P.E.R.C. NO. 77-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,
Respondent,

Docket No. CO-76-25-29

-and-

EAST BRUNSWICK ADMINISTRATORS ASSOCIATION,
Charging Party.

EAST BRUNSWICK BOARD OF EDUCATION,
Petitioner,

-and-

Docket No. SN-76-19

EAST BRUNSWICK ADMINISTRATORS ASSOCIATION,
Respondent.

SYNOPSIS

The Commission affirms the findings of fact and conclusions of law of the Hearing Examiner, and overrules the exceptions filed by the Board of Education, in a combined unfair practice and scope of negotiations proceeding. The Association alleged that the Board had failed to sign and implement a collective negotiations agreement that had been agreed upon by duly authorized representatives of both parties. The Hearing Examiner found for the Association after an exhaustive review of the factual record and analysis of the legal principles. The Board's exceptions primarily contend that its negotiating team did not have authority to conclude an agreement and that one of the contract clauses concerned the granting of salary increments which is a non-negotiable item. The Commission concludes that the Board created a circumstance which indicated that its negotiating team had authority to conclude an agreement. In such a situation, absent express qualifying conditions, the Association was justified in presuming that the Board's negotiators possessed the apparent authority to conclude a binding agreement. The Commission does not find that the holding of Clifton Teachers Association v. Clifton Board of Education, 136 N.J. Super 336 (App. Div. 1975), that Boards have authority to withhold an increment for cause, is necessarily inconsistent with the determination that salary increments are a mandatorily negotiable term and condition of employment, especially where, as here, that part of the contract which deals with salary increments does not appear to dilute the Board's authority to withhold an increment for cause. The Board is ordered to execute, and give retroactive effect to, the agreement.

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Respondent.

Appearances:

For the Board of Education, Rubin and Lerner, Esqs. (Mr. Frank J. Rubin, of Counsel)

For the Administrators Association, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, Esqs. (Mr. Jack Wysoker, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on August 1, 1975 by the East Brunswick Administrators Association (the "Association") alleging that the East Brunswick Board of Education (the "Board") had engaged in certain unfair practices within with meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular the Association alleged that the Board had failed to sign and implement

a collective negotiations agreement that had been agreed upon and reduced to writing by duly authorized representatives of the Board and the Association, in violation of N.J.S.A. 34:13A-5.4(a)(6). The Association also contended that the Board's actions in rejecting the above agreement at the last minute constituted a refusal to negotiate in good faith, in violation of N.J.S.A. 34:13A-5.4(a)(5). Finally, the Association alleged that these actions of the Board also constituted violations of N.J.S.A. 34:13A-5.4(a)(1) and (3).[1/]

A Petition for Scope of Negotiations Determination (the "Petition") was filed by the Board on October 30, 1975.[2/] The Board contended that the Association's Charge directly concerned the matter of granting or withholding of a salary increment. The Board asserted said issue was not a proper subject for collective negotiations. Thus, the Board maintained that to the extent that the Charge involved the resolution of the salary increment issue, the Charge must be dismissed.

1/ The cited subsections prohibit employers, their representatives or agents from "(1) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this Act... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act...(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative... / or / (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ The Commission's authority to determine whether a matter in dispute is within the scope of collective negotiations appears in the Act at N.J.S.A. 34:13A-5.4(d):

"The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Commission's Executive Director that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 29, 1975. On November 7, 1975, an Order Consolidating Cases was issued that consolidated the Board's Petition with the Association's Charge.[3/]

Pursuant to the Complaint and Notice of Hearing and the Order Consolidating Cases, hearings were held in this consolidated proceeding before Hearing Examiner Stephen B. Hunter on January 20, 1976, February 23, 1976, and February 24, 1976, at which time all parties were represented and were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were submitted by the parties by April 30, 1976. On June 16, 1976 the Hearing Examiner issued his Recommended Report and Decision (H.E. No. 76-13, 2 NJPER 204). A copy of the Report is attached hereto and made a part hereof.

The Board requested an extension of time for the filing of exceptions to the Report and the Association agreed to the request. Exceptions with supporting brief were filed by the Board on July 14, 1976. No answering brief or cross-exceptions were filed by the Association.

The Association presented its initial negotiations proposals to the Board on December 20, 1974 and the parties began formal negotiations for a 1975-76 agreement on January 17, 1975.

3/ See N.J.A.C. 19:15-1.1(b).

The parties' negotiating representatives reached agreement on the terms of a new contract on July 1, 1975; these terms were reduced to writing by the Board's chief negotiator, Assistant Superintendent Leroy Swoyer, and after some further changes were agreed upon, Swoyer prepared a document (Exhibit J-2) which the parties stipulated to be the product of negotiations of the two negotiating teams.

The Association asserted that the Board's negotiating team (Superintendent Sweeney and Assistant Superintendent Swoyer) was the duly authorized representatives of the Board and had acted within the general guidelines which the Board had provided. Thus, the Association contended that the agreement reached by the parties' respective negotiating representatives was a binding agreement not subject to any substantive requirements for ratification.

Citing In re Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975), the Association asserted that under the circumstances presented herein, it was entitled to rely on the apparent authority of the Board's negotiators to conclude an agreement, in the absence of express qualifying conditions.

The Association also asserted that the Board had refused to negotiate in good faith when it utilized negotiators without sufficient authority to negotiate effectively, i.e., without authority to conclude an agreement with the Association. The Association maintained that the record revealed that the Board had failed to provide meaningful guidelines for and had failed to exercise any control over its negotiators. In addition, the Association noted

that the Board team made no attempt to effectively communicate with its principals and ultimately did not recommend that the Board ratify the agreement which had been negotiated.

In the event that ratification was determined to be a necessary element for J-2 to be considered a binding agreement, the Association argued that the Board had waived its right to ratify because of its bad faith, exemplified by the failure of the Board's negotiators to seek ratification for the agreement they had negotiated and drawn up.

The Board submitted that the Association's charges are unfounded. The Board asserted that it did not in fact delegate authority to its negotiating team to enter into a binding agreement, and noted that the Association presented no testimony to the contrary. The Board further asserted that the Association's negotiating team was not justified under the circumstances herein in relying upon an alleged apparent authority of the Board's representatives to conclude an agreement.

The Board contended that the Swoyer testimony showed that the Association's negotiating team was repeatedly warned that any agreements reached were tentative and subject to the Board's approval. On this basis, the Board sought to distinguish the instant matter from Bergenfield, supra. Further, the Board noted that in Bergenfield the employer's negotiating representatives were mostly Board members, unlike the situation present herein.

The Board also contended that its conduct did not constitute bad faith negotiations. Citing the Association's own cases, the Board

argued that a negotiator's lack of authority to conclude an agreement was only one factor to be considered in evaluating the employer's good faith in negotiations. The Board urged that the admonitions of the Board team to the Association team concerning the former's lack of authority vitiated any probative value that fact might have had.

The Board claimed that contrary to the Association's allegations, its negotiators had been given guidelines for negotiations in the form of comments from individual Board members.

The Board further disputed the applicability of the Association's cited authorities. The Board contended that in the two New York PERB cases cited,[4/] wherein the New York Board found that a negotiator's failure to seek ratification of his agreement constituted a failure to negotiate in good faith, the finding was predicated upon facts indicating that the negotiator's failure to recommend ratification was itself the reason that the agreement was not ratified. The Board asserted that the instant case was clearly distinguishable, as the testimony showed that no such causal relationship existed herein.

Finally, the Board claimed that insofar as it touched upon the question of the limitation of the Board's discretion regarding the withholding of increments, the Charge was defective by virtue of that issue's non-negotiability.

4/ In re Putnam County Chapter, Civil Service Employees Association, 8 PERB 4592 (1975); In re Union Springs Central Schools Teachers, 6 PERB 3120 (1973).

The Hearing Examiner concluded that the Board violated N.J.S.A. 34:13A-5.4(a)(6) by failing to sign and implement the collective negotiations agreement that had been agreed upon and reduced to writing by the duly authorized representatives of the parties; that the Board violated N.J.S.A. 34:13A-5.4(a)(5) when it failed to negotiate in good faith with the Association concerning terms and conditions of employment of the persons in the negotiating unit; that while not ostensibly motivated by a specific anti-union animus, the Board's improper conduct necessarily had a restraining influence and concomitant coercive effect upon the free exercise of the rights guaranteed by the Act to the members of the negotiating unit, in violation of N.J.S.A. 34:13A-5.4(a)(1); and that the Board's conduct was not violative of N.J.S.A. 34:13A-5.4(a)(3).

The Board excepts to the Hearing Examiner's analysis and application of the concept of apparent authority. The Hearing Examiner indicated that standard agency law provides for a principal to be bound by the conduct of an agent clothed with apparent authority. The Board acknowledges that this abstract statement of agency law is correct. However, the Board contends that the Hearing Examiner failed to perceive that the term apparent authority is a term of art. The Board suggests that in laymen's terms, apparent authority is merely the appearance on the part of the agent of having the authority to engage in activity on behalf of a principal - ostensibly, solely as a function of the agent's activity and conduct.

The Board cites this definition of apparent authority:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. (Restatement 2nd, Agency § 8)

and

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third to believe that the principal consents to have the act done on his behalf by the person purporting to act for him. (Restatement 2nd, Agency § 27)

The Board notes that the Restatement definition makes apparent authority primarily a function of the principal's conduct. The Board asserts that it did not expressly represent to the Association the nature of the Board team's agency. The Board's only "conduct" was its failure to expressly forewarn the Association that ratification was necessary before an agreement could be concluded. While the Hearing Examiner found that the Board's negotiators had not informed the Association team of their limited authority, the Board notes that no record evidence indicates that it was aware of this circumstance.

