

P.E.R.C. No. 91-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF SHAMONG
TOWNSHIP,

Respondent,

-and-

Docket Nos. CO-H-89-247
& CO-H-90-176

SHAMONG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Shamong Township Education Association against the Board of Education of Shamong Township. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally increased the length of the morning and afternoon kindergarten sessions by 1/2 hour and thereby increased the pupil contact time for kindergarten teachers and aides. The Commission finds that the controverted increases in pupil contact time were all within the established range of pupil contact for other teachers.

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SHAMONG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Cassetta, Taylor & Whalen
(Bruce Taylor, consultant)

For the Charging Party, Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel)

DECISION AND ORDER

On March 3, 1989, the Shamong Township Education Association filed an unfair practice charge against the Board of Education of Shamong Township. This charge alleges that the Board violated subsections 5.4(a)(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally increased the length of the morning and afternoon

^{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, and (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment...."

kindergarten sessions by 1/2 hour and thereby increased the pupil contact time of kindergarten teachers and aides.

On December 26, 1989, the Association filed a second charge. The charge alleges that the Board violated subsections 5.4(a)(1) and (5) when it unilaterally increased the pupil contact time of kindergarten teacher Clare Faber by 20 minutes per week and the number of teaching periods assigned reading teachers.^{2/}

On June 8, 1989 and January 5, 1990, Complaints issued on the two charges. The Complaints were then consolidated for hearing.

On January 9 and 10, Hearing Examiner Stuart Reichman conducted a hearing. The parties introduced exhibits, examined witnesses, and filed post-hearing briefs.

On May 21, 1990, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 90-52, ___ NJPER ___ (¶ ___ 1990). He found that all the increases in pupil contact time were within the established range of pupil contact time for teachers.

On June 15, 1990, the Association filed exceptions. It asserts that the Hearing Examiner miscalculated the pupil contact time of kindergarten teachers and improperly compared the pupil contact time of kindergarten and reading teachers to that of other teachers. It concludes that the increased pupil contact time for these teachers violated subsections 5.4(a)(1) and (5).

^{2/} This charge also alleged an increase in the number of teaching periods assigned to two math teachers. That allegation has been withdrawn.

On June 25, 1990, the Board filed a reply urging adoption of the Hearing Examiner's findings of fact and conclusions of law.

We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at 3-14) are generally accurate. We incorporate them with these additions and modifications.

We add to finding no. 2 the stipulations that the longer kindergarten sessions increased the pupil contact time of teachers by at least 127 minutes (Board's position) and at most 215 minutes (Association's position) a week and the pupil contact time of aides by 190 minutes a week (1T17).

We add to finding no. 4 that when the kindergarten sessions were lengthened to three hours in September 1988, the lunch period of kindergarten teachers changed. Before then, kindergarten teachers had 70-75 free minutes between the morning and afternoon sessions.^{3/} Teachers took their 1/2 hour lunch period within this block of time (1T43; 1T48; 1T56-1T57).

In the 1988-89 school year, the lengthening of the kindergarten sessions eliminated the free time between sessions. Teachers now take their 1/2 hour lunch period during the morning or afternoon session, depending on when specialists are working with their classes (1T43; 1T71). Thus 150 minutes a week of specialist

^{3/} A few minutes were used to supervise students getting on and off buses. Aides do this work now (2T87).

time is used for lunch. Kindergarten teachers working the three hour sessions do not exceed the 6 3/4 hour work day.

We modify finding no. 6, in particular footnote 4. Like the Hearing Examiner, we reject CP-6 and rely on the teachers' actual work schedules. Faber's 1988-89 schedule (CP-10), as corrected by her testimony about music and physical education periods (1T68-1T70), showed these amounts of specialist time a week: library - 60 minutes; physical education - 70 minutes; art - 90 minutes; music - 140 minutes; and computers - 30 minutes a week average.^{4/} Faber took her 1/2 lunch during one of the specialist periods. Within the 1800 minutes devoted to the two kindergarten sessions each week, there were thus 390 minutes during which specialists taught and Faber was free to take her lunch period and do other activities. Her pupil contact time thus averaged about 1410 minutes a week.

We modify finding no. 8. Dotti's 1988-89 schedule (CP-5) showed these amounts of specialist time a week: library - 60 minutes; physical education - 65 minutes; art - 90 minutes; music - 140 minutes; and computer - 30 minutes a week average. Dotti took her 1/2 hour lunch during one of the specialist periods. Within the 1800 minutes devoted to the two kindergarten sessions each week, there were thus 385 minutes during which specialists taught and

^{4/} The assistant principal for curriculum testified that the physical education class was 5 minutes longer than Faber said it was (2T76). This fact dispute is not critical so we do not resolve it.

