only provision in J-1 concerning release time for Association officers is Article V, subsection A(6), which provides in pertinent part:

> The Board shall, with the knowledge and approval of the building principal concerned, allow up to ten (10) days per year of released time to the President and/or First Vice President of the Association. Such released time, if granted, shall be used only for Association business.

Corvinus believed that the release time referred to in Article V of the contract was for conducting union business that would take an entire day such as a P.E.R.C. hearing. It was not for taking care of something that would take a couple of hours or less (1T116-1T117).

Except for current contract negotiations, Corvinus was unaware of any proposals concerning the Association President being paid for a school period to conduct union business (1T127). During her Presidency there was no need for the union negotiating team to put such a proposal on the table because Corvinus thought she already had the REA period as a benefit (1T140).

21. Other than "R.E.A." appearing on Corvinus' recitation schedules, no school official ever authorized or verbally gave her permission to have a paid period to conduct union business (1T120-1T122). School administrators, however, were aware of the REA period (1T121). When arranging meetings with administrators to discuss union business Corvinus sometimes told them that a good time for her to meet was during her REA period (1T18 and 1T84). When Corvinus would leave her assigned building to conduct Association business she would write in the sign-out book "REA business" or "BOE" (Board of Education).

While Andrew Brown was the High School principal, if Corvinus told him she was leaving the building for REA business, he did not deny her the ability to leave (1T84). Corvinus has never been formally or informally disciplined for meeting with

principals, assistant superintendents or superintendents during school time (1T90).

22. David Shore was the immediate past President of the Association. He served as President for approximately eight years (1T124). He is a Basic Skills Instructor (1T39 and 2T14). During his tenure as Association President, he did not have an REA period, that is, a school period designated to exclusively conduct union business (1T123).

As a Basic Skills Instructor, Shore had a more flexible schedule than a teacher that is assigned students to teach period by period. He had discretion when the instructional period began and ended (1T39-1T40). He, therefore, had more flexibility to meet and conduct union business throughout the school day than did Association President Corvinus (1T141). If Shore wanted to leave his assigned school building for any reason, he had to obtain permission (2T33-2T35).

23. Since 1970, Corvinus is the only Association President to have worked out of the High School (1T90).

24. George Sliwiak was the Superintendent of Schools for the Board from July 1, 1990 to June 30, 1994. He was also principal of the High School from July 1, 1971 through June 30, 1986 (1T22-1T24).

While Sliwiak was Superintendent and Corvinus was Association President, they met about twice a month. He would typically meet with her at the same time during the school day

(1T17). In 1992, for example, they typically met during the third period (1T33-1T34). Their school schedules would determine when they would meet (1T17). Sliwiak came to know what period Corvinus was available to meet and would schedule meetings accordingly (1T34).

Sliwiak did not meet with other staff members with the consistency in time of day as he did with Corvinus (1T22). In 1990 and 1991 when Shore was Association President there was no consistency in time when they met to discuss union business (1T29-1T31). As Superintendent, Sliwiak never authorized Corvinus to have a paid school period to do union business (1T35).

25. Maxine Howard is a staff secretary in the main office at the High School. She has been employed by the Board for 16 years. As staff secretary, she is responsible for calling substitute teachers, handing them their schedules for the day and making sure they know where to go (1T42). Howard also was the caretaker of the sign-out book which was kept in a drawer in front of her (1T51-1T52). Howard received all telephone calls that came into the High School because she was at the main switchboard (1T65-1T66).

Howard is the primary secretary to keep teacher schedules. She keeps them on her desk (1T44). The schedules she receives are completely filled in as in J-7, Corvinus' 1994-1995 schedule (1T48-1T49). There are no blank spaces in the schedules she receives as compared to J-5 and J-6 (1T46 and 1T49). Even

though J-5 shows blanks, Howard remembered Corvinus had an REA period during period 3 in 1992-1993 (1T49 and 1T74).

Howard also knew Corvinus had an REA period in 1993-1994, but could not recall which period (1T50). Her recollection of Corvinus having an REA period for the school years 1992-1993, 1993-1994 and 1994-1995 was based in part on the consistency in the time of day Corvinus conducted union business over the telephone or signed out to leave the building (1T49-1T53).