The thrust of the Boards' argument herein appears to be that it actively did nothing to encourage the Association negotiators to believe that the Board consented to having its negotiating representatives conclude an agreement in its behalf and that the Hearing Examiner based his finding of apparent authority solely on the conduct of the Board's agent - its negotiating team.

In sum the Board argues that the record does not support the conclusion that its inaction, under these circumstances, was unreasonable. The Board also excepts to the Hearing Examiner's conclusions regarding the parties' intended meaning for the symbol TOK - agreements concluded by the negotiation teams on specific items for negotiations, not subject to any conditions precedent, which would thereafter be set aside until a final contract settlement was reached - and even conceding the above meaning as determined by the Hearing Examiner, the Board excepts to his finding that such use of the symbol TOK by the parties lent any support to the conclusion that the Board team was empowered to conclude an agreement.

We find the above exceptions by the Board to be without merit. The concept of apparent authority in agency law is an old and established one which has been utilized and explained by the courts of this State on numerous occasions. The concept has applicability to a wide range of legal relationships. Its application to the relationships found in labor relations is relatively recent as compared to the apparent authority concept itself.

It has long been established that as between a principal and third persons who have dealt with an agent of the principal, the true limit of the agent's power to bind the principal is in the apparent authority with which the agent is clothed.[5/] A principal is bound by the acts of an agent which are within the apparent authority which he (the principal) knowingly permits the

5/ J. Wiss & Sons Co. v. H.G. Vogel Co., 86 N.J.L. 618, 92 A. 360 (Ct. Err. & App. 1914), Fairmont Aluminum Co. v. Stuart Engineering & Manufacturing Co. 150 F. Supp. 511 (D. N.J. 1957).

agent to assume, or within the apparent authority which he holds the agent out to the public as possessing.[6/]

The test which has been applied by the courts in determining whether apparent authority existed as to a third party who had transacted business with an agent, is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business involved, is justified in presuming that such agent has the authority to perform the particular act in question.[7/]

While all authority must derive from the principal, apparent authority may derive from a principal's adoption of or acquiescence in similar acts done on other occasions by an agent.[8/] Acquiescence by a principal in an extension of the authority he

6/ Wiss, supra; Fairmont, supra; Heckel v. Cranford Country Club, 97 N.J.L. 538, 117 A. 607 (Ct. Err. & App. 1922); Wilkerson v. Steinberg & Spielfogel, 20 N.J. Misc. 206, 27 A. 2d 206 (Ct. Com. Pleas. Monmouth 1942), aff'd 129 N.J.L. 342, 29 A. 2d 714 (Ct. Err. & App. 1942); Continental-Wirt Electron Corp. v. Sprague Electric Corp, 329 F. Supp. 959 (E.D. Pa. 1971).

7/ Wiss, supra; Jacob Ruppert v. Jernstedt & Co., 116 N.J.L. 214, 182 A. 900 (Ct. Err. & App. 1936). In Continental-Wirt, supra, the court held that with regard to a professional agent, it can be assumed that he has the authority usually exercised by such agents, or that authority which has been exercised by him previously in representing this principal, if no new restrictions are imposed thereon.

8/ Kugler v. Romain, 110 N.J. Super. 470, 266 A. 2d 144 (Ch. Div. 1970); California Bean Growers Assn. v. Mankowitz, 154 A. 533 (Cir. Ct. Essex 1931).

gave an agent may be sufficient to create an appearance of authority beyond that actually given said agent.[9/]

In Bergenfield, we found that parties to a public sector collective negotiations relationship are entitled to conduct their relationship through representatives and are bound by the actions of their representatives in accordance with the principles of agency law. The Act's endorsement and implementation of the concept of public sector collective negotiations necessarily contemplates the application of the standard principles of the law of agency, as the parties to this relationsip often cannot conduct their day to day intercourse on a "principals only" basis. We further noted that the language of the Act itself supports this view.[10/]

In Bergenfield, it was also determined that the representatives of the parties were "duly authorized", that each worked within the "general guidelines" set forth by his principal, that the representatives had reached agreement, and that the memorandum of agreement contained no conditions precedent. We found that the parties were bound by the agreement reached by their representatives and directed them to execute a formal writing reflecting such agreement. We further stated that even in the absence of the parties' stipulations concerning the "duly authorized" status of their representatives and the representatives' adherence to the "general

9/ Dierkes v. Hauxhurst Land Co., 80 N.J.L. 369, 79 A. 361 (Ct. Err. & App. 1911). The consideration to be given to acquiescence in expansion of authority should be determined not only by what the principal knows, but also by what he should know in exercising ordinary care concerning the business in which the agent is involved. See, Am. Jur. 2d, § 74.

10/ In re Bergenfield Board of Education, P.E.R.C. 90 at pps. 8-10, 1 NJPER 44, 45 (1975).

guidelines" provided by the parties, we would have held the Respondent bound by the agreements of its negotiating team. Under the circumstances presented, we concluded that the Charging Party was entitled to rely upon the apparent authority of the Respondent's negotiators, in the absence of any express qualifying conditions.

In the instant matter, the parties stipulated that the negotiating teams were "duly authorized representatives" who were designated to conduct negotiations on behalf of their respective principals. The record reveals that the negotiating teams worked within the general guidelines provided for them by the Association and the Board respectively.[11/] However, notwithstanding the above, we conclude that as in Bergenfield, under the circumstances presented, the Association was entitled to rely upon the apparent authority of the Board's negotiators in the absence of express qualifying conditions.

In January 1975, the Board appointed a team of negotiators to meet with Association representatives for the purposes of negotiating an agreement for 1975-76. One of the Board's representatives, Swoyer, was an experienced negotiator who at one time in his career worked for a management consulting firm. He was the Board's chief negotiator, the individual in essential charge of all labor relations for the Board.

11/ While the issue of whether the Board's team had exceeded its authority was controverted, to the extent that only general guidelines were provided for the Board's negotiators - other than an overall dissatisfaction of the Board with the package agreed to by its negotiating representatives - it was not established that such general guidelines were contravened.

The record reveals that no qualifications were ever placed upon the authority of the Board team to conclude an agreement. There was no writing that delimited the authority of either negotiating team or which called for final ratification by the parties themselves. The record reveals no instance wherein a member of the Board indicated to any Association representative that the Board's negotiators could not conclude an agreement, nor was it established that any member of the Board's team ever qualified his authority to conclude a binding agreement with the Association's representatives.[12/]

In addition to never qualifying its authority to conclude an agreement with Association negotiators, an examination of the entire record reveals that the conduct and demeanor of the Board's team during the whole course of negotiations gave the impression that it had the authority to conclude a binding agreement. In this connection, we refer to the Board's exception concerning the meaning of the designation TOK and its relevancy herein.

We conclude that the designation TOK was intended by the negotiating teams to indicate that an item had been agreed upon and

12/ We note that this latter issue was controverted by the parties. The findings of the Hearing Examiner on this matter, based in part upon his credibility determinations to which appropriate deference must be given, are supported by substantial record evidence. In this regard we observe that concerning the instances about which Swoyer testified, wherein he indicated that the Association's negotiators were informed by a member of the the Board's negotiating team of their lack of authority to conclude agreement, the testimony was not corroborated by any other witness and was specifically refuted by Association witnesses.

was not subject to any conditions precedent - and that it would thereafter be set aside for later inclusion in the final settlement terms reached by the teams. While there was conflicting testimony as to how each party intended to use the designation, we suggest that the parties' conduct offers a clearer insight into the intended meaning of TOK: when the Association tried to reopen a previously TOK'ed item, Board negotiator Sweeney sternly rebuffed the attempt, indicating that once an item had been negotiated and agreed to that it was thereafter a closed issue - otherwise, he posed rhetorically, what's the use of their negotiating? The parties thereafter observed this "guide". Further, that each negotiating team attempted to negotiate items, TOK them after accord was reached, and thereafter set them aside during the pendency of a seven month negotiation, fits into a clear and consistent pattern of conduct indicating an ability on the part of each team to conclude agreement.

In the instant matter, the manifestations of the Board - both active and inactive - created a circumstance which indicated that its negotiating agents were in a position to conclude agreement. The Board sent its experienced chief negotiator, Swoyer, and Superintendent Sweeney into a seven month negotiation, and there was no express qualifying condition placed upon their authority to conclude an agreement with the Association team. In the past the Board and Association teams had negotiated the agreement of the parties.

We attach no small significance to the fact that Swoyer

believed that he was the Board's duly authorized negotiating agent, that he was acting within the guidelines set forth by the Board, and accordingly that the package to which both teams had agreed would be accepted by the Board.[13/] If from his vantage point, the Board's own agent believed the foregoing and acted accordingly, it is not difficult to accept the Association's contention that a circumstance existed here, created in large measure by the Board, which indicated that the Board's negotiators had the capacity to conclude an agreement.

The Board maintains that it made no active manifestations concerning the authority of its negotiators and that it was unaware of the comportment of its negotiators. Neither fact was necessary under the circumstances herein in order to find apparent authority. From the Association's viewpoint, it was reasonable for the Association to assume that the Board was aware of the course of the negotiations and its agent's conduct therein.[14/] The Courts have held that the authority of an agent to do certain acts on behalf of his principal may be inferred from the continuance of the acts themselves over such a period of time and the doing of them in such a manner that the principal would naturally have become cognizant of them and would have forbidden them if unauthorized.[15/]

13/ Given the truth of these items - which we note constitute the essential elements of one holding in Bergenfield, supra, - such an agent would be possessed of the authority to conclude an agreement on behalf of his principal.