Dotti was free to take her lunch period and do other activities. Her pupil contact time thus averaged about 1415 minutes a week.

We add to finding no. 18 that the recognition clauses of the 1987-1989 and 1989-1992 contracts define the word "teachers" as all professional employees in the negotiations unit. The salary guides and the contract clauses governing teaching days, teaching hours, teaching workload, and teachers' aides make no distinctions among types of teachers.

Pupil contact time for teachers is mandatorily negotiable. See, e.g., In re Maywood Bd. of Ed., 168 N.J. 45, 59-60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); see also H.E. at 14-15. A unilateral increase in pupil contact time violates the employer's negotiations obligations under N.J.S.A. 34:13A-5.3 unless the majority representative has clearly and unequivocally waived its right to negotiate. Such a waiver may come in different forms, including explicit contractual language or an established past practice. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 88-15, 13 NJPER 712 (¶18265 1987); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (3/10/87).

The pupil contact time of kindergarten teachers and aides was markedly increased at the start of the 1988-89 school year. So

was the pupil contact time of the reading teachers and of kindergarten teacher Faber at the start of the 1989-90 school year. No negotiations occurred and no contract language permitted these unilateral changes. The question is whether an established past practice permitted them. The answer turns on whether we apply the past practice concerning the pupil contact time of teachers in grades 1-8. If we do, then we must dismiss the Complaint since the pupil contact time of kindergarten and reading teachers remained well within the range of pupil contact time for other teachers. If we do not, then we must find an unfair practice.

In Maywood Bd. of Ed., P.E.R.C. No. 78-23, 3 NJPER 377 (1977), recon. den. P.E.R.C. No. 78-37, 4 NJPER 6 (¶4003 1977), we held that a unilateral increase in the pupil contact time of two physical education teachers violated the Act, even though the increases might have been within the range of the pupil contact time of other physical education teachers. The Appellate Division reversed and remanded, reasoning that an increase within the terms of an accepted practice is not an unfair practice. 168 N.J. Super. 45, 59-60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). Since Maywood, it has often been found that an increase in the pupil contact time of some teachers was within the range of the pupil contact time of comparable teachers.

In Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), we rejected a Hearing Examiner's determination that an increase in the pupil contact time of seventh

grade core program teachers was an unfair practice. The Appellate Division agreed, holding that the increase in the pupil contact time of this subgroup was within the range of the pupil contact time of all other teachers. 180 N.J. Super. 440, 447 (App. Div. 1981).

Similarly, in Bethlehem Tp. Bd. of Ed., we rejected a contention that the teaching periods of upper grade teachers should be analyzed apart from the teaching periods of lower grade teachers. We noted that the contract referred simply to teachers, without differentiating between upper and lower grade teachers, and that one upper grade teacher had taught six periods before. Since an increase in the number of upper grade teaching periods was consistent with an established practice of assigning six teaching periods to the larger majority of teachers in the same school and unit, we dismissed the Complaint.

Similar analyses produced similar results in Glen Ridge Bd. of Ed., P.E.R.C. No. 90-33, 15 NJPER 619 (¶20258 1989) and Phillipsburg Bd. of Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989). In Glen Ridge, we held that a unilateral increase in the pupil contact time of elementary school teachers was within the parties' total understanding and practice concerning the pupil contact time of all teachers. In Phillipsburg, we held that a unilateral increase in the number of teaching periods for literature, writing, and social studies teachers did not exceed the number of teaching periods assigned other teachers.

In some cases, a subgroup of employees can be the right referent for purposes of analyzing a past practice. In East Brunswick Bd. of Ed., P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986), for example, we held that unilaterally assigning extra teaching periods to nurses violated the Act. Since nurses were not mentioned in any contract article besides the recognition clause, we concluded that the workload limits for certificated teachers were not meant to apply to nurses. We have also found violations based on increases in the pupil contact time of a particular subgroup of teachers absent any allegations and proof that the increases were within an established range of pupil contact time for a larger group. Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), app. pending App. Div. Dkt. No. A-4090-89T2 (kindergarten teachers); Upper Pittsgrove Reg. Bd. of Ed., P.E.R.C. No. 90-34, 15 NJPER 621 (¶20259 1989) (teachers at one school). We must consider all the circumstances of a case and the issues presented in determining the appropriate employee group for purposes of assessing a past practice defense.

