P.E.R.C. NO. 98-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH ARLINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-357

NORTH ARLINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the North Arlington Board of Education violated the New Jersey Employer-Employee Relations Act by assigning unit work to non-unit employees represented by the North Arlington Education Association, thereby eliminating overtime opportunities for unit employees. The Commission orders the Board to immediately discontinue the use of non-unit substitute custodians who are performing work previously assigned during the school year to unit custodians as overtime work and post a notice of its violation.

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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In the Matter of

NORTH ARLINGTON BOARD OF EDUCATION,

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-and- Docket No. CO-H-94-357

NORTH ARLINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Glenn T. Leonard, attorney

For the Charging Party, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel; Mary J. Hammer, on the brief)

DECISION AND ORDER

On May 31, 1994, the North Arlington Education Association filed an unfair practice charge against the North Arlington Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1) and (3),[1/] by assigning unit work to non-unit employees, thereby eliminating overtime opportunities for unit employees.

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."

On November 29, 1994, a Complaint and Notice of Hearing issued. On December 14, the Board filed its Answer generally denying the allegations and asserting that the matter should have been arbitrated, the charge is untimely, and the hiring of non-unit employees is a past practice and a managerial prerogative.

On April 4, 1995 and March 14, 1996, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. The Hearing Examiner permitted the Association, with the Board's consent, to withdraw its 5.4(a)(3) allegation and amend its charge to allege a violation of 5.4(a)(5).[2/] At the conclusion of the Association's case-in-chief, the Hearing Examiner denied the Board's motion to dismiss.

On January 31, 1997, the Hearing Examiner issued his report and recommendations. H.E. No. 97-18, 23 NJPER 156 (¶28077 1997). He found that while the Board had used non-unit employees to perform custodial work during the summer and had used non-unit substitutes to cover for absent teachers, secretaries and bus drivers; it had not used non-unit custodians to reduce or eliminate overtime assignments for custodians during the regular school year. He

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2/ This provision prohibits public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

concluded that using non-unit substitute custodians without negotiations violated the Act and recommended that the Board be ordered to restore the status quo and post a notice of its violation.

On February 10, 1997, the Board filed exceptions. It asserts that the Hearing Examiner erred in: not dismissing the Complaint as untimely filed; distinguishing between non-unit employees performing unit work during the summer and during the regular school year; distinguishing custodians as a sub-group, thereby discounting the fact that the Board has used non-unit employees to substitute for absent teachers, bus drivers, and secretaries; and concluding that this case does not involve a proper exercise of the Board's managerial prerogative, fiduciary responsibility, statutory powers and prudent fiscal planning.

On February 24, 1997, the Association responded to each exception and urged adoption of the Hearing Examiner's findings and recommendations.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-10).

The Association represents instructional, custodial/maintenance, secretarial and transportation employees. Since at least 1957, the Board has hired non-unit summer custodians, including students, teaching staff members and administrators, to perform duties such as cleaning and painting. In early November 1993, the Board's secretary/business administrator explained to the Board the financial advantage of hiring substitute custodians to

replace absent custodians during the school year. The Board then passed a resolution hiring one substitute custodian for the 1993-94 school year. Two weeks later, the Board hired another substitute custodian. The two custodians were not included in the Association's unit and were paid $8.00 per hour.

In January 1994, the Board assigned one of the substitute custodians to work at the Roosevelt School from the time the regular custodian left for the day until the end of the afterschool program. Before the substitute was given this assignment, a unit custodian was assigned and received overtime pay. With the exception of this assignment, substitute custodians worked only when regular custodians were absent. Overtime pay opportunities for regular custodians have been reduced, but not eliminated.

Barry Ross is a full-time custodian. At hearing, he could not recall exactly when he learned that the Board had hired non-unit substitute custodians during the school year. He told Association president John Galante about the substitute custodians during the first week of December 1993. About two weeks later, Galante saw a newspaper advertisement for part-time custodians.

The Board has routinely hired non-unit personnel to substitute for teachers, secretaries and bus drivers. Before November 1993, it had not done so for custodians.

Preservation of unit work is, in general, mandatorily negotiable. See Middlesex Cty. College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977) and cases cited by Hearing Examiner, H.E. at 13. A

public employer must negotiate before changing a mandatorily negotiable term and condition of employment. N.J.S.A. 34:13A-5.3. Thus, a public employer must negotiate before transferring unit work to non-unit employees of the same public employer.