14/ We note that Board member Bohrer attended two of the thirteen negotiating sessions. Further, the Board held three or more meetings of various kinds each month, each of which was attended by one or both of its negotiators.

15/ Dierkes, supra., note 9.

Under the circumstances presented, we conclude that the Board placed its negotiators in such a situation that, in the absence of express qualifying conditions, the Association was justified in presuming that the Board's negotiators possessed the authority to conclude an agreement.

N.J.S.A. 19:14-7.3(b) provides that,

> Each exception shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; shall identify that part of the recommended report and decision to which objection is made; shall designate by precise citation of page the portions of the record relied on; and shall state the grounds for the exception and shall include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

The Board's exception number 2 concerning the Hearing Examiner's finding of violations of N.J.S.A. 34:13A-5.4(a)(5) fails to conform to the above-cited requirements of specificity, identification, and precision. The exception is simply stated /"Respondent...takes exception to the following portions of the Hearing Examiner's recommended Report...(2) The finding that the Board failed to negotiate in good faith (page 9)."/, with nothing further cited in support thereof. We will accordingly disregard this exception.

Based upon an examination of the entire record we affirm the findings and conclusions of the Hearing Examiner, substantially for the reasons contained in his report, that the Board violated N.J.S.A. 34:13A-5.4(a)(5) in failing to negotiate in good faith with

the Association concerning the terms and conditions of employment of the individuals in the negotiating unit; that the Board's improper conduct necessarily had a restraining influence and concomitant coercive effect upon the free exercise of the rights of the members of the negotiating unit, guaranteed to them by the Act, and was violative of N.J.S.A. 34:13A-5.4(a)(1);[16/] and we agree with the conclusion of the Hearing Examiner that the Board's conduct herein was not violative of N.J.S.A. 34:13A-5.4(a)(3).

Inasmuch as we have found violations of N.J.S.A. 34:13A-5.4(a)(6), (a)(5) and (a)(1), we will base our order upon this plurality of violations. Accordingly, we do not find it necessary to pass upon the Board's exceptions (numbers 6 and 7) concerning an order based solely upon N.J.S.A. 34:13A-5.4(a)(5) violations.

In its Petition, the Board asserts that the Association's Charge involves the issue of negotiability of contract provisions dealing with increments, and to the extent that the Charge relates to the issue of the Board's discretion concerning the withholding of increments, the Charge is thereby defective as that issue is non-negotiable.

The Board cited Clifton Teachers Association v. Clifton Board of Education, 136 N.J. Super 336 (App. Div. 1975), for the proposition that a board's authority to withhold an increment (pursuant to N.J.S.A. 18A:29-14) is not negotiable.

The Association claimed that the Board's Petition was no defense to the unfair practices committed by the Board during ne-

16/ In re Galloway Township Board of Education, P.E.R.C. No. 77-3 at p. 9, 2 NJPER ___ (1976).

gotiations. The Association submitted that there was no evidence in the record which indicated that the Board's failure to execute the agreement negotiated and agreed to by the respective teams and the Board's alleged failure to negotiate in good faith were prompted by the concerns set forth in its Petition.

The Association asserted that the issue herein was the Board's alleged misconduct during negotiations, and that that issue was unrelated to the question of whether the withholding of an increment was a managerial prerogative.

The Association contended that the decisions in Clifton, supra, and Westwood Education Association v. Westwood Regional Board of Education, Docket No. A-261-73 (App. Div. 1974), certif. denied, 66 N.J. 313 (1974), were no longer valid with regard to the negotiability of the matter of withholding of increments. It was noted that these cases were decided under c. 303, Laws of 1968, and that the since-enacted c. 123 amendments, Laws of 1974, compelled the conclusion that the withholding of increments - compensation - was clearly a mandatorily negotiable issue.

The Hearing Examiner found that the Board's contentions concerning the negotiability of the withholding of increment issue did not constitute a defense to any aspect of the Association's Charge.

He concluded that the issue of withholding increment was a required subject for negotiations as it was directly related to compensation. The Hearing Examiner found that the presence of both

item 5 [17] and the grievance procedure in the agreement did not diminish the Board's ability to withhold increments for cause. He found that by this arrangement the parties had provided an alternate forum for the resolution of disputes, in accordance with the "shall be utilized" clause of N.J.S.A. 34:13A-5.3.[18]

The Board excepts to the Hearing Examiner's finding that item 5 involved a required subject of negotiations, insofar as it concerned the withholding of increments. The Board contends that c. 123 did not affect the negotiability of issues that had previously been deemed non-negotiable and asserted that because Clifton was decided prior to c. 123 does not impair its validity.

On the basis of the foregoing and after an examination of the entire record, we agree with the finding of the Hearing Examiner that the Board's contentions concerning the negotiability of the issue of withholding of increments do not constitute a defense to any aspect of the Charge.

We conclude that the issue of withholding of increment is a mandatorily negotiable item.[19] We agree with the Hearing Ex-

17/ Item 5 appears at p. 9-10 of Exhibit J-2 (the agreement reached by the parties' negotiating representatives). It is the provision in the agreement which touches upon the issue of withholding of increment. It reads as follows: "The Board upon recommendation of the Superintendent reserves the right to withhold a salary increment, and no Administrator will be disciplined, reprimanded, reduced in rank or compensation or have an increment withheld without just cause."

18/ The following sentence was added to N.J.S.A. 34:13A-5.3 by c. 123: "...Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

19/ See, In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); Board of Education of Englewood v. Englewood Teachers' Association, 64 N.J. 1 (1973).

aminer that the language of item 5 is consistent with N.J.S.A. 18A-29-14.[20/] The Board retains its authority to withhold an increment for cause despite the presence of item 5 in the agreement. While the inclusion of this provision may subject the withholding of increment issue to the negotiated grievance procedure, as we have already noted (supra, note 20) a board's authority to withhold an increment has never been unlimited.

In effect, by including item 5 in the agreement, the parties have provided an alternate forum - the negotiated grievance procedure - for the resolution of disputes arising out of an alleged violation or misinterpretation of the clause negotiated concerning withholding of increment, fully justified by the "shall be utilized" language in N.J.S.A. 34:13A-5.3.

We therefore conclude that item 5 deals with a required subject for negotiations, and that its inclusion in J-2 gives ef-

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20/ N.J.S.A. 18A:29-14 provides

Withholding Increments; causes; notice of appeals

Any board of education may withhold, for inefficiency or other good cause the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

While N.J.S.A. 18A:29-14 grants authority to a board of education to withhold an increment "for inefficiency or other good cause", this authority is not unlimited as such a decision may be challenged under the terms of N.J.S.A. 18A:29-14 itself. See, In re Union County Regional High School Board of Education, P.E.R.C. No. 76-43 at p. 5, fn. 8, NJPER (1976), appeal pending (App. Div. Docket Nos. A-4393-75 and A-4394-75).

fect to the provisions of N.J.S.A. 34:13A-5.3, while in no way diluting the Board's authority to withhold an increment for cause pursuant to N.J.S.A. 18A:29-14.[21/]

ORDER

A. The Respondent, East Brunswick Board of Education, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act.

(b) Refusing to negotiate in good faith with the East Brunswick Administrators Association concerning the terms and conditions of employment of the employees represented by the said Association.

(c) Refusing to reduce agreements negotiated with said Association to writing and sign such agreements.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Formally execute, upon request, the collective negotiations agreement, designated as Exhibit J-2, that was agreed upon and reduced to writing by the duly authorized negotiating teams of the East Brunswick Board of Education and

21/ Inasmuch as both we and the Hearing Examiner have found the inclusion of item 5 in J-2 not to be inconsistent with the Board's authority pursuant to N.J.S.A. 18A:29-14, we find it unnecessary to pass upon the Board's exception wherein it is contended that the Hearing Examiner had erroneously concluded that c. 123, Laws of 1974, had invalidated Clifton, supra. Similarly we also need not pass upon the Hearing Examiner's conclusion that under c. 123 negotiations concerning the withholding of increments must be conducted in a manner not inconsistent with N.J.S.A. 18A:29-14.

the East Brunswick Administrators Association, and give retroactive effect to such agreement.

(b) Post at its central office building in East Brunswick, New Jersey, copies of the attached notice marked "Appendix A." Copies of said notice, on forms provided by the Commission shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman, in writing, within 20 days from the date of receipt of this Order what steps have been taken to comply herewith.

B. That portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(3) is hereby dismissed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioners Hipp and Hurwitz did not participate in this matter.
Chairman Tener and Commissioners Parcells and Hartnett voted for the Decision.
Commissioner Forst was not present.

DATED: Trenton, New Jersey
August 24, 1976

ISSUED: August 25, 1976

NOTICE TO ALL 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, 1968

we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL NOT refuse to negotiate in good faith with the East Brunswick Administrators Association concerning the terms and conditions of employment of the employees represented by the said Association.

WE WILL NOT refuse to reduce agreements negotiated with said Association to writing and sign such agreements.

WE WILL formally execute, upon request, the collective negotiations agreement, designated as Exhibit J-2, that was agreed upon and reduced to writing by the duly authorized negotiating teams of the East Brunswick Board of Education and the East Brunswick Administrators Association, and give retroactive effect to such agreement.

