

H.E. NO. 99-11

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

In the Matter of

LINDEN BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-98-232

LINDEN EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Linden Board of Education violated 5.4a(5) and (1) of the Act by unilaterally changing the regular workweek of a unit employee from Monday through Friday to Tuesday through Saturday. The Hearing Examiner also recommends that the change resulted in a loss of overtime pay to the employee for 1997-98 for which compensation was ordered, based upon records placed into evidence.

The Hearing Examiner recommends dismissal of the allegation that the change in workweek was motivated by anti-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 Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Alan J. Schnirman, attorney

For the Charging Party, Bucceri and Pincus, attorneys  
(Sheldon H. Pincus, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On December 24, 1997, the Linden Education Association filed an unfair practice charge against the Linden Board of Education. The charge alleges that on or about October 27, 1997, during collective negotiations, the Board unilaterally changed the workweek of a head custodian who was a negotiations unit employee and member of the Association negotiations team and grievance chairperson. The workweek was changed from Monday through Friday to Tuesday through Saturday, resulting in a loss of overtime pay for work performed on Saturdays. The Board's actions allegedly

violate section 5.4a(1), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On February 4, 1998, a Complaint and Notice of Hearing issued.

On March 30, 1998, the Board filed an Answer, admitting the workweek change but denying that it acted unilaterally and that its action unlawfully "chilled" collective negotiations. The Board asserts that the workweek change complies with the 1995-98 collective agreement signed by the parties.

On May 27, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by August 31, 1998.

Based upon the entire record, I make the following:

#### FINDINGS OF FACT

The parties stipulated the following paragraphs, taken verbatim from the Complaint:

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<sup>1/</sup> 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."

1. The Charging Party, Linden Education Association ("Charging Party" or "Association"), is the exclusive majority representative for collective negotiations for, among others, a negotiations unit consisting of Head Custodians employed by the respondent, Linden Board of Education ("Board"). Excluded from the bargaining unit are teachers, secretaries, paraprofessionals, assistant custodians and maintenance personnel, who are members of separate bargaining units also represented by the Linden Education Association.

2. The Association is an employee representative within the meaning of N.J.S.A. 34:13A-1 et seq. The Board is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq.

3. Prior to the Spring of 1996, Head Custodians were part of a negotiations unit comprised of Head Custodians, Maintenance Personnel and Custodians.

4. At or about that time (and during the course of negotiations for a successor agreement), the Board initiated a Clarification of Unit Petition seeking to exclude Head Custodians from the then-constituted negotiations unit.

5. As a result of the filing of the Clarification of Unit Petition, the Board and the Association agreed that:

(a) Head Custodians would be removed from the unit of custodians and maintenance personnel;

(b) The Board voluntarily recognized the Head Custodians as a separate negotiations unit;

(c) The Head Custodians' terms and conditions of employment for the period July 1, 1995 through June 30, 1996 would be covered by what was later agreed to as the collective negotiations agreement between the Association and the Board for maintenance personnel and custodians covering the period from July 1, 1995 through June 30, 1998.

(d) Negotiations for an agreement for the Head Custodians would commence thereafter.

6. The Association and the Board began collective negotiations for Head Custodians in or about January, 1997. To date, no agreement has been reached.

7. Mr. Bergdoll is not only a member of the bargaining unit but is also a member of the bargaining team as well as the grievance chairperson.

I find the following facts:

8. Max Bergdoll has been employed by the Board since 1978. He has been head custodian at the athletic field since 1981 (T75).<sup>2/</sup> Until October 1997, Bergdoll's regular workweek was Monday through Friday. He worked Saturdays often during football and track seasons, for which he was paid an overtime rate of time and one half (T76).

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<sup>2/</sup> "T" represents the transcript, followed by the page number(s); "J" represents jointly submitted exhibits; "CP" represents charging party exhibits.

9. Article XI (Hours of Work) of the 1993-95

"maintenance personnel, custodians" collective agreement provides:

1. Custodians: A work day shall consist of eight (8) consecutive hours inclusive of one-half hour paid lunch period.

2. A workweek shall consist of forty (40) hours.

3. Maintenance Department: The workweek for maintenance personnel shall be forty (40) hours; five eight-hour shifts, 7:00 a.m. to 4:00 p.m., Monday through Friday, inclusive of one (1) hour unpaid lunch period daily. The Board may change the starting and ending time of one or more maintenance employees upon two weeks notice and for no longer than thirty days.