In this case, the employer did not negotiate with the Association before using substitute custodians outside the negotiations unit during the school year to do work traditionally done by regular custodians within the negotiations unit. Accordingly, it will have violated the Act unless we accept one of its defenses: the charge was filed more than six months after it first used substitute custodians; it has long used non-unit employees to substitute for unit employees; and it has long used non-unit employees to perform custodial duties.

N.J.S.A. 34:13A-5.4(c) provides that a Complaint shall not issue, and accordingly a violation cannot be found, based on any unfair practice occurring more than six months before the filing of the charge, unless the charging party was "prevented from filing such charge."

The Association alleged that beginning on December 1, 1993, the Board hired non-unit substitute custodians to perform unit work. It filed its charge on May 31, 1994. The Board responded, and at hearing proved, that it first used substitute custodians in November 1993, more than six months before the filing of the charge. The Association presented evidence that it did not become aware of the Board's action until December 1993 and that

therefore it was "prevented" from filing a charge within six months of the hiring of the substitute custodians. The Hearing Examiner found that there was no evidence that the Association became aware of the November hirings before December and we cannot say that the Association should have known of those hirings earlier. We accept his analysis and conclusions that the operative date for calculating the limitation period begins to run from December 1993.

The Board also argues that since it has hired non-unit summer custodians for decades, the Association's challenge to its hiring of non-unit custodians during the school year should be dismissed. The Association responds that the use of summer help for cleaning and painting predates any collective negotiations between the parties and that such summertime work was never unit work.

The Hearing Examiner found a distinction between the Board's longstanding use of non-unit summer custodians and the use of non-unit substitute custodians to reduce overtime assignments during the school year. We accept that distinction. Summer employment has been used to meet a demand for maintenance duties such as cleaning and painting. It predates the Act and the parties' negotiations relationship. The use of non-unit employees to substitute for regular custodians is different and warrants different treatment. The Board had not used substitute custodians before November 1993 and we conclude that the Association did not waive its right to represent employees performing regular custodial duties during the school year. Any such waiver would have had to have been clear and unmistakeable. Red Bank Reg. Ed. Ass'n v. Red

Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). Nothing in the record suggests that either party contemplated the use of substitute custodians before November 1993.

The Board also argues that because its custodians are in a broad-based unit including teachers, secretaries and bus drivers, and because it has long used non-unit substitutes for those employees; any challenge to its hiring of substitute custodians is untimely. However, the Hearing Examiner correctly notes that "in some cases, a subgroup of employees can be the right referent for purposes of analyzing a past practice." Shamong Tp. Bd. of Ed., P.E.R.C. No. 91-21, 16 NJPER 489, 490 (¶21213 1990). We must consider all the circumstances and issues presented in determining the appropriate employee group for purposes of assessing this defense.

While custodians are included in a negotiations unit with teachers, secretaries and bus drivers; they are, nonetheless, a distinct group. Before 1988, custodians were in a separate negotiations unit. The current contract is divided into specific sections setting employment conditions for each subgroup. Contrast East Brunswick Bd. of Ed., P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986)(kindergarten and reading teachers not treated differently from other teachers). The Hearing Examiner concluded that the Board's practice of using non-unit employees to substitute for teachers, secretaries and bus drivers did not permit it to unilaterally begin using non-unit employees to substitute for custodians. We accept his determination.

Finally, the Board argues that its desire to reduce labor costs implicates educational policy and its managerial prerogatives. The Hearing Examiner rejected that argument and we accept his analysis.

The Board's reliance on three cases involving the use of volunteers is misplaced. In UMDNJ, P.E.R.C. No. 86-110, 12 NJPER 355 (¶17133 1986), we held that the University had a prerogative to use volunteer residents in its opthamology program since it had a compelling interest in training residents; it could not pay for any extra positions; no unit members had been or would be replaced with volunteers; no unit work had been lost; and the volunteers were not being used to undermine the majority representative's status. In Rutgers, the State Univ., P.E.R.C. No. 92-84, 18 NJPER 100 (¶23046 1992), we held that the University had a prerogative to use student volunteers as firefighters since the employer had reorganized its fire department; firefighters had always worked alongside volunteer fire companies and a force of student volunteers; the employer had not exceeded the historical range covering the number of volunteers; no layoffs had occurred; and no vacancies had been filled by volunteers. And in State of New Jersey (Division of Fish, Game and Wildlife), P.E.R.C. No. 94-107, 20 NJPER 232 (¶25115 1994), we found that the employer's longstanding and strong tradition of using volunteers to perform environmental conservation work outweighed the employees' interest in restricting the practice.