EAST BRUNSWICK BOARD OF EDUCATION

(Public Employer)

Dated _____ By _____

(Title)

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 Chairman of the Public Employment Relations Commission, Labor & Industry Bldg., P.O. Box 2209, Trenton, N.J. 08625 Telephone (609) 292-6780

H.E. No. 76-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Petitioner - Respondent,

- and -

Docket No. SN-76-19
Docket No. CO-76-25-29

EAST BRUNSWICK ADMINISTRATORS ASSOCIATION,

Respondent - Charging Party.

ERRATA

The Hearing Examiner's Recommended Report and Decision in the above-entitled matter that issued on June 16, 1976 is hereby corrected as follows:

Page	Line	Delete	Substitute
3	25	has	had
25	12	before	before,
25	25	guidleines	guidelines

Stephen B. Hunter
Hearing Examiner

Dated: June 23, 1976

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Petitioner - Respondent,

Docket No. SN-76-19
Docket No. CO-76-25-29

-and-

EAST BRUNSWICK ADMINISTRATORS ASSOCIATION,

Respondent - Charging Party.

Appearances:

For the East Brunswick Board of Education
Rubin and Lerner, Esqs.
(Mr. Frank J. Rubin, of Counsel and on the Brief)

For the East Brunswick Administrators Association
Mandel, Wysoker, Sherman, Glassner, Weingartner and Feingold, Esqs.
(Mr. Jack Wysoker, of Counsel and on the Brief, Mr. Richard H. Greenstein, on the Brief)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on August 1, 1975 by the East Brunswick Administrators' Association (the "Association") alleging that the East Brunswick Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act") in that the Board had failed to sign and implement a collective negotiations agreement that had been agreed upon and reduced to writing by the duly authorized negotiating teams of the Board and Association. The Association also contended that the Board's actions in rejecting said contract on the sole ground of an alleged last minute decision to revert back to a merit concept system for the purpose of determining the salaries of the administrators in the unit - after previously agreeing during negotiations to utilize a

salary guide schedule for that purpose - constituted a refusal to negotiate in good faith with the Association.[1/]

A Petition for Scope of Negotiations Determination (the "Scope Petition") was filed by the Board on October 30, 1975. It was the position of the Board that the aforementioned Charge filed by the Association directly concerned the matter of the withholding or granting of a salary increment; an issue that the Board maintained was not an appropriate subject for collective negotiations. The Board thus asserted that, to the extent that the Association's Charge was based on the resolution of the salary increment issue, that Charge must be dismissed.

It appearing that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 29, 1975. On November 7, 1975 an Order Consolidating Cases was issued that consolidated the Board's Scope Petition with the Association's Charge in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay.[2/]

Pursuant to the Complaint and Notice of Hearing and the Order Consolidating Cases, hearings were held in this consolidated proceeding on January 20, 1976, February 23, 1976, and February 24, 1976 in Newark and New Brunswick, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs were submitted by the parties by April 30, 1976. Upon the entire record in this matter, the Hearing Examiner finds:

1/ More specifically, the Association asserted that the actions of the Board violated N.J.S.A. 34:13A-5.4(a)(1)(3)(5) and (6).

These subsections prohibit employees, 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 or employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act...(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative...(and) (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ See N.J.A.C. 19:15-1.1(b).

1. The East Brunswick Board of Education is a Public Employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The East Brunswick Administrators Association is an employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. An Unfair Practice Charge having been filed with the Commission alleging that the Board has engaged or is engaging in unfair practices within the meaning of the Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

4. A Petition for Scope of Negotiations Determination having been filed with the Commission seeking a determination as to whether a certain matter in dispute is within the scope of collective negotiations this particular matter is appropriately before the Commission for determination.

BACKGROUND 3/

The Association is the recognized exclusive majority representative for all administrative personnel holding the title of Vice Principal, Elementary Principal, Junior High School Principal, Senior High School Principal, Director or Supervisor employed by the Board. On March 21, 1973 the Board and the Association entered into a two year collective negotiations agreement that became effective as of July 1, 1973 and was to continue in effect until June 30, 1975 or until a successor agreement had been properly negotiated [Exhibit J-1].

The parties began negotiations for a successor agreement [that would become effective as of the start of the 1975-1976 school year] on January 17, 1975 after the Association has presented its initial proposals to the Board on or about December 20, 1974. The negotiating representative of the Board consisted of a team composed of the Superintendent of Schools, Dr. Joseph Sweeney, and the Assistant Superintendent, Dr. Leroy Swoyer. One Board member, Priscilla Bohrer, was present at negotiating sessions that took place on May 13, 1975 and on May 29, 1975. The parties stipulated that Swoyer was the chief spokesman for the Board's negotiating team.

3/ All of the facts referred to in this section are essentially uncontroverted and are not in dispute.

The Association's negotiating team consisted of a committee that was chaired by Charles King. The other members of the Association's team were George Finkle, Albert Susman, Joseph Josefowicz, Eugene Travers and Richard Gonier. Not all of the Association's committee members attended all of the negotiating sessions between the Board and the Association.

The negotiating representatives of the Board and the Association met for the purpose of negotiating a successor agreement on the following dates: January 17, 1975; January 27, 1975; February 11, 1975; March 25, 1975; April 7, 1975; April 17, 1975; April 29, 1975; May 13, 1975; May 29, 1975; June 26, 1975; June 30, 1975; July 1, 1975 and July 3, 1975.

On July 1, 1975 the Board and Association negotiating representatives reached agreement on the terms of a new contract which were subsequently reduced to writing by Swoyer and distributed to designated Association representatives at a meeting held on July 3, 1975. (Exhibit J-3) This document was reviewed by the parties on July 3, 1975 and after certain corrections were proposed and agreed upon Swoyer prepared another document [Exhibit J-2] that the parties stipulated to be the product of negotiations of the two respective negotiating committees. The most significant change in the administrators' terms and conditions of employment that was negotiated and incorporated within J-2 concerned a change in the method of computing the salaries of the individuals in the unit from a merit and performance basis [as set forth in the agreement between the Board and the Association covering the 1973-1974 and 1974-1975 school years (J-1)] to an incremental salary guide basis. A copy of the relevant salary sections of exhibits J-1 and J-2 are attached hereto as Appendices "A" and "B" respectively and made a part hereof.

The members of the Administrators' Association ratified the agreement (incorporated within J-2) on July 8, 1975 but the agreement was rejected by the full Board on July 9, 1975.[4/] Neither Swoyer nor Sweeney recommended that the Board ratify this agreement.

At a subsequent meeting between representatives of the Board and the Association held on July 28, 1975 the Board rejected the salary guide

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4/ The Association appended to this stipulation that the ratification vote by the Association was pro forma only.

concept as the sole basis for computing the administrators' salaries and also excepted to certain of the other conditions enunciated within the salary section of J-2 and reproduced in Appendix "B" of this report.

Subsequent thereto on August 1, 1975 the Association filed its Charge against the Board.

MAIN ISSUES

1. Whether the agreement (Exhibit J-2) stipulated to be the end product of negotiations between the negotiating committees of the Board and the Association constituted a final and binding agreement given the mandate of the Commission's decision in the matter entitled In re Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975)?

2. Whether the actions of the Board itself and its representatives and agents during the course of negotiations and during the Board's "ratification" process constituted a refusal to negotiate in good faith with the Association?

3. Whether the issue concerning the Board's statutory authority to withhold increments for inefficiency or other good cause is a required, permissive or illegal subject for collective negotiations? If this issue is determined not to be mandatorily negotiable does this constitute a defense, at least in part, to the Association's Charge?

POSITION OF THE ASSOCIATION ON THE UNFAIR PRACTICE CHARGE

The Association maintained that the agreement reached by the duly authorized representatives of the Board and the Association, after almost seven months of negotiations, was a final and binding agreement not subject to any substantive ratification vote. The Association asserted that under the circumstances presented it was entitled to rely completely upon the apparent authority of the Board's negotiators to conclude an agreement in the absence of express qualifying conditions. The Association argued that it was uncontroverted that Sweeney and Swoyer were the "duly authorized" representatives of the Board and that these individuals had understood that all of their proposals and counterproposals as well as the agreement referred to as J-2 were within the "general guidelines" that had been enunciated by the Board during its meetings with its negotiators. The Association contended that the testimony of the Board's

own witnesses served to substantiate the Association's arguments that the conduct of the Board and its negotiating team established the apparent if not the actual authority of Swoyer and Sweeney to bind the Board to the end product of negotiations between the respective parties. The Association also emphasized that in the past the final contract that was signed by the Board in its negotiations with the Association was always the agreement reached by its negotiators.

The Association cited judicial and administrative decisions in support of its allegations that J-2 should be enforced and fully implemented based on the Board's failure to execute that agreement in violation of N.J.S.A. 34:13A-5.4(a)(6). The Association relied particularly on the Commission's decision in the matter entitled In Re Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975).

Alternatively the Association argued that the agreement (J-2) should be enforced and fully implemented based on the "totality of the circumstances" present in the instant matter and the Board's refusal or failure to bargain in good faith with the Association in violation of N.J.S.A. 34:13A-5.4(a)(5). The Association contended that if it was determined that J-2 did not represent a final and binding agreement it would be necessary to conclude that the Board had violated the Act by utilizing negotiators without sufficient authority to negotiate intelligently or to conclude an agreement with the Association.