[J-6]

10. On September 20, 1995, during negotiations for a successor agreement, the Board proposed that "for custodians who begin shift at 3:00 p.m. or after to 11:00 p.m. or after, there shall be no Friday p.m. shift and instead such custodians shall work 8:00 a.m. to 4:00 p.m. on Saturday" (J-2).

It also proposed a new Article XI, paragraph #3, concerning maintenance employees. The Board proposed:

The workweek for maintenance personnel shall be forty (40) hours; five eight-hour shifts, 7:00 a.m. to 4:00 p.m., inclusive of one (1) hour unpaid lunch period daily. The Board may change the starting and ending time of one or more maintenance employees upon two weeks notice and for no longer than thirty days.

[J-2]

The Association rejected the proposals (T22). It counteroffered to keep the Saturday overtime rate, and allow volunteers on a rotating basis (T58).

11. Throughout the fall of 1997, the parties were collectively negotiating a successor agreement for head custodians (T25). Bergdoll was a member of the Association negotiations team and had become grievance chairperson in September 1997 (T26; T79).

On October 13, 1997, during a negotiations session, Bergdoll was given a notice stating that beginning October 27, his regular workweek will change from Monday through Friday to Tuesday through Saturday (T76; T89). Association president Dennis Grieco was informally notified of the workweek change "a couple of days" before the session (T69). The parties stipulated that since 1985, Bergdoll is "the only custodian assigned a workweek which included Saturdays in other than an overtime or emergent situation" (T9).

At each negotiations session, the parties confirm dates of their next two sessions (T64). The Board and Association had confirmed their next scheduled sessions when Bergdoll was notified of the change in his workweek. The session then ended abruptly (T49-T50; T51).

Bergdoll testified that the change in his workweek was motivated by "trouble with several supervisors in the sense that I--there is a little bit of animosity between us..." On cross-examination, Bergdoll testified that he had trouble with "one supervisor." When pressed on the inconsistency, he testified, "I might have said several, but I meant one" (T91; T97). Bergdoll did not name that supervisor. Nor did he, or any Association witness, explain any particular circumstance(s) which may have motivated a

retaliatory workweek change. When pressed on direct examination to state any other reason (after "animosity") why his workweek was changed, Bergdoll testified, "Nothing that I am positive of. I mean, I have, you know, I suspect things, but I can't--I have no facts to back them up" (T91). Bergdoll's testimony concerning retaliation is strikingly vague, considering he is the alleged target of Board animus.

12. The next scheduled negotiations session was October 31, 1997. The Association cancelled it when NJEA representative and negotiations team member Glenn Johnson fell ill. He was unavailable from October 31 through November 14 (T34; T64; T71).

The record does not reveal the date of the session scheduled after October 31. The parties did not meet in November or December 1997. In December, Grieco and Board business administrator Joseph Barcelona informally discussed some negotiations issues (T65; T68). In particular, they discussed changes in job titles and duties (T62-T38; T68). But Grieco wanted to

...bring Glenn [Johnson] in on it; Glenn was more familiar with the terminology as to what to call them and so forth and so on and we would wait for Glenn. And we set up a date in January, if I recall.

[T68]

An "informal" agreement was reached in January 1998 (T32-T33). On some undisclosed date, the parties signed a 1995-98 collective agreement covering "maintenance personnel, custodians" (J-1). Although "head custodians" are excluded from recognition under Article I, local president Grieco testified that the head custodian



title was changed to "reporting custodian" and is included in the "maintenance personnel, custodians" unit (T25). In the absence of any other facts on the record concerning this matter, I credit Grieco's testimony.

13. Article XI (Hours of Work) of the 1995-98 collective agreement for "maintenance personnel, custodians" provides in a pertinent portion:

1. Custodians: A work day shall consist of eight (8) consecutive hours inclusive of a one-half hour paid lunch period....For custodians who begin their shift at 3:00 p.m. or after 11:00 p.m. and should the Board implement such a program, they may volunteer on a rotating basis to work an 8:00 a.m. to 4:00 p.m. Saturday shift at time and one-half their regular rate of pay rather than their regular Friday schedule.  
[J-1]

Paragraphs 2 and 3 of the 1995-98 agreement are unchanged from the same numbered paragraphs in the 1993-95 agreement (see finding #9).