None of these cases involved the shifting of unit work to non-unit employees. Moreover, in UMDNJ and State of New Jersey, educational or governmental policy prompted the use of volunteers while in Rutgers, the increased use of student volunteers was consistent with the University's practice. Here, the employer's motivation is budgetary and its use of non-unit custodians is new. Unlike cases involving educational or governmental policy, this employer's budgetary concerns can be raised and addressed through the collective negotiations process.

In the absence of exceptions, we adopt the Hearing Examiner's recommendation that the employer be ordered to restore the status quo but not be ordered to make retroactive payments to unit custodians.

ORDER

The North Arlington Board of Education is ordered to:

Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

B. Refusing to negotiate in good faith with the North Arlington Education Association, particularly by unilaterally assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

Take this action:

A. Immediately discontinue the use of non-unit substitute custodians who are performing work previously assigned during the school year to unit custodians as overtime work.

B. 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.

C. 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.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: July 31, 1997
Trenton, New Jersey
ISSUED: August 1, 1997

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 assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

WE WILL cease and desist from refusing to negotiate in good faith with the North Arlington Education Association, particularly by unilaterally assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

WE WILL immediately discontinue the use of non-unit substitute custodians who are performing work previously assigned during the school year to unit custodians as overtime work.

Docket No. CO-H-94-357

NORTH ARLINGTON 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"

d:\percdocs\notice 10/93

H.E. NO. 97-18

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

In the Matter of

NORTH ARLINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-357

NORTH ARLINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the North Arlington Board of Education has violated the New Jersey Employer-Employee Relations Act when it assigned non-unit substitute custodians to perform unit work during the school year which was previously available to unit custodian on an overtime basis. The Hearing Examiner found that while there exists an established practice for the Board to use non-unit employees to perform custodial work, the practice did not allow the Board to reduce or eliminate overtime assignments, regularly enjoyed during the school year by unit custodians.

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. 97-18

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

In the Matter of

NORTH ARLINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-357

NORTH ARLINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Glenn T. Leonard, attorney

For the Charging Party, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On May 31, 1994, the North Arlington Education Association ("Association" or "Charging Party") filed an Unfair Practice Charge (C-3)[1/] with the Public Employment Relations Commission ("Commission") against the North Arlington Board of Education ("Board" or "Respondent"). The Association alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ Exhibits received in evidence marked as "C" refer to Commission Exhibits, those marked "J" refer to exhibits submitted jointly by the parties and those marked "R" refer to Respondent's exhibits. Transcript citation 1T1 refers to the transcript developed on April 4, 1995, at page 1. Transcript citation 2T refers to the transcript developed on March 14, 1996.

34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1) and (5),[2/] by assigning unit work to non-unit part-time employees thereby eliminating overtime without prior negotiations with the Association.

Initially, the Association's charge alleged a violation of Section 5.4(a)(3)[3/] of the Act. At the beginning of the hearing, the Association moved to amend the unfair practice charge to allege a violation of subsection (a)(5) and withdraw its allegation that the Board violated subsection (a)(3). I granted the Association's motion and provided the Board with an opportunity to amend its answer (1T15). The Board's amended answer denied that it engaged in any conduct violative of subsection (a)(5) of the Act (1T16).

On November 29, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On December 14, 1994, the Board filed its answer (C-2) generally denying the allegations contained in the charge and asserting several

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

3/ These subsections prohibit public employers, their representatives or agents from: "(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."

affirmative defenses. Hearings were conducted on April 4, 1995 and March 14, 1996, at the Commission's offices in Newark, New Jersey. At the conclusion of the Association's case, the Board moved to dismiss the complaint. I denied the Board's motion (C-4).

On the basis of the evidence presented in this proceeding, I make the following:

FINDINGS OF FACT

1. The Association is an employee representative within the meaning of the Act and represents a collective negotiations unit consisting of all certified and non-certified employees of the Board. The unit includes instructional, custodial/maintenance, secretarial and transportation employees (J-1). The Board is a public employer within the meaning of the Act.

2. The Association and the Board were parties to a collective negotiations agreement covering July 1, 1991 through June 30, 1994 (J-1). The collective agreement established the terms and conditions of employment, including compensation, for custodial employees (J-33). The agreement contains no preservation of work clause (J-1). The parties reached a Memorandum of Agreement for a successor collective agreement covering the period July 1, 1994 through June 30, 1997 (J-32; J-33). As of April 4, 1995, the Memorandum had been ratified by both sides (J-33). The Memorandum contains no provision modifying Article V of J-1 pertaining to the

custodians work day and overtime. The custodians have been included in the current wall-to-wall unit with the instructional and clerical staff and bus drivers since July 1, 1988 (2T8). Prior to that time, the custodians were represented by the Association in a separate collective negotiations unit consisting of secretaries and bus drivers (2T7).