The Association stated that the record clearly revealed that the Board had failed to provide meaningful substantive guidelines to its negotiating team and had never sought to exercise any control whatsoever over negotiations with the Association; despite the Board's assertion that its team had not been granted the authority to conclude an agreement with the Association. In addition, the Association referred to evidence in the record to establish that the Board's negotiating team made little or no effort to communicate with members of the Board to apprise them of the status of negotiations and the proposals advanced by the two negotiating teams. The Association emphasized that it was also undisputed that neither Swoyer nor Sweeney recommended that the Board ratify the agreement that had been negotiated. The Association therefore concluded that the aforementioned actions or inaction of the Board and its representatives and agents represented evidence of the Board's failure to bargain in good faith.

The Association argued that if ratification was necessary under the circumstances for J-2 to ripen into a final and binding agreement the Board must be held to have waived its right to ratify because of its "bad faith" highlighted by the refusal of its negotiators to seek ratification of the agreement that they had negotiated; drafted and typed up; corrected and shook hands on. In light of the Board's conduct the Association asserted that the only remedy that was appropriate under the circumstances was to order the Board to execute, upon demand, the agreement reached by the Board and Association negotiating teams on July 1, 1975 and finalized on July 3, 1975.

The Association, in response to the Board's Scope Petition, stated that the question of the negotiability of a clause concerning the withholding of an increment was completely unrelated to the Charge filed by the Association. The Association proffered that even if the clause on the withholding of an administrator's increment was excised from J-2 as being illegal the remainder of that agreement would be fully enforceable. Therefore the Association contended that the issues related to the Board's Scope Petition were unrelated to the instant unfair practice charge.

POSITION OF THE BOARD ON THE UNFAIR PRACTICE CHARGE

The Board submitted that the allegations of the Association in its Charge were all unfounded.

The Board maintained that the testimony elicited at the hearing clearly established that the Board had not in fact delegated authority to its negotiating representatives, Swoyer and Sweeney, to enter into a binding agreement with the Association. The Board asserted that this non-delegation of its management authorities comported fully with past practices that had been established within the school district.

The Board next contended that the Association's negotiating team was unjustified in relying on any alleged apparent authority of the Board's representatives to conclude a binding agreement. The Board attempted to distinguish the Bergenfield decision cited by the Association by stating that Swoyer had testified that on several occasions either he or Sweeney had informed the Association's representatives that all tentative agreements reached by the negotiating teams were subject to the final approval and ratification of the Board. Therefore, unlike the facts in Bergenfield, the

Board in the instant matter had specifically relayed "express qualifying conditions" to the Association that defined the limits of their authorities. The Board also sought to distinguish Bergenfield on the basis that three of the five Board members in Bergenfield were at times active participants in the negotiating process and two members of that Board were involved in the formulation of the salary schedule that became the subject of the litigation in that matter - unlike the situation in the instant matter.

The Board disputed the Association's assertions that the Board's conduct constituted a refusal to bargain in good faith. The Board argued that many of the cases cited by the Association were inapposite.

More specifically, the Board contended that it was under no legal or moral obligation to empower its negotiating representatives with the authority to conclude a final and binding agreement not subject to any form of a substantive ratification vote. The Board stated that the cases cited by the Association merely affirmed that lack of authority on the part of a negotiator was at best circumstantial evidence consistent with the possibility that an employer was acting in bad faith. The Board submitted that the statements of the Board's representatives made to the Association's team that qualified the extent of their authority vitiated whatever probative value that fact may otherwise have had.

The Board also refuted the Association's allegations that the Board's representatives were not given any guidelines on how to conduct negotiations with the Association. The Board asserted that the guidelines given had taken the form of comments and suggestions of individual Board members. The Board proffered the argument that more specific guidelines would have only been appropriate if the Board had invested in its team the authority to conclude a binding contract.

The Board also questioned the relevancy of two cases decided by the New York Public Employment Relations Board that were cited by the Association in support of its allegation that the failure of Sweeney and Swoyer to seek ratification of the agreement negotiated constituted "bad faith". The Board contended that in both of these cases PERB had determined that there was a cause and effect relationship between the conduct of negotiators in failing to recommend ratification and the actions of their principals in rejecting the agreement. The Board maintained that in the instant matter it had rejected the agreement for reasons having nothing to

do with the failure of its negotiating representative to recommend the negotiated agreement; thus no cause and effect relationship was established.

Lastly the Board submitted that at least certain aspects of the Association's Charge should be dismissed insofar as the matters at issue touched upon the question of the limitation of the Board's discretion regarding the withholding of increments [as granted by N.J.S.A. 18A:29-14] - an issue that was beyond the scope of negotiations.

DISCUSSION AND ANALYSIS - CONCLUSIONS OF LAW

The undersigned after careful consideration of the foregoing and the record as a whole, finds that the Board did violate N.J.S.A. 34:13A-5.4(a)(6) by failing to sign and implement the collective negotiations agreement that had been agreed upon and reduced to writing by the duly authorized negotiating teams of the Board and the Association. The undersigned concludes that at all times during the course of negotiations, culminating in the agreement of the respective negotiating teams upon Exhibit J-2 [prepared by the Chief Board negotiator, Dr. Swoyer] as the end product of negotiations, the Board's negotiating committee acted as if it had been authorized to conclude a final and binding agreement with the Association not subject to any conditions precedent.

The undersigned further finds that the Board violated N.J.S.A. 34:13A-5.4(a)(5) in failing to negotiate in good faith with the Association concerning terms and conditions of employment of the individuals in the negotiating unit. The Board's "bad faith" is specifically established by the conduct of the Board's negotiating team, as representatives and agents of the Board, and by the conduct of the Board itself during the period between January 27, 1975 and July 28, 1975.

The undersigned also concludes that the Board's improper conduct, although not apparently motivated by any specific anti-union animus, necessarily had a restraining influence and attendant coercive effect upon the free exercise of the rights of the members of the negotiating unit guaranteed to them by the Act and was violative of N.J.S.A. 34:13A-5.4(a)(1).

After careful consideration of the foregoing and the record as a whole, the undersigned does not find that the Board's conduct violated N.J.S.A. 34:13A-5.4(a)(3).

THE N.J.S.A. 34:13A-5.4(a)(6) ISSUE - THE APPARENT AUTHORITY OF THE BOARD'S NEGOTIATING TEAM TO CONCLUDE AN AGREEMENT

In the Commission decision In re Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975), the Commission found that a memorandum of agreement signed by a representative of each party and containing no conditions precedent [such as the need for the agreement to be ratified by the constituencies of both parties before said agreement could be deemed to be final and enforceable] was a binding agreement. In the Bergenfield decision the Commission in part relied upon the parties' stipulation that both negotiating teams were "duly authorized representatives" and that both negotiating teams "worked within the general guidelines as established by the Board and the Association respectively." Moreover, the Commission in a footnote stated the following:

> Even in the absence of these specific stipulations, we would hold the Respondent [Board of Education] to the statements or agreements of its negotiating team. Not only did its team include at different times, three of its five Board members -- a circumstance which approaches the actions of a principal rather than an agent -- but also we would conclude that the Charging Party under the circumstances presented was entitled to rely upon the apparent authority of the Respondent's negotiators in the absence of express qualifying conditions. [In re Bergenfield, supra, 1 NJPER 44 at 46 (footnote 15)]

The Commission in Bergenfield determined that the parties had to be bound by the agreement reached by their representatives and determined that the Respondent in that matter should execute the professional salary guide that had been agreed upon by both negotiating teams. The rationale enunciated by the Commission in support of this decision is particularly relevant to the instant matter before the undersigned. The Commission in Bergenfield stated in part that:

> We recognize that our conclusion is based to some extent upon our assumption that the parties to a public sector collective negotiations relationship in New Jersey are entitled to conduct their relationship through representatives, and are also bound by the actions of their representatives, in accordance with the principles of law of agency, as is the case in the private and public sectors elsewhere. We do not feel that we are unjustified in this assumption. The Act itself clearly supports this approach.

Simply by endorsing and implementing the concept of public sector collective negotiations, the Act necessarily anticipates the application of standard principles of the law of agency, as the parties are governmental entities on the one side, and usually incorporated or unincorporated associations on the other side, neither of which can generally conduct its day to day affairs on a "principals only" basis.

Furthermore, the Act contains specific provisions which leave little room for a contrary conclusion. In spelling out the obligations to negotiate and to reduce a negotiated agreement to a signed writing, N.J.S.A. 34:13A-5.3 refers to the parties' "representatives", "designated representatives", and "authorized representatives". In defining the term "representative", N.J.S.A. 34:13A-3(e) specifically provides that the term "shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them." The definition of "employer" set forth in N.J.S.A. 34:13A-3(c) includes "public employers" and includes "any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification". The newly enacted unfair practice amendment is fully consistent with the above-cited definitions, specifically imposing its prohibitions not only upon "employers" and "employee organizations", but also "their representatives or agents". N.J.S.A. 34:13A-5.4(a)and (b)

Finally, the very requirement that a party formally memorialize an agreement reached at the negotiating table, is essentially a re-affirmation of the law of principal and agent. This is so because, as previously indicated, the principals do not normally participate directly in the negotiation process. In accordance with analogous federaly law, in the private sector a corporate board of directors will be required to formally memorialize an agreement reached by its bargaining representative acting within the sphere of his actual or apparent authority. The New Jersey Act, in setting forth the identical principle, will therefore require the public employer to do likewise is similar circumstances. (In the instant case, the employer is coincidentally also a corporate entity, operating through a "board of education" instead of a "board of directors". N.J.S.A. 18A:10-1.) (In Re Bergenfield, supra, 1 NJPER 44 at 45)

In the matter sub judice the undersigned concludes that the negotiating teams were "duly authorized representatives" and that both negotiating teams "worked within the general guidelines established by the Board and the Association respectively."

