

P.E.R.C. NO. 91-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF
THE CITY OF BAYONNE,

Respondent,

-and-

Docket No. CO-H-89-156

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Bayonne Teachers Association against the Board of Education of the City of Bayonne. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when, after factfinding, it unilaterally implemented its final negotiations offer. Based on the totality of the circumstances, the Commission finds that the parties had reached a genuine post-factfinding impasse and that the Board did not commit an unfair practice when it implemented its last best offer.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy,
attorneys (Robert T. Clarke, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Richard A. Friedman, of counsel)

DECISION AND ORDER

On December 9, 1988, the Bayonne Teachers Association filed an unfair practice charge against the Board of Education of the City of Bayonne. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), and (5),^{1/} when,

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

after fact-finding, it unilaterally implemented its final negotiations offer.

The Association sought an interim order restraining the Board from implementing a new salary structure. On December 16, 1988, a Commission designee denied that request. I.R. No. 89-9, 15 NJPER 66 (¶20023 1988).

On January 17, 1989, a Complaint and Notice of Hearing issued. On February 2, the Board filed an Answer admitting that it had implemented its final offer, but denying that this action violated the Act.

On February 17, March 15 and March 27, 1989, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by June 15, 1989.

On January 4, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-32, 16 NJPER 84 (¶21034 1990). He concluded that a post-factfinding impasse existed and that the Board had a right to implement its last best offer.

On January 31, 1990, after an extension of time, the Association filed exceptions. It asserts that an employer cannot implement a last best offer unless it proves that the majority representative negotiated in bad faith or, alternatively, that circumstances compelled that action. It accepts the Hearing Examiner's specific findings of fact, but contests his conclusion that an impasse existed. It asks that we find a violation and that we enter an order permitting it to reopen negotiations for the first

two years of a four-year agreement and requiring the Board to negotiate over the last two years.

On February 21, 1990, the Board filed a letter incorporating its post-hearing brief and urging dismissal of the Complaint.

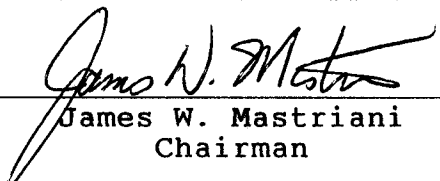
We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at 3-24) are undisputed, accurate and comprehensive. We incorporate them.

We also adopt the Hearing Examiner's thoughtful discussion of the law (H.E. at 25-29) and his careful application of that law to the facts (H.E. at 29-36). We reaffirm City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977), and its emphasis on the totality of the circumstances; and we correspondingly reject the Association's argument that a single factor -- either a representative's bad faith or an employer's compelling need -- must be proven in every case to justify unilateral action. Based on the totality of the circumstances, we find that the parties had reached a genuine post-factfinding impasse and that the Board did not commit an unfair practice when it implemented its last best offer.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
July 19, 1990
ISSUED: July 20, 1990

H.E. NO. 90-32

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

In the Matter of

BOARD OF EDUCATION OF THE CITY
OF BAYONNE,

Respondent,

-and-

Docket No. CO-H-89-156

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the Commission dismiss a Complaint that the Board coerced employees and violated its duty to negotiate in good faith when it unilaterally implemented its last best offer to the Association after exhausting impasse resolution procedures and negotiating after fact-finding. The hearing examiner finds that the parties reached impasse and that the Board showed its intention to reach an agreement with the Association.

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

H.E. NO. 90-32

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

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For the Respondent
Appruzzese, McDermott, Mastro & Murphy, Esqs.
(Robert T. Clarke, of counsel)

For the Charging Party
Zazzali, Zazzali, Fagella & Nowak, Esqs.
(Richard A. Friedman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 9, 1988, the Bayonne Teachers Association ("BTA") filed an unfair practice charge against the Board of Education of the City of Bayonne ("Board"). The charge alleged that on or about December 6, the Board coerced BTA members and refused to negotiate in good faith when it "unilaterally determined to implement its final [collective negotiations] offer of November 15, 1988." The Board's act allegedly violates subsections 5.4(a)(1),

(2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq. ("Act").^{2/} The charge was accompanied by a request for interim relief.

On December 16, 1988, a Commission designee denied the BTA's application for interim relief to restrain the Board from implementing a new salary structure. See Bayonne Bd. of Ed., I.R. No. 89-9, 15 NJPER 66 (¶20023 1988).

On January 17, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 2, 1989, the Board filed an Answer admitting that on November 15, 1988, it

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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 charge also alleged that the Board violated subsection 5.4(b)(2), (3) and (5) of the Act. These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission." No facts contained in the charge support these allegations, which were dismissed on the record in the second day of hearing.

presented its final collective negotiations offer to the BTA and that on December 5, 1988, it passed a resolution, "implementing the items agreed to by the parties during negotiations and the economic benefits provided for during the period September 1, 1987 through September 1, 1988 of the Board's final offer." It denied engaging in unfair practices and contended that a post-fact-finding impasse was reached permitting it to implement its final offer.

On February 27, March 15 and March 27, 1989, I conducted a hearing in this case. The parties examined witnesses and presented exhibits. Post-hearing briefs were filed by June 15, 1989.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Board of Education of the City of Bayonne is a public employer within the meaning of the Act. The Bayonne Teachers Association is a public employee representative within the meaning of the Act and represents teachers, guidance counselors, psychologists, librarians, nurses, social workers and others employed by the Board. The BTA also represents a unit of secretaries and clerks.

2. The parties' most recent collective negotiations agreements ran from September 1, 1984 through August 31, 1987 (J-1).

3. Negotiations for successor contracts began on March 24, 1987. BTA's chief negotiator was Alan D'Angelo, a mathematics teacher employed by the Board for sixteen years. He was accompanied

by BTA president, Lisa Cerbone, treasurer Howard Daley, and NJEA Uni-Serv representative Frank Cocuzza (1T12).^{3/} The Board was represented by attorney Robert Clarke, and Business Administrator Clifford Doll (2T93). Doll had been Administrator for nine years and oversaw all Board "financial doings", including negotiations (2T92). Others joined the teams later in negotiations.