Howard did not know how the acronym "R.E.A." got typed into period 8 of Corvinus' 1994-1995 recitation schedule, J-7. She did not prepare the schedule and did not know who authorized it. She received the schedule with "R.E.A." already typed in it (1T53-1T55).

26. Darlene Roberto has been acting as the Interim Superintendent since May 7, 1996. Before assuming this position, Roberto had been employed by the Board in various capacities since 1973. She has been a classroom teacher, guidance counselor, middle school building principal and director of the Basic Skills Program over the years (2T5).

Once classes are assigned to a teacher for the year, it is the building principal who assigns prep and duty periods. The building principal or his designee also determines the type of duty a teacher will receive for the year (2T23).

27. Peter Kowalsky was an assistant principal at the High School from August of 1989 until August 24 of 1996. He was

named principal of the middle school effective August 25, 1996 (2T44-2T45).

When Kowalsky was assistant principal at the High School he, along with the other assistant principals and building principal, collectively assigned duty periods to teachers (2T48 and 2T57). He never assigned a duty period to Corvinus to solely conduct union business (2T48). Kowalsky maintained that there was no official duty period known as an REA period or union business duty period (2T48).

In 1995-1996 Corvinus had lunch duty assigned as her duty period (2T48). Kowalsky was her supervisor for that duty period (2T60). In 1994-1995, Kowalsky thought that Corvinus was assigned hall duty (2T48). He could not recall the duties she was assigned in other school years, but to the best of his recollection, she had some sort of duty (2T48-2T49).

Despite his recalling that Corvinus was assigned hall duty in 1994-1995, Kowalsky could not explain why her recitation schedule, J-7, did not reflect this duty and instead showed "R.E.A." in the eighth period (2T53). Kowalsky could not produce a recitation schedule for 1994-1995 that contradicted J-7 and showed a hall duty assigned to Corvinus (2T54). He did not know why "R.E.A." was put in the schedule or who authorized it (2T53). However, he does not always see the completed teacher schedule, but the building principal does (2T52-2T53).

28. Prep periods are to be used by teachers for educational purposes, especially preparing for class instruction. However, they have been used for faculty and parent conferences (2T9-2T10).

Teachers are not monitored during their prep periods. They are free to go any place in their assigned building (2T8 and 2T49). Teachers, however, cannot leave their assigned building without signing out. Moreover, if a teacher leaves the building for other than school business, she must contact an administrator (2T50).

During prep periods, nothing prohibits a teacher from meeting with vice principals, principals or the superintendent of schools (2T10). Teachers can make telephone calls during their prep period (2T49). A teacher could conduct union business during a prep period without management being aware of it (2T60-2T61).

29. Kowalsky has never been informed by any administrator in the District that Corvinus was in their building at an unscheduled or unauthorized time. Corvinus has never been reprimanded for leaving the High School without permission (2T54-2T55).

30. Article V, subsection B(2) of J-1 provides:

> The Board retains the right to hire, assign, promote and direct employees covered by this Agreement...Furthermore, to direct school operations, to determine educational policy, and to do all things necessary and proper to accomplish the mission of the school district.

ANALYSIS

The Charging Party asserts that the schedule change resulted in all High School teachers being accountable for staff development and lengthened the work day for eighth grade teachers from 2:45 p.m. to 3:10 p.m. The Charging Party also alleges that Respondent violated the Act when it assigned the Association President lunch duty in place of her union business period. The Association maintains that the union business period developed out of past practice.

Generally, the Board defends its actions by averring that the unilateral changes are permitted under law and contract. Furthermore, Respondent asserts that a paid union business period never officially existed or developed into a past practice within the meaning of the law.

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

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

A public employer may violate this obligation in two separate fashions: (1) repudiating a term and condition of employment it had agreed would remain in effect throughout a contract's life, and (2) implementing a new rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a contractual defense. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

Here, the Association does not have an explicit contractual right protecting against work schedule changes or a

contractual guarantee for a paid union business period. Therefore, my focus is on the second type of violation listed above.

If the Association establishes that a change in the terms and conditions of employment has occurred without negotiations, the Board will be found to have violated the Act unless it has a managerial prerogative or contractual right to make the change. Id. at 366.

An established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979). Generally, a past practice which defines terms and conditions of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. Where a collective agreement is silent or ambiguous on the issue at hand, past practice controls. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982).