The parties stipulated and the record revealed that the negotiating committees representing the Board and the Association respectively were "duly authorized representatives" who were designated to conduct negotiations with one another by their respective constituencies.5/

An examination of the record also clearly revealed that the negotiating teams at all times "worked within the general guidelines established by the Board and the Association respectively". It was uncontroverted that the Association's negotiating team acted within the guidelines established by the Association's membership; however the Board attempted to prove that its team [composed of Swoyer and Sweeney] had exceeded its guidelines when Swoyer and Sweeney had agreed to the agreement entitled J-2 on July 3, 1975. The record however does not support this contention of the Board.

The Board's first witness, Lawrence Kelberg, President of the Board, testified that the guidelines enunciated by the Board were very general in nature and that no specific guidelines or instructions had been given with regard to the structure of the salary schedule or any of its basic components. Kelberg stated that individual Board members elucidated different opinions concerning the matters at issue during the course of negotiations. Kelberg testified that it was believed that certain guidelines could be discerned based upon the discussions among individual Board members that reflected their personal feelings, opinions and disagreements on both economic and non-economic issues. Kelberg was unable to delineate any guidelines - either general or specific - that had been exceeded by the

5/ The parties further stipulated that the extent of the authorization accorded to the negotiating teams (i.e. whether they had been authorized to conclude an agreement) was to be established by the record. It is clear to the undersigned that the phrase "duly authorized" as utilized in the Bergenfield decision referred only to whether or not negotiating teams had been specifically designated to conduct negotiations on behalf of their principals.

Board's representatives in negotiating J-2.[6] Kelberg could only relate that there were not five Board members present on either July 7 or July 9, 1975 who were both in favor of utilizing an incremental salary guide system as the sole basis for computing administrative salaries [as opposed to the merit system in effect in the past - see Appendix "A"] and in favor of agreeing upon the total amount of money negotiated as an increase.

The Board's second witness, Dr. Leroy Swoyer, an Assistant Superintendent of Schools and the Board's chief spokesman during the course of negotiations, concurred with Kelberg when Swoyer stated that the guidelines given with regard to the pivotal issue concerning the structure of the salary schedule were "of the broadest nature with no limitations." [7] Swoyer also agreed with Kelberg when he testified that the Board had never given either him or Dr. Sweeney any specific instructions concerning (1) the number of ratio points that could be negotiated; (2) the base figure to which the administrators' new ratios would be applied to; (3) the range levels relating to levels of academic preparation and (4) the wording of a "withholding of increment" clause ----- four particularly important factors considered by the Board and Association negotiating teams in structuring a new salary schedule. Swoyer stated that as a result of his discussions with the Board he had developed his own perceptions of the area of settlement and had determined the parameters of possible agreement with the Association.[8] Swoyer testified that according to his perceptions he felt that when he drew up the agreements designated as J-2 and J-3 he was acting within the guidelines established by the Board.[9] Swoyer added that both he and Dr. Joseph Sweeney, the Superintendent of Schools and the other member of the Board's negotiating team, believed that J-2 would be agreed to by the Board.[10]

6/ Kelberg testified that the guidelines that were established by the full Board were "more on the order of total number of dollars that could be spent." (Transcript - Page 225) Kelberg thereafter stated that the total percentage increase negotiated by the two teams (approximately a 7% increase) did not in and of itself exceed the Board's percentage guidelines.

7/ Transcript, page 275.

8/ Transcript, pages 260 and 274.

9/ The Board's other witness, Kelberg, testified that when the Board asked Sweeney and Swoyer whether they felt that they were negotiating within the guidelines established by the Board the team answered in the affirmative. (Transcript, page 234)

10/ Transcript, pages 279-280, 305-306.

On the basis of the foregoing and the record as a whole, the undersigned concludes that the Board and Association negotiating teams were at all apposite times operating within the general guidelines established by their respective constituencies. The Board apparently concludes that one must reach the conclusion that certain guidelines had to have been exceeded by Swoyer and Sweeney since the Board failed to formally ratify J-2. In the absence of any testimony defining the guidelines violated and in light of the testimony of the Board's own witnesses, referred to hereinbefore, the undersigned cannot agree with the Board.

In any event, as stated before, the undersigned has determined that the Association was entitled to completely rely upon the existence of the apparent authority of Swoyer and Sweeney to conclude a final and binding agreement with the Association's negotiating team that was clearly not subject to any condition precedent, i.e., ratification by the majority of Board members by resolution at a public meeting or any other condition. Therefore, even assuming arguendo that Sweeney and Swoyer had exceeded the Board's "guidelines", the undersigned would still determine that the Board had violated N.J.S.A. 34:13A-5.4(a)(6) because of these "apparent authority considerations." A discussion of the evidence that establishes the apparent authority of the Board's negotiating team to conclude an agreement is therefore in order.

It is uncontroverted that no written agreements were negotiated that in any way delimited the authority of the respective negotiating committees to reach a final agreement. For example, no pre-negotiations "groundrules agreement" [commonly negotiated in the public sector] had been executed that stated that the negotiating teams were empowered to make decisions, concessions or agreements subject only to final ratification by the Board of Education or Association membership. There was no language within the prior contract between the parties that required the submission of an agreement to the Association's membership or full Board for ratification. In addition, there were no conditions precedent referred to in either Exhibits J-2 or J-3, prepared by Swoyer; and these documents were typed in final contract form and not as more informal "memoranda of understanding."

The undersigned concludes that the testimony of Association witnesses King, Jozefowicz and Finkle [three members of the Association's negotiating team] that no member of the Board's negotiating team at any time

qualified his authority to conclude a binding agreement nor stated that the agreement reached between the negotiating representatives (J-2) was subject to Board ratification before it could be considered binding was substantially more credible than the testimony of Swoyer on these issues. The undersigned does not credit Swoyer's testimony with regard to these matters since his statements were often too guarded, evasive or contradictory to be convincing.

For example, Swoyer had testified that the Association's negotiating team had been informed on several occasions that the Board's representatives could not conclude an agreement absent Board ratification.

Swoyer stated that at a April 29, 1975 negotiations session the Board and Association teams had reached a tentative agreement relative to additional vacation days and a higher percentage of dollar payment for sabbatical leaves. Swoyer testified that it was very specifically stated at that time that these two areas were tentatively agreed to pending the subsequent approval of the Board.[11/] Swoyer also pointed out that his notes incorporated the caveat "Try on Board - if no - come back" with reference to these vacation and sabbatical issues.

Swoyer's statements concerning this April 29, 1976 meeting were not corroborated however by any other witness and were specifically refuted by Association witnesses. The subsequent actions of Swoyer and Sweeney concerning the vacation and sabbatical leave issues casts additional doubt on Swoyer's "recollections" of this negotiations session. Swoyer later testified that he and Sweeney had discussed these issues with the Board but the Board had withheld any judgment on the increased vacation and sabbatical leave benefits until they saw "what else comes of it." [12/] Nevertheless Swoyer testified that he had never informed the Association's negotiating team that the "tentative" agreements had not been approved by the Board and had never advised the Association that in fact no action had been taken on these issues. Negotiations proceeded as if these particular issues had been conclusively resolved and the increased vacation and sabbatical benefits were

11/ In his notes Swoyer used the designation "T.O.K." to describe the status of the vacation days and sabbatical leave issues. The different meanings accorded to the "T.O.K." concept by the Board and the Association negotiating teams will be discussed in a later section of this recommended report and decision.

12/ Transcript, page 298.

later incorporated into J-2 by Swoyer.[13] The undersigned finds it difficult to give any credence to the testimony that Swoyer had expressly qualified the authority of his team to conclude agreements on increased sabbatical and vacation benefits when Swoyer's later testimony reflected the complete independence shown by Swoyer and Sweeney concerning these same two issues when they apparently ignored the Board's refusal to approve these benefits and conducted the remaining negotiating sessions with the Association as if agreements on these issues had been finalized.

Swoyer also indicated that he had described the limitations placed on the Board negotiating team's authority when he responded to statements made by Charles King that he, on behalf of the Association, would not negotiate further with the Board team if the Board team did not have the authority to conclude an agreement. Swoyer stated at one point in the record that "We indicated we, the Board, had appointed us as the negotiating representatives for the Board and that we were there to - (testimony interrupted) - we were there to arrive at a product which we'll take back."[14] Swoyer later testified that, in response to King's declaration, he thought that he said "...that's nice and you have to go back and ratify. We represent the Board and have to go back and get the approval of the Board."[15] The undersigned does not find that Swoyer's responses are free from ambiguity. The Association recognized that the Board itself had taken some formal action in the past, as had the Association, to approve of the settlement concluded by the respective negotiating teams. The Association deemed these actions to be pro forma only and tantamount to a vote of confidence in the agreements concluded by the duly authorized teams. Neither of Swoyer's statements serves to clarify whether the Board's team could or could not conclude a binding and enforceable agreement absent a formal "ratification" vote. The undersigned further concludes that in light of the admonitions of King, communicated to Sweeney and Swoyer, that negotiations would not continue if the Board's team did not have the authority to bind the Board by its actions and agreements[16] it is extremely doubtful that Swoyer or Sweeney so informed the Association's negotiating committee.

13/ Transcript, pages 298-299.

14/ Transcript, pages 275-276.

15/ Transcript, pages 270 -272, See also Transcript, pages 301-304.

16/ Transcript, pages 44-45, 270-272, 275-276, 301-304, 332.