Under all the circumstances of this case, we decline to analyze the pupil contact time of kindergarten and reading teachers separately from the pupil contact time of their colleagues. The recognition clause defines "teachers" as all professional employees in the negotiations unit, and the contractual clauses on salaries, teaching days, teaching hours, teaching load and teacher aides do not distinguish among groups of employees. The negotiations history

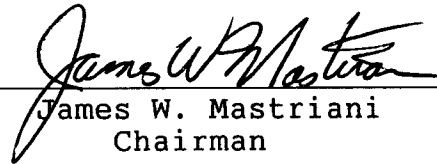
confirms that no distinctions have been drawn. Moreover, unlike in East Brunswick, all these employees have the same certification requirements.

The controverted increases in pupil contact time were all within the established range of pupil contact time for other teachers. We therefore dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
August 13, 1990
ISSUED: August 15, 1990

H.E. NO. 90-52

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

In the Matter of

BOARD OF EDUCATION OF SHAMONG
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Respondent,

-and-

Docket Nos. CO-H-89-247
& CO-H-90-176

SHAMONG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Shamong Township Board of Education did not violate the New Jersey Employer-Employee Relations act when it increased the amount of pupil contact time worked by kindergarten teachers, kindergarten aides and reading teachers within the range of pupil contact time established by the parties' past practice.

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. 90-52

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Appearances:

For the Respondent, Cassetta, Taylor & Whalen
(Bruce Taylor, Consultant)

For the Charging Party, Selikoff and Cohen, P.A.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 3, 1989, the Shamong Township Education Association ("Association") filed an Unfair Practice Charge (Docket No. CO-89-247) against the Board of Education of Shamong Township ("Board"). On December 26, 1989, the Association filed a related Unfair Practice Charge (Docket No. CO-90-176) against the Board. The charge docketed as CO-89-247 alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:14A-1 et

seq. ("Act"), specifically Section 5.4(a)(1) and (5)^{1/} by unilaterally increasing the length of the morning and afternoon kindergarten sessions from two 2-1/2 hour sessions to two three hour sessions each day. This change resulted in an alleged increase in the pupil contact time for kindergarten teachers of 215 minutes per week and kindergarten aides of 45 minutes per week. On May 23, 1989, the Association amended its charge to allege that the increase in pupil contact time for kindergarten aides amounts to 190 minutes per week. The charge docketed as CO-90-176 alleges that in school year 1989-90 the Board unilaterally increased the pupil contact time of kindergarten teacher Clare Faber by 20 minutes per week and increased the number of teaching periods taught by the Indian Mills School's reading teachers, thereby increasing those reading teachers' pupil contact time as well.^{2/}

On June 8, 1989, the Director of unfair practices issued a Complaint and Notice of Hearing in Docket No. CO-H-89-247. On January 5, 1990, the Director of unfair practices issued a Complaint

^{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. (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 docketed as CO-90-176 also alleges that the Board increased the number of teaching periods of two mathematics teachers. The Association has withdrawn that portion of the charge. (1T11).

and Notice of Hearing in Docket No. CO-H-90-176 and an Order Consolidating the two cases. A hearing was conducted on January 9 and 10, 1990 at the Commission's offices in Trenton, New Jersey. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed timely post-hearing briefs. Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act (1T13).^{3/}

2. The parties stipulated that prior to the 1988-89 school year, there were two 2-1/2 hour kindergarten sessions per day. Kindergarten was changed to two three-hour sessions per day beginning in September, 1988 (J-4).

3. The parties stipulated that teacher's aides' schedules have varied over the years consistent with the changes experienced by the primary teacher (J-3). One aide is assigned to each kindergarten class (2T85-86).

^{3/} The transcript citation "1T13" refers to the transcript produced on January 9, 1990 at p. 13. A transcript citation "2T1" refers to the transcript produced on January 10, 1990 at p. 1. Documentary evidence submitted by the Respondent is designated "R." Documentary evidence submitted by the Charging Party is designated "CP." Documentary evidence submitted jointly by the parties is designated "J."

4. Pursuant to the collective agreement, the length of the school day for all teachers is six and three-quarter (6-3/4) hours inclusive of lunch. Teachers are ordinarily required to report for duty 15 minutes before the opening of the pupils' school day and permitted to leave 30 minutes after the close of the pupils' school day (J-1; J-2). This pre- and post-school day time is considered non-pupil contact time. Kindergarten teachers working two 3-hour sessions did not exceed the 6 3/4 hour school day.