Article XX (Maintenance of Standards) of the 1995-98 agreement states in a pertinent part:

The Board agrees that all conditions of employment relating to wages, hours or work, overtime differentials and general working conditions, so long as the same shall not be inconsistent with anything specifically covered by this agreement, shall be maintained as they are presently in effect in the Linden School System at the time of the signing of this agreement.  
[J-1]

Article XXIII (Salaries and Other Benefits) has an overtime pay provision for custodians. The rate is time and one-half the employee's regular rate payable after forty (40) hours (J-1).

14. Bergdoll's negotiated 1997-98 salary is \$38,516 (J-4; T80). The current overtime rate of pay (at time and one-half) is \$27.78 per hour (T80). The 1996-97 rate was \$27.21 per hour (J-4).

The Association presented accounting spread sheets showing dates, hours, rates and total compensation in overtime payments to Bergdoll for school years 1993-94, 1994-95, 1995-96 and 1996-97 (J-5). Annual accumulated overtime payments ranged from \$6,367 (1996-97) to \$7,727 (1993-94) (J-5; T80). Accumulated overtime payment in 1995-96 was \$7,096. Also presented were Bergdoll's "reports for extra services", approved bi-monthly overtime time sheets from July 1, 1997 to May 15, 1998 (CP-1). The time sheets report the work performed, together with the dates and number of hours worked.

In 1996-97, Bergdoll worked 119.25 hours of Saturday overtime for \$3,128.72. In 1997-98, Bergdoll worked about 81 hours of Saturday and Monday overtime.

#### ANALYSIS

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.

A public employer violates this obligation by 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).

A board of education has a prerogative to determine the days and hours of custodial services are needed and the number of custodians on duty at any given time. Given those determinations, however, the work schedules and work hours of individual employees are, in general, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393, 412 (1982); Englewood Bd. of Ed. v. Englewood Ed. Ass'n., 64 N.J. 1 (1973); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 95-107, 21 NJPER 227 (¶26145 1995).

A public employer may agree that if weekend work is necessary, full-time employees working Mondays through Fridays will do that work and be paid at overtime rates. New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd. NJPER Supp.2d 195 (¶172 App. Div. 1988); New Jersey Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987), see also Bridgewater-Raritan Reg. Bd. of Ed.

The Board maintains it has the contractual right to change the workweek of a custodian, despite the overtime provision in the current agreement. It relies on Article XI, which states, "A workweek shall consist of forty (40) hours." It argues,

There is no language in this section of the agreement which covers 'custodians' that imposes

limits or designates which days of the week covered employees shall work. Therefore, the scheduling of such dates is a contractual right since the parties in the contract only set forth the hours in workweek and not the days in said workweek.

[post-hearing brief at 4]

The Board illustratively contrasts the memorialized Monday through Friday workweek for maintenance employees with the absence of such a provision for custodians.

I disagree with the Board. The most that may be said of the 1995-98 agreement is that it establishes an 8 hour workday and 40 hour workweek for custodians. It does not speak to days or hours of work. No waiver of section 5.3 rights can be found unless a contract clearly and unequivocally authorizes a unilateral change. Elmwood Park Bd. of Ed.; Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). No provision(s) of the current agreement establishes such a waiver.<sup>3/</sup>

The Board does not dispute that for many years Bergdoll worked overtime on selected Saturdays, following his regular Monday through Friday workweeks. The Board also stipulates that Bergdoll

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<sup>3/</sup> Contrast New Jersey Sports & Exposition Auth. at 13 NJPER 710, where the public employer had a contractual right to change the workweek. The contract provided, "the workweek shall be Monday through Sunday both inclusive and shall be comprised of eight (8) hour days..." A critical fact in that case was that other unit employees at the facilities had "worked different days of the week depending on the schedule of events and Saturday and Sunday had been used as regular work days." Id. at 13 NJPER 711. No analagous facts appear in this case.

is the only custodian to have been assigned (on October 27, 1997) work on Saturdays which was neither overtime nor emergent. These facts show that an existing working condition was changed, despite the absence of a contractual commitment that the workweek would be Monday through Friday with Saturday work paid at overtime rates. Such a change triggers the duty to negotiate under section 5.3. As stated in Sayreville Bd. of Ed.:

[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.  
[9 NJPER 140]

The Board's budgetary concerns are a legitimate factor in formulating a negotiations position, but they do not eliminate the negotiations obligation entirely. Public employers generally do not have the right to cure economic problems by unilaterally changing work hours. See Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Principals Assn., 164 N.J.Super. 98 (App. Div. 1978). Having failed to negotiate to impasse before unilaterally changing Bergdoll's workweek, the Board violated 5.4a(5) and (1) of the Act.