At the first session, the parties agreed to some ground rules, including that each team had the authority to sign agreements, subject to ratification; that a "news blackout" would prevail through negotiations; and that two dates beyond each session would be set for future negotiations (1T143-1T144; 2T94). The Board and BTA did not discuss compensation (2T24; 3T5).^{4/}

4. On March 30, 1987, the negotiations teams met again. The BTA proposed non-economic contract terms for the secretarial and clerical employees and for teachers (R-2, R-3; 2T97, 2T98). The parties discussed a "scattergram" for the teachers unit, and salary guide proposals, generally (3T6). The Board's team stated that it had "strong financial problems", including a loss of State aid

^{3/} 1T refers to transcript dated February 27, 1989; 2T refers to transcript dated March 15, 1989; 3T refers to transcript dated March 27, 1989.

^{4/} The parties disagreed about where future sessions would be conducted -- the BTA wanted a more "neutral" site than Board offices. They also discussed two pending grievances (3T4). D'Angelo and Cocuzza claimed that the parties "followed a procedure" in which compensation for teachers would be resolved before compensation for secretaries (1T150; 2T24). Doll did not recall any "agreement" to that effect (2T95). Their testimony is not contradictory.

(2T96; 3T6, 3T75). Doll and Clarke were also concerned about inequities in the guides (2T96; 3T8).

5. The next meeting was on April 7. The negotiators discussed R-2 and R-3 item by item. The provisions concerned grievance procedures, Association rights, working conditions, absences and leaves, and indemnifications. The "salary guides" articles stated, "See monetary proposals for guides and longevity." R-3 (the "instructional" proposal) also contained provisions concerning a teacher's placement on the guide, and percentages to be paid for work performed "beyond the normal school day" and school year (R-3).

6. On April 28, the BTA proposed one-year salary guides and longevity percentages for teachers, psychologists and secretaries (R-4; 2T99). The estimated wage increase for teachers was 18.48%. The parties discussed the proposal. D'Angelo asked the Board to present a wage proposal. When it balked, D'Angelo insisted, and the Board offered a 0% increase (1T87).

7. On May 12, 1987, the Board rejected R-4 as too expensive. Doll called it "outlandish and out of sight" (2T103; 3T12). He and Clarke proposed R-5 and R-6, non-economic provisions for teachers and secretaries. Both documents state that salary guides "shall be negotiated" (2T103; 2T186). The BTA lowered its proposed one-year wage increase for teachers to 16.48% (1T87; 2T105; 3T13). There was no agreement to pend negotiations on psychologist and guidance counselor salaries until teacher salaries were negotiated (2T105).

8. On May 14, the Board team proposed a \$500 wage increase (including increments) for teachers (3T14). D'Angelo said the offer was designed to "placate the teachers" and his team dismissed it as "ridiculous" (1T101). The Board maintained that a flat dollar increase would help remove guide inequities. Doll could not recall if he or Clarke told the BTA that the Board could not afford a larger wage increase (2T106; 3T15). The parties met again on May 20 and no new proposals were offered (2T106; 3T16).

9. On May 28, the BTA proposed a one-year teacher salary guide costing about 15.83% more than the 1986-87 guide (R-7; 2T108). The parties discussed the proposal and the Board's negotiators rejected it as too expensive (2T107; 3T17). The BTA also informed the Board that a salary proposal for psychologists was forthcoming and that it would parallel teacher proposals (2T107). On June 4, the parties continued discussing the proposals and BTA suggested that guidance counselors be paid 1/200 of their salaries for each day they worked in the summer (2T109).

10. On June 10, 1987, the BTA submitted a revised teachers' salary guide and other unspecified proposals (2T110; 3T19). The parties discussed them at length. They met again on June 17 and settled a dispute that was proceeding to a grievance-arbitration hearing (2T111). On July 9, the Board and BTA met and reviewed all unresolved items, including salary proposals (2T111; 3T230). The Board did not change its \$500 wage increase proposal (3T21; see finding 8).

11. On August 5, 1987, the parties had their thirteenth and final negotiations session before a Notice of Impasse was filed. (See N.J.A.C. 19:12-3.1). The Board and BTA agreed to "memorialize" their agreement on "non-economic" items and to withdraw all unresolved non-economic items (1T15; 2T112; 3T22). The BTA verbally proposed a one-year contract providing a 15.83% wage increase to teachers,^{5/} 1% longevity pay, a .31% increase in guidance counselor stipends and a .17% increase to psychologists (2T113).

The Board's response was an offer to pay each teacher \$850 (including increment), a \$350 increase over its previous offer.^{6/} The Board stated that a flat dollar amount would redress guide inequities and it told the BTA that it was constrained by about a \$2 million dollar loss of State aid (1T56; 2T114). Doll stated that the offer, amounting to a 3.8% wage increase, was "realistic" (3T24).

^{5/} The transcript of D'Angelo's testimony at 1T16 states that the BTA offered a one-year 18.5% wage increase to teachers. Such a proposal is inconsistent with the tenor of negotiations in August 1987 and no other testimony suggests that the BTA increased its offer from either 16.48% (see finding 7) or 15.83% (see finding 9). BTA's post-hearing brief states that the August 5 offer was 15.83%. Accordingly, I regard the transcript at 1T16 to be in error and rely upon the transcript of Doll's testimony at 2T113.

^{6/} On direct examination, D'Angelo testified that on August 5, the Board offered a 0% wage increase (1T18). On cross-examination, he stated that the Board proposed \$500 per teacher "long before August 5, 1987" and "could not disagree" that the Board proposed it on May 14, 1987 (1T89, 1T91). Notwithstanding the inconsistency, I have already credited Doll's testimony that the Board proposed a \$500 increase on May 14 (see finding 8).

After a caucus, the BTA rejected the Board's offer. NJEA Uni-Serv representative Cocuzza said that the BTA team was reluctant to present a counteroffer if the Board team was going to declare impasse (2T114). It soon counteroffered another one-year wage package of a 14.82% increase for teachers (and slightly less for psychologists), 1% longevity pay and a .21% increase in guidance counselor stipends (R-8; 1T95).^{7/}

The Board rejected the counteroffer, calling it too expensive and "ridiculous" (1T96). The Board counteroffered \$900 for each teacher (2T115). D'Angelo called the Board's proposal "totally unacceptable and couldn't possibly fund the guide in any way, shape or form and [it] would need to increase [its] position." (1T97). Doll replied that Board could not afford more because the budget had already been set for 1987-88 school year (3T57).