The New Jersey Supreme Court developed the standard for determining when a subject is negotiable:

> ...a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide

> whether a negotiated agreement would not significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

In re IFPTE Local 195 v. State, 88 N.J. 393, 404-405 (1982).

Change in Staff Schedule

Applying the above legal principles, I find that the Board violated subsections 5.4(a)(1) and (5) of the Act when it changed dismissal time for eighth grade teachers from 2:45 p.m. to 3:10 p.m. without first negotiating with the Association.

Work hours for teachers must be distinguished from the establishment of the students school day. It is a management prerogative to set the school schedule for students. Bd. of Ed. W'dst'n-Pilesgr. Sch. v. W'dst'n-Pilesgr. Ed. Assn., 81 N.J. 582, 593 (1980). Therefore, the Board had a prerogative to unilaterally change dismissal time for High School students to 2:25 p.m.

Working hours and compensation are negotiable terms and conditions of employment. Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 6-7 (1973). An alteration of scheduled hours of employment is a required subject of negotiations. Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975).

The contracts for the period of July 1, 1991 through June 30, 1996 (J-1 and J-2) are silent with regard to teacher dismissal time. The Staff Handbooks entered into evidence shed no further light on the subject because the Staff Handbook for 1990-1991 (R-1) covers a period of time before these contracts and the Staff Handbook for 1995-1996 (R-2) merely memorializes the changes that are complained of.

The uncontroverted testimonial evidence establishes that since 1992-1993 eighth grade teachers were dismissed at 2:45 p.m. and teachers for grades 9-12 were dismissed at 3:10 p.m. for at least the last twenty years. There has been no change in teacher dismissal time for teachers of grades 9-12. Only eighth grade teachers have had their work day lengthened.

The Association argues that all High School teachers should be dismissed sixteen minutes after the students are dismissed to bring High School teacher dismissal in accord with the rest of the District. But the Association does not articulate a sustainable basis under law or contract. The past practice of eighth grade teacher dismissal time was eleven minutes after students were dismissed (2:45 p.m. minus 2:34 p.m.). Teachers for grades 9-12 were dismissed sixteen minutes after student dismissal prior to the changes in 1995-1996 (3:10 p.m. minus 2:54 p.m.) However, there was no uniform practice of dismissing all high school teachers sixteen minutes after students were dismissed as the Association asserts.

Moreover, there was no evidence that ties teacher dismissal time to student dismissal time. There is no contract provision. In fact, what Article VII of J-1 clearly establishes is that eighth grade teachers shall be on duty until at least 2:34 and teachers for grades 9-12 shall be on duty until at least 2:54. The past practice of dismissing eighth grade teachers at 2:45 p.m. and grades 9-12 teachers at 3:10 p.m. was in accord with this contract provision. The Association's position of dismissing all High School teachers 16 minutes after students leave for the day, or at 2:41 p.m., would violate the expressed terms of Article VII for grades 9-12.

In sum, with regard to teacher dismissal time, there was no change for grades 9-12 teachers and no basis in law or contract to dismiss them earlier then 3:10 p.m. Eighth grade teachers, on the other hand, had their work day unilaterally elongated by twenty-five minutes (3:10 p.m. minus 2:45 p.m.). The Board neither had a managerial prerogative nor a basis in contract to do so without negotiations. Thus, it violated subsections 5.4(a)(1) and (5) of the Act.

The Association also argues that the Board violated the Act by making teachers more accountable during the time between student dismissal and teacher dismissal. The examples offered by the Association are that teachers are supposed to be available to attend workshops and training sessions and they are not as free to roam the building as they once were. There has been, admittedly, no increase in student contact time from the schedule changes.

The Board asserts it has not violated the Act. It argues that R-2, the 1995-1996 Staff Handbook, provides that all High School teachers are expected to be available for staff development/in-service between 2:30 and 3:10. The Board maintains that the Association has not demonstrated how this time is actually used differently from the past or that inappropriate assignments have been made during this time.

The Board, however, has not focused on the correct issue. The issue is not whether the teachers have been given inappropriate assignments after students are dismissed, rather, it is whether any assignments or obligations have been unilaterally imposed during what was historically duty free time.

In Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988), the Commission held that the unilateral assignment of duties during duty free time was violative of the Act. The Commission has also held that the announcement of a unilateral alteration of terms and conditions of employment is in and of itself a violation of the Act. The actual implementation of the announced change is a separate violation. Somerville Bd. of Ed., P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987).

Here, the Board via the 1995-1996 Staff Handbook announced its intention to require staff development/in-service between 2:30 p.m. and 3:10 p.m. While I agree with the Board that the Charging Party did not clearly demonstrate that teachers actually had involuntarily attended workshops and the like, I find

that the announcement of this requirement violated subsections (1) and (5) of the Act.

Under the circumstances presented here, to the extent that High School teachers had duty free time prior to 1995-1996, the Board cannot impose any duties, including staff development, without first negotiating with the Association. Before the 1995-1996 schedule changes, eighth grade teachers taught until 2:34 p.m. and teachers for grades 9-12 taught until 2:54 p.m. After they were done teaching, High School teachers essentially enjoyed duty free time in that they were allowed to do whatever they wanted short of leaving for the day. Hence, the Board cannot require staff development/in-service of eighth grade teachers after 2:34 p.m., or, in the case of teachers for grades 9-12, after 2:54 p.m. without further negotiations.

Elimination of Union Business Period

The Board asserts that the union business period was never officially authorized or sanctioned. The Board argues that it strains believability that an REA period came into existence without the Association ever requesting it or the Board consciously and deliberately granting it.

The Board also argues that it has a managerial prerogative under law and reserved in contract to assign duty periods. Furthermore, the assignment of duty periods are not immutable so that even assuming the Association President had a union business duty period one year, the Board can assign a different duty period the following year.

For the reasons stated below, I find that the Board violated subsections (1) and (5) when it assigned Corvinus lunch duty in place of her REA period.

J-1 does not make reference to the assignment of duty periods or a union business period. The only reference in the contract regarding release time for Association officers can be found in Article V. Article V speaks in terms of days. The only evidence submitted by either party to shed light on Article V was the testimony of Corvinus. She stated that Article V has been used for taking days off to attend to union business such as a P.E.R.C. hearing. The contractual release time was not for attending to tasks that would take a couple of hours or less. That is what the REA period was used for.

The Board did not submit evidence to rebut this interpretation or argue otherwise in its post-hearing brief. Therefore, I find that Article V does not contemplate the type of release time being used by the Association President during the school day which has been referred to as the REA period.

Because the contract is silent as to the REA period, it is appropriate to examine the past practice of the parties. County of Sussex at 431.

Corvinus and Howard testified with specificity that Corvinus had a union business period. They both stated that in 1992-1993 Corvinus consistently conducted union business during period 3. Former Superintendent Sliwiak corroborated their

testimony by testifying that he met with Corvinus to discuss union business with unusual consistency during period 3 in 1992-1993. While Howard could not remember the period number in 1993-1994, she remembered Corvinus conducted union business at the same time of day that school year. I credited Corvinus that her duty period, which evolved into the REA period, was during period 4 in 1993-1994.

Corvinus' recitation schedule for 1994-1995 (J-7) also evidenced the existence of an REA period. On that schedule the acronym "R.E.A." is clearly printed in period 8. To Corvinus and Howard, this designated the REA period or union business period. Corvinus believed that the REA period replaced her duty period once she became Association President. I agree. There is no mention of any type of duty on Corvinus' 1994-1995 recitation schedule, which supports a finding that the REA period came to replace her duty period.

Only Kowalsky gave contrary testimony. He stated that there was no REA period and that Corvinus always had an assigned duty period since 1989. He further stated that she had lunch duty in 1995-1996 and hall duty in 1994-1995, but could not remember Corvinus' duty assignments in other years. Kowalsky could not explain why Corvinus' recitation schedule for 1994-1995 did not reflect hall duty as he stated but instead showed she had an REA period.

The Board did not submit any other evidence to support Kowalsky's assertion that Corvinus had hall duty in 1994-1995 or otherwise challenge the accuracy of J-7. In fact, the Board failed to submit completed recitation schedules for any of the years in question that would support a finding that Corvinus had assigned duties prior to 1995-1996. Consequently, I could not rely on Kowalsky's testimony regarding the assignment of duties to Corvinus prior to 1995-1996.