Swoyer also referred to his recollection that the Board team's authority had been limited at one of the negotiating sessions attended by Priscilla Bohrer, a member of the Board. He stated that it was his recollection that he had said that "anything that is done here is tentative subject to Board approval on the product of negotiations." 17/ In addition, Swoyer testified that Sweeney on July 1, 1975 had indicated to the Association "the problem of required Board approval and getting approval." 18/ Swoyer's testimony with regard to these two incidents was again not corroborated by any Board witness and was specifically refuted by all the witnesses called by the Association. The undersigned does not credit these statements of Swoyer for the reasons set forth hereinbefore.

An analysis of the record reveals that the meaning accorded to the designation "T.O.K." by the parties serves to substantiate the contention of the Association that it was entitled to rely upon the apparent authority of the Board's negotiator to conclude a binding agreement. At first blush it appears that the Board and the Association differ substantially in their interpretation of the "T.O.K." concept. King, testifying for the Association, argued that "T.O.K." placed after a particular article indicated that the item had been agreed to and therefore could be set aside.19/ Jozefowicz, testifying for the Association, stated that "T.O.K." was attached to the margin of each written proposal or contract provision that had been agreed upon and indicated that there was no need to discuss this any further or to go back to it until after the money situation was resolved and an agreement had been finalized between the negotiating teams.20/ Swoyer testified that on the contrary the legend "T.O.K." meant that the issue so marked was tentatively okayed, pending the approval of the Board of the contract and the product of negotiations.21/ It was however uncontroverted that Superintendent of Schools Sweeney, the other member of the Board's team, on one occasion

17/ Transcript, page 265.

18/ Transcript, pages 265 and 268 and Exhibit B-2.

19/ Transcript, page 49.

20/ Transcript, page 172.

21/ Transcript, page 266.

(in March or April, 1975) chastised the Association's team for attempting to reopen negotiations on a matter that had been "T.O.K.'d". Sweeney stated that when the parties came to an agreement those items were final or else there was no sense in negotiating. The Association thereafter did not pursue this issue further and accepted its prior agreement on that issue.[22/] The undersigned concludes that the parties by their conduct have established that the designation "T.O.K." was intended to represent agreements concluded by the negotiating teams - not subject to any conditions precedent - that would be set aside until a final contract settlement was reached by the negotiating teams.

Another factor that the undersigned has considered in determining that the Association was entitled to rely upon the apparent authority of the Board's negotiating team to conclude a binding agreement concerned the "past practices" of the parties with regard to the treatment accorded to previous agreements negotiated by the Board and Association negotiating teams. Association witnesses King and Jozefowicz and Board witness Kelberg testified that all prior contracts and "negotiations results" negotiated by the two negotiating committees had been approved by the Board at a public meeting.[23/] The undersigned concludes that the prior conduct of the Board would tend to confirm the Association's contention that any formal action taken by the Board after negotiations had been concluded was pro forma only and that ratification was not a condition precedent to the effectiveness of the contract negotiated by the two teams.

The undersigned has already discussed and rejected the Board's contention that the Association's negotiating team was unjustified in relying on any alleged apparent authority of the Board's representatives to conclude a binding contract since it was alleged that the Board's representatives had informed the Association's team that ratification was a condition precedent to the effectiveness of the agreement negotiated. It is necessary now to refer to the additional defenses raised by the Board concerning the Association's "a(6)" charge.

The Board maintained that it did not in fact delegate authority to its negotiating representatives to enter into a binding agreement with the Association. The undersigned finds, consistent with the

22/ Transcript, pages 164-166.

23/ Transcript, pages 118, 166-167, 174, 203.

Commission's Bergenfield decision and other apposite administrative and judicial decisions,[24] that it is not necessary to establish that the Board's team had been granted the actual authority to conclude a contract in order to establish a violation of N.J.S.A. 34:13A-5.4(a)(6). It is sufficient to establish, as in the instant matter, that the Board's negotiating team comported itself throughout the course of negotiations in a manner that indicated that it had the authority to conclude a binding agreement, in the absence of express qualifying conditions to the contrary enunciated by the Board or any of its agents or representatives.

The Board also seeks to distinguish Bergenfield on the ground that in Bergenfield three of the five Board members were actively involved in the negotiating of the agreement signed by representatives of each negotiating team while in the instant matter none of the Board members played an active role in the negotiating of J-2. The Commission in Bergenfield clearly determined that the participation of Board members in the negotiations process was merely one factor to be considered in establishing whether a negotiating team had the apparent authority to conclude an enforceable agreement. The evidence discussed hereinbefore establishes by the preponderance of the evidence the apparent authority of Swoyer and Sweeney to conclude an agreement with the Association not subject to any conditions precedent.

THE N.J.S.A. 34:13A-5.4(a)(5) ISSUE - THE REFUSAL OF THE BOARD TO NEGOTIATE IN GOOD FAITH WITH THE ASSOCIATION

As stated before the undersigned finds that the record in the instant matter establishes that the Board has also violated N.J.S.A. 34:13A-5.4(a)(5) in failing to negotiate in good faith with the Association.

The Executive Director of the Commission relied upon established principles of labor law universally accepted in both the private and public sectors concerning the evaluation of conduct in terms of the obligation to negotiate (or bargain) in good faith in refusing to issue a Complaint in the matter entitled In re State of New Jersey (Council of New Jersey State College Locals), E.D. No. 79, 1 NJPER 39 (1975), affirmed P.E.R.C. No. 76-8

24/ See, for example, N.L.R.B. v. East Texas Steel Casting Comp. 409 F. 2d 852, 79 LRRM 3088 (1972), Aptos Seascape Corp., 194 NLRB 94, 79 LRRM 1110 (1971), N.L.R.B. v. Coletti Color Prints, Inc., 387 F. 2d 298, 66 LRRM 2776 (1967), In the Matter of Sachem Central School District No. 5, 6 PERB 3034, (1973), In the Matter of Elwood Public Schools, 6 PERB 4546 (1973).

(1975); affirmed for the reasons cited in the Executive Director's decision Appellate Division, Docket No. A-531-75, decided May 17, 1976/. The Executive Director stated that it was necessary, in the absence of a per se violation of the duty to negotiate,[25] to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred.

The Executive Director reaffirmed that "/a/ determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged." /In re State of New Jersey, supra, E.D. No. 79 at page 8, 1 NJPER 39 at page 40/

An analysis of the overall conduct and/or attitude of the Board itself as well as the conduct and attitude of its designated agents or representatives, with regard to negotiations with the Association during the period between January 27, 1975 and July 28, 1975, reveals the following information:[26]

1. The Association entered into negotiations with the Board intent upon negotiating a change from a merit and performance basis of computing the administrators' salaries, that had previously been in effect, to an incremental salary guide system which would provide an orderly process for proceeding through particular salary ranges based upon educational levels and longevity. This was the top priority issue from the Association's standpoint.

During the period between January 17, 1975, when the Association first discussed the rationale behind the attempt to change from a merit and performance system to a salary guide system, and July 28, 1975, no member of the Board's negotiating team and no member of the Board ever informed any individual on the Association's negotiating committee that the Board's determination as to whether it would embrace the salary guide concept was

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25/ Per se violations of the duty to negotiate may be found without a subjective analysis of "good faith". Per se violations of the duty to negotiate occur normally when unilateral changes are made by an employer concerning terms and conditions of employment during the course of a collective negotiations relationship or when an employer has completely circumvented the majority representative or the entire negotiations process. In the federal private sector, in the absence of a separate provision within the National Labor Relations Act that parallels N.J.S.A. 34:13A-5.4(a)(6), the failure to sign a written memorandum of agreement has been uniformly regarded as a per se refusal to bargain. /See C & W Lektra Bat Co. 85 LRRM 1530/

26/ The facts referred to hereinafter are not in dispute.

definitely contingent upon the total salary increase negotiated by the negotiating teams pursuant to that new system.[27]

Instead, Sweeney on January 17, 1975 described the "merit and performance" system of the past as a disaster. On April 17, 1975 after the Association had made its second proposal based on the utilization of an incremental salary guide [exhibit A-3 - submitted on March 25, 1975], Sweeney indicated that the concept of a salary guide was agreeable and that this was seen as a major concession by the Board in the negotiations.[28] In subsequent negotiations sessions every written proposal presented by the Board's representatives (exhibits A-6A, A-6B, A-7A, and A-7B) and every written Association proposal (exhibits A-6C and A-7C) were predicated on the utilization of an incremental salary guide system. No reference was made in these proposals to any merit or performance factor. The proposals differed only with regard to specific components of the guide including the number of ratio points to be added to each administrator's present ratio and the base salary figure to be used in determining an administrator's salary.

The two typewritten agreements drawn up by Swoyer (J-3 and J-2 reflecting changes made on July 3, 1975) represented the end product of negotiations between the Board and Association teams and provided for the institution of an incremental salary guide that was not dependent upon any specific performance or merit factor.

At the next meeting held on July 28, 1975, after the Board had failed to approve J-2, no Board member or any Board agent or representative present disputed Swoyer's statement that the incremental salary guide system had been discussed and had been agreed to by the Board. Swoyer's statement was made in response to a question posed by Joseph Jozefowicz, a member of the Association's negotiating committee.[29] Shortly thereafter, at this July 28, 1975 meeting, the Board team caucused and later proposed a salary schedule that would be based substantially (80%) on a performance and merit factor rather than upon salary increments (as designated by ratio points) that would be

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27/ The record reveals that one of the few "guidelines" established by the Board for the benefit of its team concerned the important qualification that as the "percentage of increase went up more and more people would be interested in merit pay rather than the kind of guide we negotiated" (Kelberg's testimony, Transcript, page 221).