3. Copies of Board minutes dating back as far as 1957 were submitted in evidence jointly by the parties.[4/] Each of the Board's minutes listed in footnote number 4 reflected action to hire individuals who would perform custodial and/or maintenance functions such as cleaning and painting during the summer months at a prescribed rate of pay. Some of the individuals hired were students, teaching staff members and administrators (1T52-1T53). It was widely known within the North Arlington school community that the Board hired non-unit summer custodians (1T24; 1T33; 1T36-1T38; 1T52-1T54; 1T57-1T59; 2T4-2T6).

4. On December 14, 1992, the Board approved the appointment of Vincent Macaluso as a custodial aide for one hour per day at the rate of $5.05 per hour for the remainder of the 1992-93

4/ The following board minutes were received in evidence: June 24, 1957 (J-2); June 13, 1960 (J-3); June 12, 1961 (J-4); June 8, 1964 (J-5); June 14, 1965 (J-6); June 8, 1970 (J-7); June 14, 1971 (J-8); June 26, 1972 (J-9); June 11, 1973 (J-10); June 10, 1974 (J-11); June 9, 1975 (J-12); June 21, 1976 (J-13); June 13, 1977 (J-14); June 12, 1978 (J-15); June 25, 1979 (J-16); June 15, 1981 (J-17); June 20, 1983 (J-18); June 18, 1984 (J-19); June 14, 1985 (J-20); June 23, 1986 (J-21); June 18, 1991 (J-22); June 18, 1992 (J-23); June 14, 1993 (J-25) and June 13, 1994 (J-30).

school year (J-24; J-33). Macaluso was assigned to assist custodian Barry Ross or Charlie Wolf but worked irregularly (1T19-1T20, 1T31; 2T32). Macaluso is a handicapped individual and was hired by the Board as a means to assist Macaluso's family and to put a few dollars into Macaluso's pocket (1T20, 1T44-1T45; 2T32). Macaluso's primary work responsibility was emptying trash cans (1T20). Although Macaluso performed unit work, his position was not considered to be part of the unit (1T35-1T36). He was paid from petty cash and he received a check on the 15th of the month after services were rendered (1T45; 2T23, 2T31). Macaluso was considered the school mascot and every arm of the District did extra things to help him (2T32).

5. During a public work session of the Board on November 1, 1993, Board Secretary/Business Administrator Charles Weigand explained to the Board the financial advantage of hiring substitute custodians to replace regular custodians who were absent due to illness, vacation or otherwise. During its meeting, the Board passed a resolution allowing the hire of John Wilkowski to serve as a substitute custodian during the 1993-1994 school year (2T10-2T11; J-26). On November 15, 1993, the Board approved the hiring of Christopher Ruhrold as a substitute custodian (2T10-2T11; J-27). Wilkowski and Ruhrold were paid at the rate of $8.00 per hour (2T21; R-1; R-2). The substitute custodians were not included in the collective negotiations unit. Prior to November, 1993, the Board had never employed non-unit custodial personnel during the school year.

6. In or around January, 1994, a substitute custodian was assigned to work when the Board determined that additional custodial coverage was needed at the Roosevelt School (2T37). The Roosevelt School was assigned one regular custodian who worked from 7:00 a.m. to 3:30 p.m. (2T44). The Board established an afterschool program which allowed students of working parents to remain at the school until 5:00 or 6:00 pm. (2T36-2T37). Wilkowski was assigned to serve as custodian between 3:30 p.m., when the regular custodian left for the day, until the end of the afterschool program when parents picked up their children. Before Wilkowski was assigned to work during the afterschool program, a unit custodian was assigned and received overtime pay for those extra hours (2T36; 2T44).

7. With the exception of Wilkowski's assignment to the afterschool program, substitute custodians worked only when regular custodians were absent (2T39). Before the Board hired substitute custodians, a unit custodian would be assigned to cover for another custodian's absence and would receive overtime compensation for working the additional hours (1T23-1T24; 2T43). Unit custodians called in to cover for another custodian's absence received a minimum of two hours overtime pay (1T23-1T24). Since the Board began using non-unit substitute custodians, overtime payments for unit custodians has been reduced (1T24; 2T33; 2T43). Notwithstanding the hire of substitute custodians, unit custodians still receive periodic assignments requiring them to work overtime (1T35).