5. The kindergarten schedule includes time for special activities such as music, physical education, library, art, and computers. Teacher specialists either go into the kindergarten classroom at assigned times during the week, or the students, in the cases of physical education and library, are taken out of the classroom and brought to the specialist. During the time when the class is being taught by a specialist, neither the kindergarten teachers nor the aides are required to remain with the students (1T39; 1T50; 2T32; 2T85-86). During school years 1984-85 and 1985-86, kindergarten teachers were required to remain with their students during library time because the Board did not employ a certified librarian (1T40-1T41; 1T60). Teachers were able to work on anything they chose during the library period, nonetheless they were required to remain with the children in order to supervise conduct and assist with book selection. (1T60; 2T83-2T84). I find that during school years 1984-85 and 1985-86, library time constituted pupil contact time. My finding is further supported by

a review of Ann Dotti's class schedules for school years 1984-85 and 1985-86. Ms. Dotti's 1984-85 class schedule (CP-1) shows the time periods the class spent with teacher specialists. While Ms. Dotti's testimony indicates that the class attended the library (1T25; 1T39-1T41), the library period is not shown as a "special" time on CP-1 as is music, art and physical education. Ms. Dotti's 1985-86 schedule (CP-2) shows "special" time marked in bold print and all other pupil contact time written in script. Library periods shown on CP-2 are written in script.

6. Florence Tavani taught kindergarten from 1973 through the 1987-88 school year (1T53). Ann Dotti taught kindergarten from 1984 through school year 1988-89 (1T23). Clare Faber began teaching kindergarten in school year 1988-89 and is teaching kindergarten currently (1T67). Tavani's, Dotti's and Faber's schedules show the number of minutes that specialists teach their classes each week for the various school years. Each witness specifically testified as to the accuracy of their individual schedules (1T32; 1T56; 1T68-1T70; 1T73-1T74).^{4/}

^{4/} Admitted in evidence is Association Exhibit CP-6. CP-6 purportedly constitutes a compilation of the kindergarten teachers' schedules showing the total number of pupil contact minutes available per week, the total number of minutes the class was taught by a specialist and, by subtracting the specialist's time from the total time available for instruction, the total number of actual pupil contact minutes for the kindergarten teachers for school years 1984-85 through 1988-89, inclusive. By comparing the kindergarten teachers

7. In school year 1985-86, Tavani's kindergarten class had 195 minutes^{5/} per week with a specialist (CP-7).^{6/} In school year 1985-86, Tavani's total pupil contact time is 1305 minutes per week. In school year 1986-87 Tavani's class spent 285 minutes^{7/} per week with specialists (CP-8). Tavani had a total of 1215 minutes of pupil contact time per week during that school year. In school year 1987-88 Tavani's class spent a total of 300

4/ Footnote Continued From Previous Page

individual schedules with CP-6, I find numerous significant errors. For example, Faber's 1988-89 schedule (CP-10) shows specialists' time totalling 390 minutes per week, however, CP-6 shows only 225 minutes. Consequently, rather than 1425 minutes of pupil contact time in school year 1988-89 there is only 1260 minutes per week. Discrepancies exist between Dotti's and Tavani's schedules and CP-6 also. I find the kindergarten teachers' actual schedules to be more specific and more reliable than the compilation represented by CP-6. Accordingly, I rely on the kindergarten teachers' individual schedules and reject CP-6.

5/ The 195 minutes of specialist time is comprised of 75 minutes of music, 60 minutes of physical education and 60 minutes of art.

6/ An additional sixty minutes per week were spent at the library. These 60 minutes are not included in the specialist time calculation because, as previously explained, library time in school year 1985-86 constitutes pupil contact time for the kindergarten teacher.

7/ The 285 minutes of specialist time is comprised of 65 minutes of library, 85 minutes of music, 65 minutes of physical education and 70 minutes of art.

minutes^{8/} per week with specialists leaving Tavani with 1200 minutes of pupil contact time per week (CP-9).

8. In school year 1984-85, Ann Dotti's kindergarten class had a total of 235 minutes^{9/} per week with a specialist (CP-1). Dotti had a total of 1265 minutes of pupil contact time per week during that school year. During school year 1985-86 Dotti's class spent 195 minutes^{10/} per week with specialists (CP-2). Dotti's total pupil contact time during that school year is 1305 minutes per week. In school year 1986-87 Dotti's kindergarten class spent a total of 265 minutes^{11/} per week with specialists (CP-3). Dotti's total pupil contact time during that school year is 1235 minutes per week. During school year 1987-88, Dotti's kindergarten class spent

8/ The 300 minutes of specialist time is comprised of 60 minutes of library, 60 minutes of physical education, 90 minutes of art and 90 minutes of music. The 90 minutes of music is comprised of 30 minutes of music on Thursday morning and 35 minutes of music on Thursday afternoon for a total of 65 minutes. The class had an additional 20 minutes of music on alternate Wednesdays and 30 minutes of music on alternate Friday afternoons for a total of 50 minutes of music, or an average of 25 additional minutes of music per week.

9/ The 235 minutes of specialist time is comprised of 100 minutes of music, 65 minutes of physical education and 70 minutes of art.

10/ The 195 minutes of specialist time is comprised of 75 minutes of music, 60 minutes of physical education and 60 minutes of art.