Neither party changed its position (1T20; 2T115). After some discussion, the parties commented that if neither side would move, then they must be at impasse (1T100). Cocuzza agreed and asked which party would file the Notice of Impasse (2T115). On behalf of the BTA, Cocuzza filed the Notice with the Commission on August 11, 1987 (J-2).

^{7/} Doll testified that BTA's counteroffer was 14.68% for teachers plus 1% longevity pay, .14% differential for psychologists and a .31% increase in guidance counselor stipends. I credit D'Angelo's testimony simply because as chief negotiator, he was in the best position to know BTA's proposals. The discrepancy does not much matter, given the enormous differences in the parties' proposals on August 5, 1987.

12. On August 18, 1987, a mediator was appointed, pursuant to N.J.A.C. 19:12-3.1 - 3.3.

13. On September 23, 1987, the BTA filed an unfair practice charge, docket no. CO-88-84, and an application for interim relief alleging that the Board violated subsections 5.4(a)(1) and (5)^{8/} of the Act by refusing to pay salary increments (1T104). The Board paid the increments on or about October 15, 1987.^{9/}

14. On September 30, the mediator conducted the first of three mediation sessions. The record does not show that the parties discussed compensation or terms and conditions of employment. The BTA objected to meeting at Board offices in Bayonne and wanted another site (1T106; 2T116). The Labor and Education Center at Rutgers University in New Brunswick was selected for the next session (1T22).

15. On October 12, 1987, the second session was held at the Labor Education Center. After assigning the parties to separate rooms, the mediator presented the Board a "revised" BTA proposal seeking a one-year 12.27% salary increase, longevity pay, a guidance counselor stipend and rate for summer work, and some non-economic measures (2T116, 2T117). He also suggested that a three-year contract might resolve the impasse (2T117).

8/ See n. 1.

9/ See Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), app. pending App. Div. Dkt. No. A-4871-88T1. The Commission dismissed the complaint.

The Board counteroffered a three-year increase of \$1020, \$1320 and \$1390 for teachers (2T54; 2T117). The dollars translated to annual increases of 4%, 5% and 5% (2T118). The mediator suggested the conversion to percentages to include the secretaries and clerks in discussions over compensation (2T118; 3T29). The Board agreed to apply the percentages to them (3T29).^{10/} The BTA wanted and was given more time to consider the proposal (2T118-2T119).

16. On November 3, 1987, the mediator held the third session. The BTA proposed a three-year contract with annual wage increases to teachers of 11.8%, 12.5% and 12.5% (including increments) (2T56). It also proposed 1% longevity pay and a .31% guidance counselor stipend. Psychologists were presumably included in the offer (2T119, 2T120). The BTA dropped its demands for travel pay and total reimbursement for doctor notes (3T30).

The Board counteroffered annual increases to teachers of \$1270, \$1330 and \$1440 (2T120). The conversion to percentages was 5%, 5% and 5%. The BTA did not respond to the proposal.

17. On November 10, the mediator was appointed conciliator. He met with the parties on December 16, 1987, January 4, January 11 and February 1, 1988 (1T23; 2T122-2T124). The Board and BTA did not change their positions (2T122-2T124; 3T32). On

^{10/} BTA witness Cocuzza stated that the parties "tacitly agreed that there was going to be an eventual application of the money to the clerical guide that was appropriated to the teachers' guide." (2T57-2T58).

January 4, another NJEA representative joined the BTA team. On February 1, the conciliator announced that the parties were deadlocked and that he would propose a settlement the next day (2T125).

18. On February 2, 1988, the conciliator gave the parties CP-2, his "mediator/conciliator formal proposal." He suggested a three-year contract extending from September 1, 1987 through August 31, 1990. Salaries, stipends, hourly rates and sick leave buy back and ceiling rates would be increased annually by 6%, 8.8% and 9% (including increments). All unresolved items would be withdrawn (CP-2). The proposal did not include guides (1T26; 2T26). At the meeting, the BTA proposed a salary rate for the guidance counselors' summer hours, which the Board rejected (2T127). The conciliator directed the BTA to inform him of its decision on his proposal by February 8 (1T110).

On February 8, the BTA rejected the conciliator's recommendation (1T26). Apprised of the rejection, the Board took no action on the proposal at its February 9 meeting (1T113; 2T128).

19. On February 18, the Commission invoked fact-finding, pursuant to N.J.A.C. 19:12-4.1. On March 4, 1988, a fact finder was appointed, pursuant to N.J.A.C. 19:12-4.2.

20. On March 31, 1988, the fact finder met with the parties and tried unsuccessfully to mediate a settlement (1T29;

2T129). A formal hearing was scheduled for June 7 and 21, 1988 (1T29; 2T134).^{11/}

21. Sometime in the first half of April 1988, the BTA wrote a letter to the Board president requesting a negotiations session with the Board's negotiators (2T130). The parties met on April 20 without the fact finder. After discussions, neither party changed its last proposal.^{12/}

The record also shows that the Board's team informally suggested that if the BTA agreed to the conciliator proposal, it would try to get the Board to increase its offer correspondingly (1T30, 1T113-1T114). The BTA rejected the suggestion because it had "no guarantee that the Board would okay it and [it] would be tipping [its] hand in the negotiations." (1T113-1T114). The BTA asked the Board to produce salary guides for its "5, 5 and 5" proposal (see

^{11/} The fact finder informed the parties that the hearing would have to be scheduled in April or June. The Board team urged April dates and the BTA team urged June dates. The fact finder scheduled the hearing in June (1T32-1T33; 2T129).

^{12/} The parties disagreed about what was the Board's proposal on April 20; the BTA saw it as percentage increases (5%, 5% and 5%), and the Board maintained that it offered dollar increases to teachers (\$1270, \$1330, \$1440). When asked if the Board ever "characterized its offer as 5, 5 and 5 on the teachers' salaries", D'Angelo responded, "But the Board never disagreed with our characterization of 5, 5 and 5." (1T119). If the BTA reasonably believed that the Board proposed an across-the-board percentage increase on April 20, it was informed otherwise on April 26 (see n. 2).

finding 16). The Board refused, repeating its desire to remedy guide inequities with "straight dollars" (2T131).^{13/}

22. On April 26, at a public Board meeting, D'Angelo asked the Board president for salary guides. Generally, Clarke responded for the Board (see n. 13). Clarke stated that the settlement was "going to be more than 5%..." (R-9; 2T186).