8. Article V of the collective agreement (J-1) provides, in relevant part, the following:

> 1. HOURS - Full time regularly employed custodial personnel shall work a forty (40) hour week at specified daily hours as fixed by the superintendent.
>
> 2. OVERTIME - For work beyond the regularly scheduled work day, custodial personnel shall be paid at the following overtime scale:
>
> a. Time and a half shall be paid for all hours worked beyond the regular eight hour work day, and for hours worked on Saturday.
>
> b. Doubletime shall be paid for hours worked on Sundays and those holidays listed in Section V., D., 1. of the document.

9. No unit custodian has been assigned to less than a full work week as the result of the Board's hiring non-unit substitute custodians (2T42). Custodians work a twelve-month work year and absences occur throughout the year (1T40; 2T25). The collective agreement does not guarantee that custodians work overtime hours nor is there any language which speaks to the allocation of overtime (1T34-1T35; 2T27).

10. Wilkowski's and Ruhrold's first day of work for the Board was on November 22, 1993. They also worked on November 23, 24, 29 and 30, 1993 (R-1; R-1A). Substitute custodians performed virtually all of the same job duties as unit custodians except that they did not carry keys so they could not lock or unlock buildings and did not necessarily possess black seal licenses required to perform boiler checks (1T22; 1T58; 2T25). Substitute custodians

were paid by check on the 15th of the month after services were rendered (2T19; 2T21-2T22).

11. Barry Ross is a full time custodian at the high school, member of the negotiations unit and the Association's custodial building representative (1T16-1T19; 1T26). Since the beginning of his employment with the Board in 1987, Ross was aware that non-unit employees were hired during the summer to perform custodial unit work (1T33; 1T36; 1T38). Ross initially learned that the Board hired non-unit substitute custodians during the school year when they were assigned to work at the high school, however, he has no specific recollection of the date he first encountered them (1T23; 1T28; 1T38-1T39). Ross told Association President John Galante about the appearance of substitute custodians during the first week of December, 1993 (1T46-1T47). About two weeks after Ross apprised Galante of the substitute custodians, Galante saw a newspaper advertisement placed by the Board seeking applications for part-time custodians (1T47).

12. Article 9 of the collective agreement (J-1) pertains to the posting of new and vacant positions. There were no postings for substitute custodians (1T25; 1T49). The Board did not advise the Association that it intended to hire substitute custodians and did not engage in negotiations concerning those employees (1T47; 1T49; 2T39). The Board did not provide the Association with copies of its meeting minutes regarding the hiring of substitute custodians (1T48). The Association has not filed any grievances or unfair

practice charges concerning the hiring of non-unit custodial personnel during the summer (1T149; 1T55).

13. The use of non-unit summer custodians has not resulted in the loss of actual, customarily worked overtime hours by unit custodians, however, it has resulted in the loss of potential overtime opportunities. Many custodial and maintenance functions were deferred until the summer when students were not present. The amount of work to be accomplished during the summer exceeded what the full-time custodial staff could accomplish during the normal 40 hour work week. Consequently, in order to do all of the work scheduled during the summer, the regular unit custodial staff would have had to work overtime. Since the Board hired summer custodians, the regular custodial staff was never required to work overtime during the summer in order to accomplish the work scheduled (2T24).

14. As stated above, the wall-to-wall collective negotiations unit includes teachers, secretaries and bus drivers in addition to custodians. The Board has routinely hired non-unit personnel to substitute for teachers, secretaries and bus drivers who were absent from work. A teacher assigned to cover the class of another teacher who was absent due to illness or otherwise received compensation in accordance with the collective agreement (1T62; 2T29-2T30; J-1). A substitute teacher brought in to cover a regular teacher's classes for the entire school day is a non-unit employee (1T54; 2T29). Similarly, the Board hires non-unit secretaries and non-unit bus drivers to cover in the event that those employees are

absent from work (1T54; 2T28).[5/] While in the case of bus drivers, it is not uncommon for the Board to assign another unit bus driver to cover an absent bus driver's route resulting in overtime for the covering bus driver, the Board also routinely brings in hourly, non-unit bus drivers in lieu of making such overtime assignments (1T60-1T61; 2T28; 2T35-2T36).

ANALYSIS

The Board contends that the Association's charge alleges that it has violated the Act by unilaterally assigning non-unit custodial employees to perform unit work. The Board argues that it has been assigning non-unit custodial employees to perform unit work for several decades, consequently, the Association's charge is not timely filed.