In addition, no evidence of any kind was offered by the Board to call into question Corvinus' description of what periods were her duty periods and what periods were her prep periods during the school years 1992-1993 through 1995-1996. Other than Kowalsky's general assertion that Corvinus always had an assigned duty, no evidence was introduced to specifically rebut the testimony that Corvinus consistently conducted union business during period 3 in 1992-1993 and during period 4 in 1993-1994, which were her duty periods in those years.

The Board adduced testimony from Sliwiak, Roberto and Kowalsky which suggests the possibility that Corvinus was conducting union business during her prep period and not during her duty period. But, the Board did not produce any direct evidence that this was so. The uncontroverted evidence is that Corvinus' prep period was period 4 and her duty period was period 3 during the 1992-1993 school year. The evidence established that Corvinus consistently conducted union business during period 3

that year. Unrefuted is that Corvinus conducted union business during her duty period, period 4, in 1993-1994. Finally, the combination of the 1994-1995 recitation schedule and testimonial evidence established that Corvinus had an REA period during period 8 and a prep period at period 3. Hence, while it is possible that Corvinus may have occasionally conducted union business during her prep period, the great weight of evidence showed that she consistently used her duty period to exclusively attend to Association affairs.

The Board argues that if Corvinus had been conducting union business during her duty period it was without their permission or approval. The Board asserts that there must be mutuality and acceptance for a past practice to be established.

The mutual consent of the parties, however, can be implied from their conduct. Caldwell-West Caldwell Bd. of Ed. at 536. In Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), the Commission rejected the Board's argument that a two-year practice of permitting the conversion of unused personal days to accumulated sick leave could not rise to the level of an established past practice because the Board never knew about it, never authorized it and the practice was created by an error committed by its payroll clerk. The Commission stated: "The point is not how a longstanding practice came to exist, but that it did exist." Id. at 485.

Similarly, the Commission found no merit in an employer's contention that it had the right to make a change in the established pay day because the practice had never been formally approved by the City Council. City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989).

In the instant case, I find that there was a three year past practice of allowing Association President Corvinus to conduct union business during what had been her duty period. It is unclear how the practice got started and who authorized it but it did exist. Furthermore, I find that the administration knew of this practice. There is no latitude to leave a duty post without permission from the administration. Corvinus consistently conducted union business during her duty period, including meeting with administrators, and was never reprimanded or denied the ability to do so. There is mutual consent implied by the parties' conduct. If Corvinus was not specifically assigned an REA period in years 1992-1993 and 1993-1994, her duty period was allowed to evolve into one. Corvinus' 1994-1995 recitation schedule memorialized the practice.

The REA period became a term and condition of employment for the Association President which had the same status as if it was stated in the parties contract. County of Sussex at 431. It cannot be eliminated without first negotiating with the Association unless the Board has a managerial prerogative or a contract right to do so. Elmwood Park Bd. of Ed. at 366.

The Board asserts it had both a contractual right and a managerial prerogative to have unilaterally assigned Corvinus lunch duty in 1995-1996. It cites Article V, subsection B(2) as the contract basis for the unilateral change. This provision is a general management rights clause. A contract clause must specifically authorize the unilateral charge. Elmwood Park Bd. of Ed. at 367. Article V does not specifically authorize a unilateral change in the union business period. Thus, the contract cannot support the Board's actions.

In 1995-1996 the way lunch was administered was changed. The high school no longer closed for lunch and students in grades 9-12 had to remain on the premises. This change generated a need for teacher supervision during lunch periods. Corvinus was assigned lunch duty that year.

It is well-settled that a board's decision to require teachers to supervise students while at lunch, on the playground, or getting on or off buses is not mandatorily negotiable provided that duty does not displace an employee's agreed-upon preparation period or other time free of pupil contact and provided the employer negotiates over compensation for that duty. South Brunswick Bd. of Ed., P.E.R.C. No. 85-60, 11 NJPER 22 (¶16011 1984).