23. On June 7 and 21, 1988, the fact finder conducted a formal hearing. On August 18, 1988, he issued a 56 page report and recommendations on "one of the most intractable impasses" in which

13/ D'Angelo testified that the parties agreed to exchange guides and specifically, that the Board "would put a guide together reflecting [its] position of the three 5's." (1T31, 1T114). He neglected to mention that "agreement" at an April 26 public Board meeting. There, D'Angelo asked Clarke whether the Board's "official proposal" was "three fives over three years." Clarke said the Board's proposal is "dollars, not percents." D'Angelo followed up:

Let me rephrase the question. The amount of money you proposed is not a complete package, You proposed so much money. We had asked you over the table to give us a salary guide that you would propose to go with. We haven't received it. I am requesting that again, based on your figures, whatever they may be [R-9, p. 59].

D'Angelo repeated to Clarke his request for a guide. In my estimate, had there been an agreement to exchange guides, D'Angelo would have demanded the Board to fulfill its promise. The transcript of the April 26 Board meeting supports the Board Administrator's testimony that the Board intended to provide a fixed dollar increase for teachers.

he had been involved (CP-3).^{14/} The fact finder recommended a three-year contract extending from September 1, 1987 through August 31, 1990. He suggested split guides for teachers; a 4% increase retroactive to September 1, 1987 and another 4% increase effective February 1, 1988; a 5% increase on September 1, 1988 and a 4% increase on February 1, 1989; a 5% increase on September 1, 1989 and a 4% increase on February 1, 1990 (CP-3 at pp. 54-55). He recommended no changes in the guide structure. Salaries for secretaries would be increased by the same percentages on the same dates. He also recommended stipend increases and that guidance counselors be paid 1/200 of their annual salary for working "beyond the normal school year." He revised the sick leave redemption plan. He favored longevity increases for secretaries only and provided a schedule based upon years of service.

24. On August 25, 1988, the negotiations teams met to discuss the fact finder's report (2T134). The BTA rejected his

^{14/} He reported the parties' last offers. In addition to the teacher proposal (see finding 16), the BTA wanted no increase in the number of steps on the guides, all employees to advance one step each year, and maximums to be set at "respectable" levels. It also proposed a .46% longevity increase in 1987-88. Salaries for secretaries would increase by 18.6%, 12.4% and 12.5% in each of the three years. Longevity payments would be \$400 at each step (the amounts would be cumulative) in 1987-88 and \$500 and \$600 in the succeeding two years (The fact finder also listed BTA's other proposals. They are not particularly relevant to this decision).

The Board's three-year proposal called for annual increases to teachers of \$1270, \$1330 and \$1440 (including increments). Secretaries would receive 5% wage increases in each of the three years.

recommendations for "split" guides and no longevity pay for teachers (1T36, 1T37; 3T45). D'Angelo was also concerned that actual guides had not been discussed (1T38).

The Board team stated that in light of the lengthy negotiations and post-negotiations efforts, it would recommend to the Board that it agree to the fact finder's proposal (1T38; 2T135). Doll stated that the Board had already allocated monies for the upcoming school year and it would have to "reorganize the money within the budget, cut back in other areas to make the second year of the three-year deal..." (3T40). At the Board team's insistence, the BTA agreed to meet again the next day (1T38).

25. On August 26, the Board negotiations team recommended to the Board that it approve the fact finder's proposal (2T137). The Board agreed (3T44). Later that day, the teams met and Clarke and Doll announced that the Board agreed to increase its offer to the terms the fact finder recommended (1T39, 1T41). The BTA repeated its concerns about longevity, "splitting the guide", and about agreeing to a "carryover percent." D'Angelo also believed that "the maximum teachers were really taking it on the chin." (1T39).

The BTA proposed a three-year guide leaving the first two years of the fact finder's split guide recommendation intact, but changing the third year to a one-time or straight 10.64% increase (including the 2% carryover increase from February 1989) and adding 1% longevity pay (R-10; 2T139-2T140). The Board team rejected the

proposal, claiming it would cost about \$259,000 (not including longevity pay) more than the fact finder's recommendation. It also objected to the BTA guide because it underfunded the lower steps (1T122; 2T138). It maintained that "there was no way we could go anywhere but to [the fact-finding recommendation] and that was even a struggle..." (2T138). The BTA responded that no agreement was possible if the Board's proposal did not exceed the fact finder's recommendation. Doll and Clarke wanted to construct guides within the parameters of the recommendation and present them to the BTA at a proposed next meeting (1T123; 2T141).

26. On September 1, 1988, the Board gave the BTA R-1, a "proposal" prefaced by a photocopy of the fact finder's "summary of recommendations"^{15/} and including guides for teachers, psychologists and secretaries/clerks and stipends for co-curricular and extra-curricular positions. Contrary to one recommendation, the Board added a step to the teachers' guides "to achieve...a higher maximum" (2T144).

Doll explained the package^{16/} and the parties discussed "how much money [the] guides represented in total", but the BTA "never got beyond the teachers' guide because it was unacceptable."

^{15/} R-1 added a provision setting an hourly rate for home instruction teachers.

^{16/} Doll explained the necessity of adding a step to the teachers' guide and why no corresponding change was made in the secretarial and psychologist guide proposals (2T144). Cocuzza agreed that these items "might have been mentioned, but...never discussed..." (2T25).

(2T22; 2T52). In rejecting R-1, the BTA again disapproved of split guides and challenged the Board to change its position (1T127; 2T142). The Board team, wanting a settlement before the school year started, urged the BTA to agree to another meeting in a day or two. The BTA said it would phone the Board team to confirm a meeting (2T142). Although D'Angelo did not attend the session,^{17/} he phoned Doll and they agreed to meet on September 7 (2T145).

27. On September 6, the Board distributed a "negotiations update" to all staff returning from summer vacation (CP-4; 1T47). The cover memorandum explained the Board's proposed "very fair" and "equitably distribute[d]" salary guides in keeping with the fact finder's recommended increases. Attached was a B.A. level guide proposal.