N.J.S.A. 34:13A-5.4(c) states, in relevant part, that:

> ...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

The Association's charge (C-3) states, in part, the following:

5/ The collective agreement provides for secretaries to receive only compensatory time off at the rate of time and one half for overtime hours worked. However, the Board has rarely, if ever, assigned a regular unit secretary to cover for another absent secretary resulting in overtime (2T34-2T35).

> Commencing on December 1, 1993, the Board began assigning, and continues to assign unit work to non-unit employees. Specifically, the Board has commenced using non-unit part-time and hourly employees to perform sweeping, vacuuming, mopping, emptying trash cans and general cleaning duties.
>
> The Board's unilateral action in assigning unit work to non-unit employees has resulted in a financial impact to unit employees through a reduction and/or loss of overtime compensation.

A plain reading of the unfair practice charge indicates that the Association is not contesting the Board's use of non-unit summer custodians. The charge identifies the use of non-unit custodians commencing on December 1, 1993 and resulting in a reduction and/or loss of overtime compensation for unit custodians as the issue raised in its charge.[6/] Wilkowski and Ruhrold were hired in November, 1993, and worked on November 22, 23, 24, 29 and 30, 1993. However, there is no evidence that the Association became

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6/ On December 14, 1992, the Board hired Vincent Macaluso to perform custodial duties for the balance of that school year. Macaluso was never included in the collective negotiations unit. The Board cites Macaluso's employment as an example of a non-unit employee performing unit work as early as the 1992-1993 school year, well in excess of six months prior to the filing of the unfair practice charge. However, I find Macaluso's hire to represent a special situation. Macaluso did not perform the full range of custodial duties; he was limited to emptying trash cans. He received only $5.05 per hour, whereas the subsequently hired non-unit substitute custodians received $8.00 per hour. Macaluso worked only one hour per day. In light of his handicap, Macaluso was the school mascot and every arm of the school community was willing to help him in special ways. Under the circumstances, Macaluso's employment does not constitute the employment of a non-unit custodian at issue in this case.

aware of Wilkowski or Ruhrold before the first week of December, 1993. The record does not indicate where Wilkowski or Ruhrold was assigned in November nor when they first worked with Association Building Representative Ross at the high school. The Board did not post a notice in compliance with Article 9 of the collective agreement that it intended to hire substitute custodians. The Board did not otherwise advise the Association that it intended to hire substitute custodians nor did it engage in any negotiations with respect thereto. The Board did not provide the Association with copies of its meeting minutes regarding the hiring of substitute custodians. Association President Galante was apprised of the appearance of substitute custodians during the first week of December, 1993. Thus, the operative date for calculating the six month limitation period begins to run from the first week of December, 1993. See Rutgers, the State University, H.E. No. 88-4, 13 NJPER 613, 617 (¶18230 1987), adopted P.E.R.C. No. 88-23, 13 NJPER 726 (¶18273 1987); Mainland Regional Education Association, P.E.R.C. No. 92-12, 17 NJPER 406 (¶22192 1991); Warren Hills Board of Education, P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978). Consequently, I find the unfair practice charge is timely filed.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees concerning mandatorily negotiable terms and conditions of employment. Section 5.3 defines an employer's duty to negotiate before changing working conditions and states, in relevant part, the following:

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

The Commission and the Courts have long held that preservation of unit work is, generally, mandatorily negotiable if it does not impinge on the employer's governmental policy determinations. Monmouth County Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (23201 1992); Rutgers, the State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (113 App. Div. 1983); Rutgers, the State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980); Middlesex County College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977). Preservation of unit work includes the issue of whether the employer may be precluded from assigning overtime opportunities to non-unit employees of the same employer. City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985). See also Township of Mine Hill, P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 86-114, 12 NJPER 362 (¶17137 1986); Washington Township, P.E.R.C. No. 83-166, 9 NJPER 402 (¶14183 1983). A unilateral change in a mandatorily negotiable term and condition of employment violates section 5.4(a)(5) of the Act unless the employer can show that the matter has already been negotiated or that the employee representative has waived its right to negotiate. The collective agreement is silent with respect to any specific provision relating to preservation of unit work.

A waiver can come in a number of different forms, but must be clear and unmistakable. Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). For example, if the employee representative has routinely permitted the employer to make certain changes in the past affecting particular terms and conditions of employment, it may have waived its right to negotiate before a similar change is made. See Monmouth Cty. Sheriff.