11/ The 265 minutes of specialist time is comprised of 75 minutes of music, 60 minutes of library, 60 minutes of physical education and 70 minutes of art.

a total of 290 minutes^{12/} with specialists (CP-4). Dotti had a total of 1210 minutes of pupil contact time per week during that year. In school year 1988-89, Dotti's kindergarten class had a total of 385 minutes^{13/} per week with specialists (CP-5). Dotti had a total of 1265 minutes of pupil contact time per week.

9. During school year 1988-89, Fabers' kindergarten class spent a total of 390 minutes^{14/} per week with specialists (CP-10; 1T69-1T70). Faber had a total of 1260 minutes of pupil contact time per week during that school year. During school year 1989-90, Faber's kindergarten class spent a total of 370 minutes^{15/} per week with specialists (CP-11; 1T73-1T74). Faber had a total of 1280 minutes of pupil contact time per week during that school year or an

12/ The 290 minutes was arrived at by adding 80 minutes of art, 60 minutes of physical education, 60 minutes of library and 90 minutes of music. The 90 minutes of music was comprised of 30 minutes of music on Mondays and 35 minutes of music on Wednesday afternoon for a total of 65 minutes. The class had an additional 20 minutes of music on alternate Wednesday mornings and 30 minutes of music on alternate Friday afternoons for a total of 50 minutes or an average of 25 additional minutes per week.

13/ The 385 minutes of specialist time per week is comprised of 140 minutes of music, 60 minutes of library, 65 minutes of physical education, 90 minutes of art and 30 minutes of computer.

14/ The 390 minutes of specialist time is comprised of 60 minutes of library, 140 minutes of music, 70 minutes of physical education, 90 minutes of art and 30 minutes of computer. I am assuming computer is held on alternating weeks as it was during school year 1988-89.

15/ The 370 minutes of specialist time is comprised of 60 minutes of library, 120 minutes of music, 70 minutes of physical education, 90 minutes of art and 30 minutes of computer.

additional 20 minutes of pupil contact per week more than school year 1988-89. The 20 minute pupil contact time increase resulted from a five minute decrease in each of the four music periods scheduled during the week (1T74-1T75).

10. Pupil contact time for kindergarten teachers would fluctuate from year to year based upon the number of specialists assigned to teach the kindergarten class and the duration which each specialist spent with the students (1T42-1T43; 1T60-1T61; 1T99; 2T26). Prior to the events which lead to the filing of the instant Unfair Practice Charges, the Association never formally contested increases or decreases in pupil contact time for any teacher included in the negotiations unit (2T37-2T38; 2T56; 2T59).^{16/}

11. For at least the last seven years, pupil contact time for reading teachers has fluctuated from one school year to the next (1T99). The amount of pupil contact time for reading teachers is

^{16/} Early in school year 1988-89, the Association complained about an increase in pupil contact time for 5th grade teachers. It filed an informal, level 1 grievance (1T107). The Association also complained about the increase in pupil contact time for the kindergarten and reading teachers. The Superintendent held a meeting with Association representatives to discuss the complaints. During the meeting, only the reading teachers' pupil contact time increase was discussed; the 5th grade teachers waited in the hall. The kindergarten teachers did not attend (2T56-2T57). The reading teachers' complaint was not resolved and resulted in the Association's filing of this unfair practice charge. At the end of the meeting, the Association decided not to have the 5th grade teachers meet with the Administration. Subsequently, the Association concluded that the pupil contact time increase for the 5th grade teachers (about 44 minutes) was minimal and decided to drop the issue (1T107-1T108; 2T56).

determined by the number of students requiring reading services and programmatic changes which have occurred over the years (1T100-1T101; 1T104).

12. During the spring, 1989, Eileen Senior, Assistant Principal for Curriculum, gave reading teachers, which included Geraldine Suleta, Association President, a draft schedule for school year 1989-90 (1T111). Reading teachers were routinely involved in the reading program scheduling process for the upcoming school year (1T110). After the initial presentation, the draft schedules were revised through the spring and summer to reflect changes in the student population needing reading services (1T129-1T130). The 1989-90 draft schedule contained six 45-minute teaching periods for the Indian Mills School's reading teachers (2T63-2T64). Suleta, with the concurrence of the other reading teachers, suggested to Senior that students be scheduled with the same reading and writing laboratory teacher. Senior incorporated this change into the final 1989-90 schedule for reading teachers (2T62-2T63). It was basically this schedule which was implemented for the reading teachers at the Indian Mills School in school year 1989-90. Although Suleta is Association president, I find that she reviewed the draft 1989-90 reading schedule in her capacity as a teacher, not as an Association official (1T135). Suleta was not certain of the final form (number and length of periods assigned to reading teachers) the schedule would take until September 1989, because draft schedules developed and circulated during the spring were either later changed or just not implemented in September (1T132-1T133).