28. On September 7, the parties met^{18/} and did not change their previous proposals. They agreed to reevaluate their positions and meet the next day (1T44). On September 8, the parties met and discussed the cost of BTA's longevity proposal (2T146). The Board team said it could not agree to the BTA proposal. The parties

^{17/} D'Angelo testified that on September 1, when the Board team presented its guide, it "told us that this was their offer, their final offer, there's no more money, go over it, we think you need to accept it. Implementation then was mentioned at that meeting" (1T46). I do not credit D'Angelo's testimony because he did not attend the September 1 session (2T7), no other witness corroborated the alleged statement, and I have previously found inconsistencies in some of his other statements.

^{18/} The Board team was accompanied by the Board president, who urged the BTA to settle the contract (2T145).

agreed to keep their "lines of communication open," though the Board maintained it had no more money to offer and the BTA insisted that it "come up" (1T45; 2T146-2T147).

29. On September 30, the Board distributed another "negotiations update." The cover memorandum urged all teachers to "closely analyze the attached salary guide[s] proposed by the Board...and the [BTA] negotiating committee and determine which is the fairer, more equitable guide" (CP-5). It also referred to a September 27 public Board meeting at which BTA members allegedly accused the Board of being unreasonable in negotiations.

30. On October 17, 1988, the BTA proposed a four-year salary guide with annual increases of 6.85%, 10.29%, 12.79% and 12.26%^{19/} plus longevity pay (CP-6; 1T53; 2T147). Only the first two years had split guides. D'Angelo acknowledged that the base salaries in the first three years of the proposal were higher than those in its August 26 proposal (1T131). Doll estimated that the new proposal cost 4% more in the first three years than the previous proposal (2T148-2T149).

The Board team was concerned that the parties were "going in opposite directions" and protested that the latest BTA proposal was more expensive than its August 26 proposal (1T132; 2T149). The Board negotiators were interested in the concept of a four-year contract and agreed to meet again with the BTA (1T54; 2T149).

^{19/} Doll testified that the fourth-year increase was 13.26% (2T148). The added one per cent may be the longevity pay increase (2T149).

31. On October 26, the Board team counteroffered the BTA CP-7, a four-year teacher guide (CP-7; 2T150). The proposal was identical to its September 1 teacher guide proposal (R-1, which paralleled the fact finder's recommendation) in the first three years and added a straight increase in the fourth year of 10.5% (1T136; 2T68, 2T150-2T151). Although some steps were added to the guide, there was an overall reduction in the number of steps (1T59).

The BTA rejected CP-7, objecting to added and "frozen" steps and to the absence of a longevity pay provision (1T59). The Board asked the BTA to prioritize its concerns (3T50). D'Angelo described the conclusion of the meeting:

...it ended as most did. We couldn't accept their offer and they wouldn't go for our offer so we would go back and see what we could do on our own and meet again. I remember we said we would adjust our guide.^{20/} (1T60).

32. On October 31, the BTA proposed a reduction in the maximum salary of the fourth year of the teachers' guide by \$500 to \$44,500 (2T151). It gave the Board team CP-8, a "working guide" showing how a step could be eliminated in the first two years of an agreement (1T161; 2T152).^{21/} CP-8 cost about 1% more than the fact-finding proposal in the first two years and it included longevity pay for teachers.

^{20/} Doll concurred that as the session ended, the BTA agreed to submit a new guide at the next meeting (2T151).

^{21/} Doll stated that CP-8 did not remove a step as much as it "made it so that no people were on the additional step." (2T153).

The Board team caucused to review CP-8 and then asked the BTA to produce guides for the third and fourth years of the proposed contract. The BTA agreed (1T62; 2T154).

33. On November 14, 1988, the BTA gave the Board team CP-9, a four-year teacher guide with annual increases of about 6.2%, 10.2%, 11.7% and 12.4% plus longevity pay (reduced from its last proposal) (1T65; CP-9).^{22/}

The Board team rejected CP-9, stating that the fact finder's recommendation was as much as it could offer (3T52). The team also advised the BTA that the next day it would caucus with Board, ask it to increase its offer, "to make [its] last final offer" (1T66).^{23/ 24/} The Board team also wanted to meet with the BTA the next day because it would have its final offer (1T68).

^{22/} D'Angelo was the only witness who testified about these percentages; handwritten percentages on CP-9 differ and Doll's testimony is that the first two years of CP-9 are identical to those in CP-8 and that the last two years had "increases" (2T155). I agree with Doll about CP-8 and CP-9. The October 17 BTA proposal had third and fourth-year increases of 12.79% and 12.26% (excluding longevity pay).

^{23/} D'Angelo's and Doll's testimonies about the Board team's statement are similar. D'Angelo recalled that the Board team stated: "...if we go back to the Board and they increase their offer it will be the last final offer; whatever we bring back tomorrow is the last final offer" (1T138). Doll recalled: "We stated that the next time we would know exactly what we had from the Board, that if it was going to change they could change and if it wasn't, it would stay the same and that was going to be it" (1T157).

^{24/} D'Angelo testified that "every time [the Board] put money on the table, it was their final offer....The [fact finder's] proposal became their final offer when they accepted

34. On November 15, the Board team and the Board caucused. The Board authorized an increased offer and specified that it was the final offer (2T158). The Board team then met with the BTA and stated more than once that the offer it was about to produce was the Board's last position (1T139).

The Board team gave the BTA CP-10, 1987-91 salary guides for secretary/clerks, teachers and psychologists. The first two years matched the first two years of the BTA proposal (CP-9), but was lower than CP-9 at four steps in the third year and lower at the highest step in the fourth year. The salary guides in CP-10 were higher than previous Board proposals.

Attached to the guides was a dated cover page with the heading, "Bayonne Board of Education Final Offer." It stated that teacher, psychologist and secretary salaries "shall be increased in accordance with the attached guides"; that stipends shall be increased by 8%, 9%, 9% and 9%; that all items "previously agreed to by the parties are included in the settlement" and that all other items that the Board proposed on September 1, 1988 shall be included in the settlement (CP-10).