The Association has also alleged that the Board's decision to change Bergdoll's workweek was in retaliation for his protected activities. Such conduct, if proven, violates the Act. N.J.S.A. 34:13A-5.4a(3).

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee(s) engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The facts show that Bergdoll was engaged in protected conduct by serving as grievance chairperson and by serving on the Association negotiations team when the change in workweek was announced. Board representatives sat across the table from Bergdoll when the change was announced.

Timing is a factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In this case, it is the only factor and I find it insufficient to show hostility. Undermining the Association's case is Bergdoll's admitted mere suspicion of hostility and his failure to name any purportedly hostile supervisor. Similarly, other Association witnesses failed to adduce evidence of hostility. Accordingly, I dismiss the allegation that the Board violated section 5.4a(3) of the Act.

#### REMEDY

I recommend that Bergdoll's regular Monday through Friday workweek be restored, pending any negotiations to impasse. Saturday work is payable at the contractual overtime rate.

I also recommend that Bergdoll be compensated \$1,062.59 plus interest, pursuant to R.4:42-11.4/

#### RECOMMENDED ORDER

I recommend that the Linden Board of Education:

A. Cease and desist from:

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

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4/ I multiplied Bergdoll's 1996-97 overtime hours (119.25) by the 1997-98 overtime rate (\$27.78) and then subtracted as mitigation his overtime accumulation in 1997-98 (\$1,680.69 for Saturdays plus \$569.49 for Mondays). The record does not show Bergdoll's overtime in 1998-99.

particularly by unilaterally changing the workweek of a unit employee from Monday through Friday to Tuesday through Saturday.

2. Refusing to negotiate in good faith with the Linden Education Association concerning terms and conditions of employment of negotiations unit employees, particularly by unilaterally changing the workweek of a unit employee from Monday through Friday to Tuesday through Saturday, thereby reducing overtime compensation.

B. Take this action:

1. Restore the Monday through Friday workweek to Max Bergdoll which was in effect before October 27, 1997.

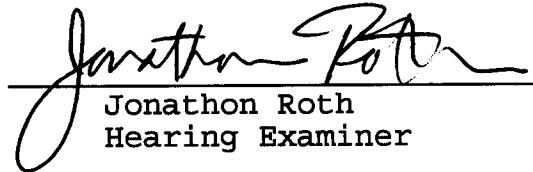
2. Pay Max Bergdoll \$1,062.59 plus interest, pursuant to R.4:42-11 in lost overtime compensation for the 1997-98 school year.

3. Negotiate to impasse over proposed changes in regular workweeks of unit employees.

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



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

  
\_\_\_\_\_  
Jonathon Roth  
Hearing Examiner

Dated: November 10, 1998  
Trenton, New Jersey



**RECOMMENDED**



**NOTICE TO EMPLOYEES**

**PURSUANT TO**

**AN ORDER OF THE**

**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

**AND IN ORDER TO EFFECTUATE THE POLICIES OF THE**

**NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,**

**AS AMENDED,**

**We hereby notify our employees that:**

**WE WILL** cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the workweek of a unit employee from Monday through Friday to Tuesday through Saturday.

**WE WILL** cease and desist from refusing to negotiate in good faith with the Linden Education Association concerning terms and conditions of employment of negotiations unit employees, particularly by unilaterally changing the workweek of a unit employee from Monday through Friday to Tuesday through Saturday, thereby reducing overtime compensation.

**WE WILL** restore the Monday through Friday workweek to Max Bergdoll which was in effect before October 27, 1997.

**WE WILL** pay Max Bergdoll \$1,062.59 plus interest, pursuant to R.4:42-11 in lost overtime compensation for the 1997-98 school year.

**WE WILL** negotiate to impasse over proposed changes in regular workweeks of unit employees.

Docket No. \_\_\_\_\_

\_\_\_\_\_  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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

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

APPENDIX "A"