It is also well-settled that paid union release time is a mandatorily negotiable term and condition of employment. In City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990) the

Commission reaffirmed that employee time off is mandatorily negotiable by highlighting the importance of release time for union officials:

> Release time for union officials can vitally affect the employees they represent. We recognize that the provisions cost money and may reduce the number of employees available to deliver services; but these are issues of wisdom and reasonableness which must be resolved through the negotiation process.
>
> Local 195 itself held that the employees' interests in effective representation outweighed governmental policy concerns which might be affected by negotiations over transferring union officials. We likewise believe that the general negotiability of time off and the specific employee and public interest in release time for representational purposes outweigh any policy concern which might be affected by agreeing to grant a handful of employees release time from non-emergency duties.

Also see, Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987). The fact that the instant case involves a past practice and not a contract clause does not diminish the applicability of the case law.

Applying these well established legal principles I find that the Board had a managerial prerogative to assign Corvinus lunch duty but not at the expense of the REA period. The Board must negotiate with the Association over the elimination of the union business period. When the Board unilaterally assigned Corvinus lunch duty in place of her REA period, it violated subsections 5.4(a)(1) and (5) of the Act.

The Board's argument that it has a managerial prerogative to assign a different duty each year and, therefore, can unilaterally change the union business period confuses the subject. At some point during the three-year practice, the duty period for the Association President ceased being a true duty period and became a union benefit. While it is true the Board can assign a different duty each year, it cannot unilaterally eliminate a mandatorily negotiable union benefit such as release time.

In the filed charge regarding the elimination of the REA period (C-1B), the Charging Party failed to specifically plead a violation of subsection 5.4(a)(5) of the Act. The narrative of the charge clearly describes the alleged violation as a unilateral change in the Association President's schedule. From the face of the charge, the Respondent had notice of what was at issue. Moreover, the parties fully and fairly litigated the issue of the unilateral elimination of the REA period. Therefore, under Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), I am empowered to find, and so do find, a violation of subsection 5.4(a)(5) though not originally plead by the Charging Party.

The Subsection 5.4(a)(3) Allegations

There was no evidence to support a finding of anti-union animus under Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), in either the school day change or elimination of the union business period. Hence, I recommend that the (a)(3) allegations be dismissed.

CONCLUSIONS OF LAW

The Board violated subsections 5.4(a)(5) and, derivatively (1), of the Act when it unilaterally required eighth grade teachers to work until 3:10 p.m., imposed staff development/in-service on High School teachers during duty free time and eliminated the Association President's union business period.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

I. That the Board cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by unilaterally requiring eighth grade teachers to work until 3:10 p.m., assigning staff development/in-service to eighth grade teachers after 2:34 p.m. and to teachers grades 9-12 after 2:54 p.m. and eliminating the Association President's REA period.

B. Refusing to negotiate in good faith with the Association over the lengthening of eighth grade teacher's work day, assignment of staff development/in service during duty free time and elimination of the union business period prior to implementing or announcing such changes in mandatorily negotiable terms and conditions of employment.

II. That the Board take the following affirmative action:

A. Immediately restore eighth grade teacher dismissal time to 2:45 p.m. and reinstate the Association President's union

business period. Amend the High School teacher schedule to reflect staff development/in-service shall end by 2:34 p.m. for eighth grade teachers and by 2:54 p.m. for all other High School teachers.

B. Negotiate in good faith with the Association over these desired changes.

C. 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 their 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 to ensure that such notices are not altered, defaced or covered by other materials.

D. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Perry O. Lehrer
Hearing Examiner

DATED: May 29, 1997
Trenton, New Jersey

APPENDIX A

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 NOT interfere with, restrain or coerce employees in the exercise of their rights guaranteed by the Act, by unilaterally requiring eighth grade teachers to work until 3:10 p.m., assigning staff development/in-service to eighth grade teachers after 2:34 p.m. and to all other High School teachers after 2:54 p.m., and eliminating the Association President's union business period.

WE WILL NOT refuse to negotiate in good faith with the Association over the lengthening of the eighth grade teachers' work day, assignment of staff development/in-service for all High School teachers during duty free time and the elimination of the Association President's union business period.

WE WILL immediately restore the 2:45 p.m. dismissal time for eighth grade teachers, reinstate the Association President's union business period and announce that staff development/in-service will end at 2:34 p.m. for eighth grade teachers and at 2:54 p.m. for teachers of grades 9-12.

Docket No. CO-H-96-115 & CO-H-96-116 Roselle Board of Education
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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