24/ Footnote Continued From Previous Page

it....They told us that the day of impasse, that that [\$850] was the only money they had...." (1T66-1T67). The record does not show that the Board labelled its proposals "final offers." While I do not doubt that the Board postured in the earlier stages of negotiations, after August 1987, the parties used the neutral third parties to convey proposals. Furthermore, nothing in the record shows that between September 1, 1988 and November 13, the Board described its proposals as "final offers" or that it threatened to "implement" a final offer.

The BTA caucused and then rejected CP-10 because it did not include longevity pay for teachers and did not provide enough money to teachers at the top of the guide (1T73; 2T160).^{25/}

The BTA counteroffered a reduced longevity pay proposal and "moved some money from the fourth year to the third year...." (1T74; 2T161).^{26/} The Board team rejected the counteroffer, asserting it could not offer more money, and urged the BTA to take the last Board proposal to a "secret ballot" vote. The BTA refused, advising the Board team that if it would not increase its offer, further discussion was pointless.^{27/} The Board team responded that it had presented the final offer and that it will recommend that the Board implement it (1T157; 2T161; 2T167). D'Angelo commented that if the Board implemented, "[it was] taking it out of my hands" (1T74). He also stated that if the Board changed its position, it should

^{25/} CP-10 did provide longevity pay for secretaries. D'Angelo was "amazed that the proposal did not include a longevity package and that we thought we made it clear throughout the long negotiations that longevity had to play a big part in the settlement..." (1T154-1T155). D'Angelo also testified that longevity pay was unnecessary if the "percentages for the particular years had some cap on them." (1T155). The BTA always included longevity pay for teachers in its proposals; the record bares out D'Angelo's former statement.

^{26/} On cross-examination, D'Angelo did not dispute that BTA's proposed longevity pay benefit in the third year would cost \$370,000 (1T154).

^{27/} NJEA UniServ Cocuzza representative testified that on November 15, the BTA "did not believe we were at impasse -- when the Board said it had no money, they subsequently put more money on the table. So on the 15th, and thereafter, when the Board reiterated the position "final offer", there was no reason to believe it was their final offer."

contact the BTA (1T158; 2T168). No date was set for another meeting.

35. On November 29, NJEA UniServ representative Cocuzza and Board counsel Clarke discussed the negotiations at a grievance-arbitration hearing (2T31).

36. On November 30, Clarke sent a telegram to Cocuzza, urging the BTA negotiators to meet the Board team before a December 5 Board meeting. It continued:

As you know, the Board is considering the possibility of implementing its last offer. You, along with the other NJEA representatives, stated that you oppose this action. Therefore, I believe every possibility of settlement should be exhausted before the next Board meeting.

As has been the Board's consistent position, we stand ready, willing and eager to meet and negotiate immediately. Therefore, I am offering all of the following date[s] [sic]: December 1st 1988 at 4:00 p.m., December 2nd 1988 at 3:00 p.m., December 3rd 1988 at 9:00 a.m. and December 4th 1988 at 9:00 a.m.

Please inform me of your response immediately.

[CP-11]

37. On December 2, 1988, the teams met and the Board team again stated that it had presented its final offer, that the BTA should accept it, take it to a membership vote, or face the possibility that the Board may implement it (1T76; 2T173). The BTA again rejected the proposal, protesting the absence of a longevity pay provision and insufficient pay for "maximum" teachers (2T173).

D'Angelo asked, "What did you call us for if you didn't change your position?" (1T170).^{28/}

The Board team asked the BTA to reconsider and after a caucus, BTA president Cerbone stated that the package was not adequately funded (2T174). The BTA team then left the room.

38. On December 5, the Board adopted the "Implementation of Final Offer to Bayonne Teachers Association" resolution by a 5-4 vote (R-12; CP-12). The final offer adopted was identical to the Board's November 15 offer. Doll recommended implementation because he knew the Board's "final line" and that it "[wasn't] going any further." (2T179).

39. On or about January 19, 1989, the two negotiations teams met but did not change their positions (2T181).

^{28/} D'Angelo and Cocuzza testified that they did not believe that the Board had made its final offer (1T77; 2T47-2T48).
D'Angelo testified:

They only moved when they were forced to move....The fact finder's report had said all along...that...it wasn't that the Board couldn't pay this money but he said they were unwilling to pay it....So in terms of that, we believed there was more money there. We believed that because they did move...after every final offer...especially because they knew from day one over two years ago that we wanted a longevity package. They had agreed with us in negotiations that our longevity package was archaic, probably one of the worst [in] existence. So we felt that the message was clear and we were going to wind up with a longevity package to wrap this up. We were confident on our side. We would not even consider that whatever they put on the table was the last final offer until longevity was put there....(1T77-1T78).

ANALYSIS

A public employer cannot normally alter terms and conditions of employment during collective negotiations with the majority representative. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), petit. for rehearing den. (App. Div. Dkt. No. A-8-75 1975), cert den. 70 N.J. 150 (1976). But when the employer and representative exhaust dispute resolution procedures and a genuine impasse exists, the employer may act without committing an unfair practice. City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd App. Div. Dkt. No. A-4496-79T2 (1981).

Permitting an employer to unilaterally implement terms and conditions of employment after a collective negotiations agreement expires is troublesome in the public sector because employees do not have the legal right to strike. In Jersey City, the Commission stated:

...even recognizing the significance of the absence of the statutory right of public employee to strike in terms of the relationship between the parties, we cannot accept what we regard as the extreme position of requiring agreement between the parties before a public employer can implement its last best offer at the expiration of the existing agreement. Although we are not completely comfortable with this situation, we believe that it is an accurate reflection of legislative intent and that any other

interpretation would require amendatory legislation.^{29/}

[3 NJPER 124].

Impasse has been defined as "a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 53 LRRM 2293 (5th Cir. 1963). "Whether an impasse has been reached is a difficult judgment to make and must be tied to each specific situation." Rutgers. The Commission sees impasse as "a hybrid, partly a factual determination and partly a conclusion of law." It does not use "a mechanical counting of the number of bargaining sessions but will look to the totality of the negotiations history in all post fact-finding unilateral implementation matters." Rutgers.

In Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967), aff'd 395 F.2d 622, 67 LRRM 3032 (D.C. Cir. 1968), the National Labor Relations Board stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

^{29/} In 1977, the legislature amended the Act, providing "terminal procedures", including binding arbitration, "for the settlement of impasse disputes" for public fire and police departments. See N.J.S.A. 34:13A-16 et seq.