13. Reading teachers are not required to possess special certification or credentials (2T79-2T80). Prior to school year 1989-90, schedules for the Indian Mills School's reading teachers have included six periods per day (1T118; 2T70; CP-12), however, the schedules never included six 45-minute periods (1T118).

14. The parties stipulated that during school year 1987-88 reading teacher Schwing^{17/} had 1200 minutes of pupil contact time per week and reading teachers Suleta, Goley and Rich each had 1125 minutes of pupil contact time per week (2T30; R-4). The parties disagree with respect to the amount of weekly pupil contact time the Indian Mills School's reading teachers were assigned during school year 1988-89. There is insufficient record evidence to make a specific finding regarding the amount of pupil contact time worked by the reading teachers in 1988-89. However, I find that the resolution of this dispute is unnecessary in reaching a determination in this matter. It is clear from R-4 and CP-12 that pupil contact time for the Indian Mills School's reading teachers has increased substantially between school years 1988-89 and 1989-90. The parties stipulate that during school year 1989-90 Schwing worked 1380 pupil contact minutes per week, Suleta and Goley worked 1402.5 pupil contact minutes per week and Rich worked 1357.5 pupil contact minutes per week (2T30; R-4).

^{17/} Schwing took reading teacher Shissler's place during calendar year 1987-88.

15. For purposes of this case only, the parties also stipulated to the number of pupil contact minutes per week for teachers in grades 1 through 8, inclusive, and teachers in grade T-1 (2T36; R-4). Between school years 1983-84 and 1989-90, pupil contact time for teachers in grades T1 through 8 ran from a minimum of 1390 to a maximum of 1470 minutes per week (R-4). The range of pupil contact minutes in grades T-1 through 8, inclusive, ran from 1390 to 1425 in school year 1987-88; 1395 to 1435 in 1988-89; and 1402.5 to 1440 in 1989-90 (R-4).

16. Mrs. Hoffman is a teacher assigned to the Nakomis School.^{18/} During school year 1989-90, she was assigned to teach a reading lab for grades 1 and 2, a math lab, literature, and a writing lab (2T77). Hoffman may also perform student testing (1T134). Since Hoffman is assigned to the Nakomis rather than Indian Mills School, teaches a math lab, and spends only between two-thirds and three-quarters of her day teaching reading, the Association contends that the amount of pupil contact time included in Hoffman's schedule should not be compared with the other reading teachers (1T134-1T135; 2T78). The Board argues that Hoffman should be compared with the reading teachers at the Indian Mills School because most of her day is spent teaching reading, she attends meetings at the Indian Mills School with the other reading teachers,

^{18/} The Nakomis School is located in a neighboring school district. The Board rented space in the Nakomis School to alleviate overcrowding at the Indian Mills School (2T13).

and the reading teachers at the Indian Mills School also previously taught math lab (2T78-2T79). I find that the determination of whether Hoffman's pupil contact time should be compared with the pupil contact time of the reading teachers in the Indian Mills School does not assist in the resolution of this Unfair Practice Charge. Consequently, I will refrain from making such finding.

17. During each round of negotiations which lead to collective agreements for school years 1985-87 and 1987-89, respectively, the Association demanded that each teacher be scheduled for at least one 45-minute preparation period per day and receive a one-hour duty free lunch period (2T5; R-2; R-3). While the preparation and lunch time demands remained an issue throughout the respective negotiations, the Board ultimately rejected the Association's demands and collective agreements were entered into by the parties excluding such provisions (2T11-2T13). During negotiations for the 1987-89 agreement, Superintendent Leo Rea told the Association that he would attempt to revise teachers' schedules in order to provide as many teachers as possible with a 45-minute preparation period. At Rea's direction, Senior tried to equalize preparation time among teachers at 45 minutes per day (2T15-2T16; 2T45-2T46). The teachers' lunch period has remained at one-half hour per day (2T18-2T19). The collective agreements are silent with respect to the length of the lunch period and the amounts of preparation and pupil contact time (2T20; J-1;J-2).

18. The collective agreements (J-1; J-2) make no distinction among reading, kindergarten or other teachers. The demands made by the Association (R-2; R-3) for preparation and lunch time did not distinguish reading or kindergarten teachers from other teachers in the unit (1T112-1T113).