The Association alleges that the Board has violated the Act by employing non-unit substitute custodial employees to perform unit work during the regular school year resulting in the loss of work and overtime for unit custodians. The Board argues that a consistent past practice existing within the collective negotiations unit, as a whole, constitutes a clear and unmistakable waiver of the Association's right to negotiate over its determination to use non-unit substitute custodians. The Board asserts that it has regularly and openly hired non-unit employees to substitute for teachers, secretaries, bus drivers and custodians. In each case, the respective unit employees have potentially lost some additional compensation as the result of the Board's use of non-unit substitute personnel. Thus, the Board contends that it had every right to believe, in light of no past objections, that the Association would not object to the assignment of non-unit custodians to cover custodial absences. See Monmouth County Sheriff; South River Board of Education, P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987); Rutgers, the State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

The issue in this case is not whether the Board has the right to use non-unit substitute employees. I find that there exists a long-standing past practice establishing the use of non-unit substitutes. The employer has been using non-unit employees to substitute for regular unit employees routinely. Since 1957, the employer has hired non-unit custodians during the summer to perform custodial duties. For well over a decade, the Board has hired non-unit teachers, secretaries and bus drivers to substitute for respective unit personnel who were absent from work. Accordingly, the Board's long-term, well-known practice of hiring non-unit employees to perform unit work represents the current term and condition of employment. The Association has waived its right to negotiate over the use of non-unit substitute employees performing unit work. I draw a distinction, however, between the Board's established right to use non-unit substitute employees resulting in the elimination of some potential additional compensation sporadically provided to unit employees (as is the case with teachers, secretaries and bus drivers[7/]) and the use of

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7/ The manner by which the Board uses teachers and secretaries to cover for absent employees is distinguishable from the situation involving custodians. It is clearly contemplated in the collective agreement that a teacher will only cover another teacher's class period and not serve as a substitute for the entire school day. Non-unit substitute teachers customarily cover for absent teachers. Unit secretaries have rarely, if ever, been assigned to cover for other absent secretaries. The work circumstance applicable to bus

Footnote Continued on Next Page

non-unit employees for the sole purpose of eliminating actual overtime assignments previously consistently provided to unit custodians.

Thus, the issue here is very narrow. Can the Board unilaterally use non-unit substitute custodians to cover for unit custodian absences resulting in the loss of actual overtime assignments previously afforded to unit custodians, or must the Board first negotiate over the use of such non-unit custodial employees?

In Shamong Township Board of Education, H.E. No. 90-52, 19 NJPER 505 (¶24233 1990), adopted P.E.R.C. No. 91-21, 16 NJPER 489 (¶21213 1990), the Commission held that comparisons of conditions of employment among employees in the same collective negotiations unit are appropriate to identify the terms of a past practice. The hearing examiner found, and the Commission affirmed, that the Shamong Board of Education did not violate the Act when it increased

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7/ Footnote Continued From Previous Page

drivers is more comparable to that of custodians, yet still distinguishable. Unit bus drivers assigned by the Board to cover for absent drivers receive overtime for that work. However, the Board has also routinely, unilaterally determined to assign non-unit substitute bus drivers to cover the absences of unit bus drivers. The Board has avoided paying overtime to unit bus drivers when it used non-unit substitute drivers. Thus, the Board has retained its right as an exercise of a consistent past practice to cover unit bus driver positions with non-unit substitute employees and thereby avoid making overtime payments to unit bus drivers. The Board has not exercised similar discretion in making overtime assignments to unit custodians to cover absences during the school year.

pupil contact time for certain teachers and aides to conform with the established range of pupil contact time assigned to other unit teachers. In arriving at its holding, the Commission noted that it "...must consider all of the circumstances of a case and the issues presented in determining the appropriate employee group for purposes of assessing a past practice defense." Shamong at 16 NJPER 490.

However, citing East Brunswick Board of Education, P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986), the Commission also noted that "[i]n some cases, a subgroup of employees can be the right referent for purposes of analyzing a past practice." Shamong at 16 NJPER 490. In East Brunswick, the Board unilaterally assigned additional teaching periods to school nurses by requiring them to teach health classes. The Board, among other things, argued that the Association waived its right to negotiate workload increases for nurses because, as certificated employees, they were "teachers" within the meaning of the collective agreement and the increased teaching load assigned to nurses fell within the contractual limits for teachers. While nurses were included in the agreement's recognition clause, they were not mentioned anywhere else. The Commission found that when the collective agreement was negotiated, nurses only had a minimal amount of teaching responsibilities, and the vast majority of their time was devoted to providing health services to students. The agreement did not address workload limits for the health services duties provided by nurses. The Commission rejected the Board's argument that the term "teacher" in the

recognition clause referred only to certificated personnel, and because nurses were certificated, they fell within the definition of "teacher" in the agreement. Thus, the Commission found that references in the agreement to "teacher" did not include nurses. Id. at 353. The Commission concluded that since the agreement was silent with respect to workload limits for instructional duties performed by nurses and since the vast majority of the nurses time when the agreement was negotiated was dedicated to providing health services, the negotiated workload limits for teachers were not meant to apply to nurses. Id. at 354.