[64 LRRM 1386]30/

The BTA argues that a New Jersey public employer has no statutory right to implement new terms and conditions of employment unless the majority representative has negotiated in bad faith. Such a rule, it maintains, is consistent with Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978), where the N.J. Supreme Court stated that the duty to negotiate "applies at all times." It argues alternatively that a public employer must show "compelling reasons" justifying a unilateral change of the status quo after dispute resolution procedures have been exhausted. It relies upon footnote 5 in the Red Bank decision, in which the Commission found "some merit" to the argument, stating that in Rutgers and Jersey City "compelling reasons" existed for the employers to make the changes. The Commission also favorably cited a New York Public Employment Relations Board case requiring public employers to have compelling reasons to make unilateral changes after exhausting dispute resolution procedures.

The BTA cites no provision of the NLRA or LMRA permitting employers to unilaterally implement terms and conditions of employment. (Section 8(d), which obligates employers and unions to negotiate but does not "compel" them "to agree to a proposal" or "require the making of a concession" misses the mark). The right to implement a last best offer first appeared in NLRB v. Katz, 369 US 736 (1962).

30/ In Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), the N.J. Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

The Court in Galloway, essentially defined "all times" as "beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." Id. at 49, n. 9. In the text of the decision, the Court cited the private sector rule:

...an employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining...constitutes an unlawful refusal to bargain...NLRB v. Katz (other citation omitted). 'Unilateral' in this regard refers to a change in the employment conditions implemented without prior negotiation to impasse with the employee representative....(my emphasis).

Our Legislature has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees...(my emphasis). [78 N.J. 48].

In both the private sector and New Jersey public sector, the Courts recognize the possibility of impasse and, impliedly, an employer's options when impasse is reached. Accordingly, I reject the argument that an employer cannot implement a last best offer unless the majority representative negotiates in bad faith.

In New York, a public employer may unilaterally change a term and condition of employment if the subject was negotiated to impasse, the employer has a compelling need to act unilaterally and it was willing to continue to negotiate the subject. Cohoes City Schl. Dist. and Cohoes Teachers Assn., Local 2579, 12 PERB 3133 (1980).

Unlike dispute resolution procedures in New Jersey, New York's Taylor Law permits, under PERB auspices, a school district or school employee organization which rejects in whole or in part a fact-finding board's recommendation to:

...explain their position with respect to the report of the fact-finding board at a meeting at which the legislative body, or duly authorized committee thereof may be present; [and] thereafter the legislative body may take such action as is necessary and appropriate to reach an agreement.
[CSL §209.3(e)].

The power to resolve negotiations disputes lies in the appropriate New York legislative body. City of Mt. Vernon, 5 PERB 3057 (1972).

No "legislative body" in New Jersey is statutorily empowered to resolve a school negotiations dispute. Without such a "referee" acting in a reasonable time, a school board forced to have "compelling reasons" for acting unilaterally in impasse cases may wait indefinitely. (In New York, the passage of time alone is not a "compelling reason." See Cty. of Onondaga, 18 PERB 4521 (1985)). Red Bank did not adopt the "compelling reasons" standard. My task, as the Commission stated in footnote 5, is to examine "the totality of both parties' conduct."

I find that under all the circumstances, the Board did not violate the Act when it resolved to implement its final collective negotiations offer to the BTA. By the resolution date -- December 5, 1988 -- the parties had reached impasse. In negotiations after fact-finding, the Board and BTA were deadlocked over longevity pay

for teachers, "split" guides, distribution of money on the guides, and overall dollars. The facts do not support a finding that the Board negotiated in bad faith -- that is, that it failed to "bring to the negotiating table an open mind and sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach an agreement."

State of N.J. and CNJSCL, AFL-CIO, E.D. No. 79, aff'd P.E.R.C. No. 76-8, 1 NJPER 39 (1975); aff'd 141 N.J. Super 470 (1976).

Between March 24, 1987 and December 5, 1988, the parties had thirteen negotiations sessions, three mediation sessions, five conciliation sessions, a mediation session with the fact-finder, a two-day fact-finding hearing and ten post fact-finding negotiations sessions. Although the number of sessions and the duration of negotiations do not determine if impasse was reached,^{31/} 32 sessions over 20 months leaves an extensive trail of the parties' efforts.

In April 1987, for example, the BTA proposed a one-year salary guide that included longevity pay; in May, the Board and the BTA exchanged wage proposals differing by about 13% for a one-year contract; in August, at the thirteenth negotiations session, the parties settled all "non-economic" items and narrowed their wage offers by 2% (the Board was insisting that a flat dollar amount would remove guide inequities); in November, and during mediation,

^{31/} See Rutgers and NLRB v. American Nat'l Insurance Co., 343 US 395 (1952).

the parties agreed to include secretaries and clerks in wage proposals, and agreed in concept to a three-year contract; the BTA wage proposal was 11.8%, 12.5% and 12.5% and the Board proposal was 5%, 5% and 5%; in February 1988, the BTA rejected the mediator/conciliator wage recommendations; in August, the BTA rejected the fact finder's recommendations and the Board approved them; in October, the BTA proposed a four-year guide, including longevity pay for teachers, which, in its first three years exceeded a previous proposal; the Board team also proposed a four-year guide, both proposals were rejected; on November 15, the Board made its final offer, including salary guides for all represented employees. The BTA rejected it and asked the Board to increase the offer; finally, on December 5, the Board voted to implement the November 15 offer.

The BTA argues that the parties did not reach impasse for these reasons: (1) the Board on several occasions, despite its protest that it could not afford to offer more money, offered more money; (2) in August 1987, when the Board declared impasse, "[it] knew or certainly must have known that there was no true impasse"; (3) no "realistic" offers were made until after the parties received the fact finder's report; (4) on December 5, 1988 and later, the Board requested negotiations. The BTA also cited other factors (listed in Morris, The Developing Labor Law, 1982-86 supp at pp. 278-279) in arguing that the parties had not reached impasse. They include: fluidity of position, continuation of bargaining,

statements of the parties concerning impasse, union animus, the nature and importance of issues and the extent of difference or opposition, and willingness to consider the issue further.