ANALYSIS

It is firmly established law in this state that teacher work hours and work load are mandatorily negotiable and, normally, a unilateral increase in pupil contact time or the number of teaching periods violates the Act. See Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Ed. Assn., 168 N.J. Super. 45 (App. Div. 1979), pet. for cert. den. 81 N.J. 292 (1979); Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. The Warrington, 138 N.J. Super. 564 (App. Div. 1976); Kingwood Tp. Bd. of Ed. v. Kingwood Tp. Ed. Assn., App. Div. Dkt. No. A-1414-84T7 (11/25/85); Upper Pittsgrove Tp. Bd. of Ed., H.E. NO. 89-44, 15 NJPER 429 (¶20179 1989), adopted P.E.R.C. No. 90-34, 15 NJPER 621 (¶20259 1989); Phillipsburg Bd. of Ed., H.E. No. 90-7, 15 NJPER 528 (¶20218 1989), adopted P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989); Hamilton Tp. Bd. of Ed., H.E. No. 90-18, 15 NJPER 667 (¶20272 1989), adopted P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), appeal pending App. Div. Dkt. No. A-4090-89T2; Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. A-3380-80T2 (3/16/82); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No.

A-2060-78 (2/20/80); City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Dkt. No. A-954-79 (1980), pet. for cert. den. 87 N.J. 310 (1981). However, a majority representative may waive its right to negotiate changes in student contact time or work load. A waiver can come in different forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). Where an employee organization declines the opportunity to negotiate after being notified of proposed changes or, if it has routinely permitted the employer to make similar changes, it may have waived its right to negotiate over what would otherwise be mandatorily negotiable subjects. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87); Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

Terms and conditions of employment can either be set forth in the parties' agreement or found in the parties' established practice. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). Generally, an established practice defining a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. Where the agreement is silent or ambiguous on the particular issue in dispute, then the established practice controls. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982); Barrington Bd. of Ed.,

P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Dkt. No. A-4991-80 (1982). By definition, an established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part 180 N.J. Super. 440 (1981). In this case, an established practice exists which allows the Board to make annual adjustments in the amount of pupil contact time to which teachers are assigned. For kindergarten teachers and aides, pupil contact time fluctuates in relationship to the number of teacher specialists provided to the students. In those years where more specialist time was scheduled, kindergarten teachers and aides experienced a reduction in the amount of pupil contact time assigned. Likewise, in those years where students were scheduled to spend less time with specialists, kindergarten teachers and aides experienced greater amounts of pupil contact time.

Pupil contact time for reading teachers fluctuated on the basis of the number of students requiring reading services and programmatic changes. Since the 1985-86 school year, some reading teachers were scheduled to work up to six teaching periods per day. Thus, with regard to reading teachers, the Board has not unilaterally changed the condition of employment when it assigns six teaching periods, since that reflects the established practice. Consequently, I find that with regard to the assignment of six

teaching periods per day,^{19/} the Association has waived its right to negotiate.

In Bethlehem Tp. Bd. of Ed., the Commission found that:

[t]he assignment of a sixth teaching period for seventh and eighth grade teachers was consistent with the established practice of assigning six teaching periods to a large majority of teachers in the same unit and in the same school. The lower grade teachers historically had been assigned to teach six periods. The contract does not differentiate between lower and upper grade teachers; rather it refers simply to teachers. Further, one seventh and eighth grade teacher had taught six periods previously, without any objection. Accordingly, under all these circumstances, we find that the Board did not violate the Act when it assigned teachers an additional teaching period consistent with established past practice. South River, [supra.] Caldwell-W. Caldwell Bd. of Ed., [supra.] [Bethlehem Tp. Bd. of Ed., 13 NJPER at 713.]

The Hearing Examiner in Bethlehem Tp. Bd. of Ed. stated:

...the past practice in this district was that the overwhelming number of regular teachers, including at least one seventh/eighth grade teacher, has six teaching periods per day.^{20/} The fact that only three teachers had a history of only five periods per day does not establish a separate labor relations practice for them. That would present an intolerable situation. [Bethlehem Tp. Bd. of Ed., 13 NJPER at 185.]

The Association contends that in determining the applicable established practice, comparisons are appropriately made only within each discrete group of teachers. Upper Pittsgrove Bd. of Ed. Thus, the Association reasons, the practice applicable to the amount of

^{19/} I speak to the increase in the number of pupil contact minutes per period, below.

^{20/} Footnote from original omitted.

pupil contact time worked by the other kindergarten teachers should be ascertained through a comparison of the pupil contact time worked by only kindergarten teachers in previous school years. The same sorts of comparisons would apply to kindergarten aides and reading teachers. I find Upper Pittsgrove Bd. of Ed. to be inappositely applied in the instant matter. Upper Pittsgrove Bd. of Ed. does not address the issue of whether the employee representative waived its right to negotiate in light of an established practice as does the instant case.