In this case, during the regular school year, unit custodians had always received overtime compensation when assigned to cover for another absent custodian. When the Board began using non-unit substitute custodians during the school year to cover for absent custodians, unit custodians lost the overtime compensation they previously received. The Board's motivation to assign non-unit substitute custodians to cover absences was solely for financial reasons: reducing or eliminating overtime payments. While custodians are included in a wall-to-wall collective negotiations unit with teachers, secretaries and bus drivers, they are, nonetheless, recognized by the parties as a distinct group. The collective agreement is divided into specific sections pertaining to conditions of employment for each subgroup, i.e., teachers, secretaries, bus drivers and custodians. The agreement contains a separate article for custodial/maintenance staff stipends.

Consequently, considering the particular issue and all of the circumstances presented in this case, I find that the past practice applicable to the use of non-unit employees to cover custodial absences is different for custodians as compared with teachers, secretaries and bus drivers. Accordingly, the Board violated Section 5.4 (a)(5) of the Act when it unilaterally assigned non-unit custodians to cover unit custodians' absences during the school year, thereby reducing or eliminating overtime.

The Board argues that it has a managerial prerogative and a fiduciary responsibility to use non-unit custodial employees. The Board states that "[t]he hiring of non-unit employees to do unit work is, it is submitted, a proper exercise of its powers and responsibilities involving budgeting, fiscal responsibility, staffing levels and educational policy." Board brief at p.25.

The sole reason that the Board hired non-unit substitute custodians to cover regular custodians' absences was to save money. The November 1, 1993 Board minutes indicate that Board Secretary/Business Administrator Weigand explained to the Board the financial advantage of hiring substitute custodial personnel to replace regular custodians who are absent due to illness, vacation or otherwise. The minutes did not mention any discussion of an educational policy reason for using non-unit custodians. Accordingly, this case does not involve an educational policy determination or managerial prerogative but centers on a good faith desire on the part of the Board to reduce labor costs by eliminating

certain overtime opportunities for unit custodians. Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 95-107, 21 NJPER 227 (¶26145 1995). See also, Elmwood Park Board of Education. It is in regard to the Board's desire to reduce labor costs over which the Board maintains an obligation to negotiate with the Association prior to instituting a change in the custodians terms and conditions of employment.

Remedy

I recommend that the Board be ordered to take immediate prospective action to return to the status quo ante of assigning unit custodians to perform the work prevously assigned to them during the school year on an overtime basis but not be required to make retroactive payments to eligible unit custodians for lost overtime. The record does not identify any specific instance when a non-unit substitute custodian worked in lieu of a unit custodian nor does it name unit custodians who lost overtime because of the assignment of non-unit substitute custodians. Since the collective agreement does not provide for an allocation of overtime process, it can not be established which particular unit custodian might have received overtime for an assignment diverted to a non-unit substitute custodian.

CONCLUSIONS OF LAW

The Board violated Section 5.4(a)(5) and, derivatively (1), of the Act when it unilaterally assigned non-unit substitute custodians to cover for unit custodians' absences, thereby depriving unit custodians of overtime assignments they previously regularly received.

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 assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

B. Refusing to negotiate in good faith with the Association over the assignment of non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis prior to instituting such change in mandatorily negotiable terms and conditions of employment.

II. That the Board take the following affirmative action:

A. Immediately discontinue the use of non-unit substitute custodians who are performing work previously assigned during the school year to unit custodians as overtime work.

B. 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.

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

Stuart Reichman
Hearing Examiner

Dated: January 31, 1997
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:

H.E. NO. 97-18

WE WILL NOT interfere with, restrain or cause employees in the exercise of the rights guaranteed to them by the Act by unilaterally assigning non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis.

WE WILL NOT refuse to negotiate in good faith with the Association over the assignment of non-unit substitute custodians to perform work previously assigned during the school year to unit custodians on an overtime basis prior to instituting such change in mandatorily negotiable terms and conditions of employment.

WE WILL immediately discontinue the use of non-unit substitute custodians who are performing work previously assigned during the school year to unit custodians on an overtime basis.

Docket No. CO-H-94-357 North Arlington 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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