The BTA's first three reasons address discrete times during negotiations which, if true and considered together, suggest only that the Board intended to follow impasse resolution procedures. In contesting Board statements made relatively early in negotiations, the BTA ignores the Jersey City requirement to examine the employer's conduct after impasse resolution procedures are exhausted and the more general requirement to evaluate the "totality of the negotiations history."

In August 1987, the Board and the BTA appreciated the necessity for a neutral third party (see finding 11). When impasse procedures began that September, they reasonably relied upon the neutrals' representations of their respective positions. They narrowed their differences only slightly in mediation before the mediator/conciliator announced a deadlock. While awaiting the fact-finding hearing, the Board informally offered to accept the conciliation proposal, which the BTA had previously rejected. Notwithstanding a BTA request for salary guides at an April 26, 1988 Board meeting, and the actual fact-finding hearing, the parties did not meet or request to meet until August 25, when they discussed the fact finder's recommendations. The parties' failure to meet in four months strongly suggests their reliance upon fact-finding to advance negotiations. Accordingly, I attach little weight to assertions of

"impasse" or complaints of inability to pay in 1987 and in the first eight months of 1988.

The BTA maintains that "realistic" negotiations began in August 1988, when the Board increased its offer to correspond with the fact finder's recommendations. In September, the Board produced salary guides for the first time and distributed two "updates" to unit members. The BTA rejected the offer, seeking a "straight" increase in the third year and longevity pay for teachers.

Throughout negotiations, the Board held its position against longevity pay. Neither the mediator/conciliator nor the fact finder recommended such a provision. Similarly, the Board adhered to a third-year "split" guide in keeping with the fact-finding recommendation. Nothing in the record suggests that its position was fluid.

Except for an added "straight" fourth year increase and a reduction in the number of steps, the Board's economic proposal did not change between September 1 and November 14, 1988. Except for a \$500 reduction at the top of the fourth year teacher's guide, the BTA's economic demands increased slightly over the same period. Having met eight times without substantially changing their positions, the Board and BTA were nearing deadlock; only their willingness to meet on a proposed fourth contract year and on distributing money on the guide suggested the possibility of change (see findings 30 and 31).

On November 14, the Board team advised the BTA that it would seek the Board's approval to offer a "final" increase. The next day the Board team gave the BTA a written "final offer" which matched the BTA split guide proposal in the first two years, increased slightly the split guide in third year and maintained a straight fourth-year increase. The BTA lowered its demand but adhered to longevity pay for teachers. This was not negotiations as usual, however; for the first time the Board emphasized the finality of its offer and documented it, and it threatened implementation. It was also the first time after the fact-finding report issued that the Board increased its wage offer in the first three contract years. And unlike the conclusion of most other sessions, the parties did not state that they would "go back and see what [they] could do on [their] own and meet again." The Board team stated that it had presented its final offer and would implement it and the BTA stated that the parties should meet again only if the Board changed its offer.

The November 30 telegram confirmed the Board's "last offer" and threatened implementation at the next Board meeting. Its desire to "meet and negotiate" does not necessarily mean it was willing to change its position -- the parties had no discussions in the intervening two weeks suggesting the possibility of a change. On December 2, the Board team repeated the "last offer" and the BTA, equally firm in rejecting it, questioned the meeting's purpose since the Board had not changed its position. (See Seattle-First National

Bank v. NLRB, 638 F.2d 1221, 106 LRRM 2621 (9th Cir 1980), denying enf. to 241 NLRB 753, 100 LRRM 1624 (1979), supp. 267 NLRB 897, 114 LRRM 1072 (1983), where an employer's letter expressing that negotiations were at impasse and the union's position that the proposals were "too onerous to accept" confirmed the "contemporaneous understanding of the parties as to the state of negotiations.").

In Jersey City, the Commission cited these factors in determining that impasse was reached: (1) the parties exhausted impasse resolution procedures; (2) a genuine impasse existed on the white collar employee hours issue; (3) post fact-finding sessions had been held; (4) the parties concluded tentative agreements on all non-economic issues; (5) the parties considered all possible compromises on the white collar employee hours issue; (6) the City gave the union two months notice that it would change the employees' work week; (7) the City implemented its last best offer; and (8) the City was willing to continue negotiating the hours issue. See also Willingboro Tp. Bd. of Ed., P.E.R.C. No. 78-20, 3 NJPER 369 (1977). The Commission noted that not all those factors were necessary before an employer could implement its last best offer.

The Board and BTA exhausted the procedures, negotiated after fact-finding and resolved all non-economic issues. The Board implemented its last best offer and was willing to continue negotiating economic issues. Although the three-week notice of implementation after twenty months of negotiations was shorter than

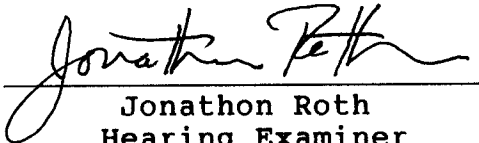
the notice given in Jersey City, nothing in the record established that it was inadequate. By December 5, the parties had not agreed in concept to longevity pay for teachers, a third-year "straight" increase, and distribution of money to "maximum" teachers. The attendant costs were several hundred thousand dollars -- the Board and BTA were deadlocked.

The hearing examiner in Jersey City wrote that a "public employer is by no means insulated from a finding that it has negotiated in bad faith by simply participating in mediation and fact-finding..." He stated that if an employer's bad faith or other unfair practices caused a post fact-finding impasse, the employer will have violated the Act.

The Board and BTA have a difficult negotiations relationship. While this matter adds another episode to that history, it does not reveal that the Board negotiated in bad faith. Throughout negotiations the Board increased its proposals and responded positively to mediation and fact-finding. While its participation was not uniformly forthcoming, it did not reveal a "pre-determined intention to go through the motions, seeking to avoid, rather than reach an agreement." The Board improved upon the fact-finding recommendation when it added a fourth contract year and increased the wage package on November 15. The record shows that afterwards neither side was willing to alter its position on several important issues. Further negotiations would not have been productive.

RECOMMENDATION

I recommend that the complaint be dismissed.



Jonathon Roth
Hearing Examiner

DATED: January 4, 1990
Trenton, New Jersey