I find that Bethlehem Tp. Bd. of Ed. rejects such a narrowly defined means of determining the established practice. The determination of the established practice must be arrived at from the perspective of the range of pupil contact time worked by teachers in the overall unit, not just individual segments. In the instant matter a large majority of teachers in the unit at the Indian Mills School are assigned 1420-1425 minutes of pupil contact time; in 1988-89 some taught as much 1435 minutes, and in 1989-90 some taught 1440 minutes. Since school year 1983-84, teachers have taught as much as 1470 minutes of pupil contact time. The contract does not differentiate among kindergarten, reading and other teachers. During negotiations, the Association has made demands only on behalf of all unit teachers, not on the basis of discrete groups. Consequently, regarding kindergarten teachers, I find that the Board has committed no unfair practice by increasing their pupil contact time within the range allowed by the established practice

for unit teachers. Moreover, since the established practice allows variation in the pupil contact time of kindergarten aides consistent with the kindergarten teachers, the Board has not violated the Act by increasing the aides' pupil contact time.

The Charging Party alleges that the Board illegally increased Clare Fabers' pupil contact time from school year 1988-89 to school year 1989-90. The Association claims, and I found, that Fabers' pupil contact time went from 1260 minutes to 1280 minutes per week. The 20-minute per week increase in pupil contact time resulted from a five-minute decrease in each of the four weekly music periods.

I find no unfair practice occurred with respect to Fabers' increase in pupil contact time. As indicated above, Fabers' pupil contact time in school years 1988-89 and 1989-90 is within the pupil contact time range established for unit teachers. Additionally, the facts clearly show that pupil contact time for kindergarten teachers routinely fluctuated as the result of changes in the amount of time teacher specialists, such as music, were scheduled with the students. This is precisely what occurred in Fabers' case. The music teacher specialist was scheduled to teach five minutes per period less in school year 1989-90 than in 1988-89. The parties' established practice allows the Board to implement this schedule adjustment without first entering into negotiations.

Applying the same rationale as that set forth for the kindergarten teachers, I find that the Board has committed no unfair

practice by assigning reading teachers the amounts of pupil contact time scheduled in school year 1989-90. The amounts of pupil contact time scheduled for reading teachers during school year 1989-90 did not exceed the range of pupil contact time established for teachers in the unit. The contract makes no distinction between reading teachers and other unit teachers, and reading teachers are not required to have any special certification or other qualifications that would otherwise distinguish them.

Fluctuations in the amount of pupil contact time for teachers in this unit are not without limit. Teachers have worked a maximum of 1470 pupil contact minutes per week. The Association has not waived its right to negotiate changes in pupil contact time which would require teachers to work schedules which exceed the maximum pupil contact time (1470 minutes) allowed in accordance with the established practice.^{21/} See Hamilton Tp. Bd. of Ed., Phillipsburg Bd. of Ed., and Bethlehem Tp. Bd. of Ed.

^{21/} For the reasons set forth previously in this decision, I have rejected CP-6. CP-6 indicates that in calendar year 1988-89, kindergarten teachers were assigned a total pupil contact time of 1425 minutes. Consequently, even assuming arguendo, that the pupil contact time reflected in CP-6 for kindergarten teachers is accurate, the outcome in this decision would remain unchanged, since 1425 minutes is within the range of pupil contact time worked by teachers in the unit. Likewise, the Board has also proffered its version of pupil contact time for kindergarten teachers as set forth in R-4. The Board arrived at its calculation of kindergarten teachers pupil contact time through the use of records other than CP-1 through CP-5 and CP-7 through CP-11 (2T91). Since I have found CP-1 through CP-5 and CP-7 through CP-11 to reflect the actual pupil contact time of the kindergarten teachers for the

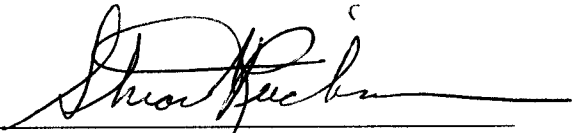
Accordingly, based upon the entire record and the above analysis, I make the following:

CONCLUSIONS OF LAW

The Shamong Township Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(5) or, derivatively, (1) by increasing the amounts of pupil contact time worked by kindergarten teachers, including Ms. Faber, kindergarten aides and reading teachers within the range of pupil contact time established by the parties' past practice.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the Complaint be dismissed.


Stuart Reichman
Hearing Examiner

Dated: May 21, 1990
Trenton, New Jersey

21/ Footnote Continued From Previous Page

years reflected by those documents, I do not adopt the Board's numbers for kindergarten teachers' pupil contact time. Again, however, even assuming arguendo, that the Board's pupil contact time numbers are accurate, the pupil contact time reflected in R-4 does not exceed the allowable pupil contact time established for teachers in the unit.