28/ Transcript, pages 26, 45-47.

29/ Transcript, pages 169-170.

"guaranteed", subject to the right of the Board to withhold said increment for just cause. This was the first Board proposal that had referred to a merit factor since the start of substantive discussions on a new salary schedule in January of 1975.

2. The Board never asked its negotiating committee to make the Board aware of the proposals that its team was making to the Association's negotiating committee.[30] On one occasion Swoyer and Sweeney were asked by the Board whether they felt that they were negotiating within the guidelines established by the Board. As a result of the affirmative answer given by the Board's team the Board subsequently did not ask to examine specific proposals that were being made by its negotiating committee.

The Board never instructed its negotiating committee to bring back to the Board any of the Association's subsequent proposals after January of 1975 or subsequent counterproposals after January of 1975. Even when the Board became aware that during the latter part of June and early July the parties were getting close to an agreement the Board's negotiating team was not advised to clear any proposal with the full Board in advance of presentation to the Association's representatives. More specifically, the Board did not instruct Swoyer and Sweeney to present to it a schedule of the new salaries that would be paid to unit members before concluding negotiations. No specific instructions were given to Swoyer and Sweeney by the Board concerning the preparation of J-2 and J-3.[31]

As a result of the above-mentioned internal policies of the Board the Board had apparently no knowledge whether any of its team's proposals exceeded the guidelines established by the Board.[32] After March of 1975 the Board had not given any further instructions, directions or guidelines to its negotiating team with regard to monetary issues.[33] Swoyer testified that the only direction given by the Board to its team on non-economic language issues consisted of the statement that Swoyer and Sweeney should attempt to come

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30/ Transcript, page 234.

31/ Transcript, pages 234, 237-238, 240-241. The testimony of the Board's witnesses lends credence to a particular contention of the Association that the Board's negotiating team had the actual authority to conclude a binding and enforceable agreement with the Association.

32/ Transcript, page 235.

33/ Transcript, page 285. As stated previously the guidelines that had been enunciated by the Board on economic issues were extremely general in nature.

to an agreement which could be presented to the Board on language.[34] No instructions at all were given to the Board's negotiating team after May 27, 1975.[35]

3. Swoyer testified that neither he nor Sweeney informed the members of the Association's negotiating committee that they had no specific directions or guidelines from the Board.[36] No statements were made by the Board's team to inform the Association's representatives that the Board's ultimate decision concerning the switch from a "merit and performance system" to an "incremental salary guide system" (concerning the formulation of the administrators' salary schedule) was clearly dependent on the amount of the salary increase negotiated pursuant to that schedule.

Swoyer and Sweeney did not go back to the Board to determine whether they were authorized to offer what they were offering the Association concerning the important salary issue during the period between March and July of 1975.[37] The Board's negotiating team made no effort to apprise the Board of specific proposals that were being made by the Board and Association teams concerning the salary schedule issue after March of 1975 although Swoyer and Sweeney presented to the Board on April 30, 1975 a copy of all the "language" changes that had been agreed to up until that time and discussed the issue of the "recognition clause" with the Board on May 27, 1975.[38]

34/ Transcript, page 285.

35/ Transcript, page 290. It is interesting to note at this juncture that the parties stipulated that the Board met regularly twice a month on Wednesday, had conference meetings on the Monday before the first Wednesday, and on occasion called special meetings. The parties also stipulated that Sweeney, a member of the Board's negotiating team, attended all regular board and conference meetings. (Transcript, page 30) It thus appears to the undersigned that the Board had sufficient opportunity to discuss the precise status of negotiations with the Association with its team on a continuous basis and the opportunity to delineate any further "guidelines" if the Board saw fit.

36/ Transcript, page 291.

37/ Transcript, page 283 - Board witnesses Kelberg and Swoyer confirmed that there were little if any substantive discussions at any time between the Board and its team concerning the status of negotiations with the Association on the issue of a salary schedule. Yet Kelberg, during the early part of his testimony, insisted that the Board was kept abreast of the status of negotiations and that the Board's team came back "very often" to the Board for instructions. (Transcript, pages 190-191) The undersigned cannot credit these particular statements of Kelberg in light of his later testimony and the statements made by Swoyer.

38/ Transcript, pages 285-286, 289-290.

No attempts were made by Swoyer and Sweeney to solicit additional authorization concerning the maximum percentage salary increase that could be negotiated with the Association during the period between March and July of 1975 even though the teachers, in a separate negotiating unit, had negotiated an increase of approximately 7.2% or 7.3% with the Board in April or May of 1975 ___ an increase that was a full percentage point higher than Swoyer perceived the Board's authorization to be vis-a-vis the Association at that time.[39] Swoyer made no attempt to communicate with the Board in any way during the time that he drafted the agreement designated as J-2 that memorialized the end product of negotiations.[40]

4. Neither Sweeney nor Swoyer recommended that the Board ratify J-2 either before or after the Board discussed that document.[41] Kelberg testified that after the Board discussed the contract Sweeney recommended that J-2 not be accepted.[42] Swoyer testified that he had never told the Association that he would not recommend J-2 for approval. Swoyer also stated that Sweeney had, to his knowledge, never informed the Association that he would not recommend that agreement.[43]

Swoyer did not recommend the ratification or approval of the agreement that he had drafted and had typed up (J-2) after his original draft of the end product of negotiations between the Board and the Association (J-3) had been corrected on July 3, 1975. Swoyer had also shaken hands after J-2 had been agreed upon with members of the Association and had also prepared a document (J-4) setting forth the salaries that would be paid to the administrators for the 1975-76 school year pursuant to the salary guide incorporated within J-2 [44] ___ two further indications that Swoyer reflected a positive attitude to the Association concerning this agreement and had, at the very least, implicitly agreed to recommend that the Board formally approve J-2.[45]

39/ Transcript, pages 281-283.

40/ Transcript, pages 313-314.

41/ Transcript, pages 209, 280.

42/ Transcript, pages 209-210.

43/ Transcript, page 300.

44/ Transcript, pages 87, 318-319.

45/ Swoyer further added the following note to J-4: "It is <u>recommended</u> that the following salaries be approved for members of the East Brunswick Administrators Association: (emphasis mine)

The undersigned concludes that an examination of the overall conduct and attitude of the Board itself and its "duly authorized" negotiating representatives mandates a finding that the Board violated N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate in good faith with the Association. The conduct of the Board in (1) establishing only the most general and superficial guidelines for its negotiating committee; (2) in failing to make any affirmative effort to control, supervise or even monitor the activities of its designated representatives by requiring that proposals and counterproposals of the Board and Association teams be distributed to Board members or at least discussed; and (3) in repudiating, after the conclusion of negotiations, the agreement reached between the negotiating teams on the pivotal issue of the structure of the salary guide - an agreement that was concluded several months before after the Association's team had been assured of the Board's approval - was completely inconsistent with a "rational" negotiating process. The Board comported itself as if it bore no responsibility for the actual process of negotiating a contract; apparently under the mistaken impression that it did not have to play any kind of effective decision making role during the pendency of negotiations since it could simply fail to approve at the conclusion of the negotiations process any agreement negotiated by its team that did not represent the consensus of the Board at that time.

The actions of the Board's negotiating team also served to undermine and subvert the negotiations process. Swoyer and Sweeney's failure to inform the Association's team of the lack of consensus among the Board members concerning the change to an "incremental salary guide" and their failure to inform the Association of the lack of specific Board guidleines concerning any of the components of that guide was tantamount to actively misrepresenting the Board's "positions" on these issues and tainted the entire negotiations process. The Board team's failure to seek additional authorization from the Board on economic issues and the failure of that team to keep the Board properly informed of the status of negotiations made it difficult if not impossible for Swoyer and Sweeney to function effectively as the Board's duly authorized representatives.

The undersigned thus finds that separate and apart from any "N.J.S.A. 34:13A-5.4(a)(6)" considerations the Board's failure to negotiate in good faith, under the unique facts in this case, mandates the conclusion that the Board should formally execute and implement J-2.

The undersigned further concludes that, assuming arguendo that ratification by the Board had been required before an enforceable contract could be concluded, the actions of Sweeney and Swoyer in failing to seek ratification in good faith of the agreement they had negotiated would have compelled the conclusion that the Board had been guilty of negotiating in bad faith in violation of N.J.S.A. 34:13A-5.4(a)(5). The undersigned concludes that the failure of Swoyer and Sweeney to affirmatively seek ratification may well have been the direct cause of the Board's failure to ratify. The failure of the two "duly authorized" Board representatives - that included the present Superintendent of Schools and a former Superintendent of Schools within the district [who had substantial experience in negotiating contracts in the public sector] - to recommend that the agreement that was the product of approximately six months of negotiations be ratified could only have had a "chilling effect" on the deliberations of the Board that resulted in the decision not to approve the agreement.46/

The undersigned concludes that the collective negotiations process itself could be severely compromised if negotiators, after obtaining concessions from the opposing party that led to an apparent contract settlement, were free at a later date to repudiate their own previously accepted proposals and prior committments. There would be little certainty to collective negotiations and parties would be considerably less willing to modify their proposals if they could not depend upon the efforts of their counterparts on the other side of the table to affirmatively seek ratification of agreements reached by the respective negotiating teams. Based on relevant private and public sector precedent the remedy for such a failure to seek ratification in good faith would be to order the offending party to formally execute and implement the agreement that was presented to it. The offending party is deemed to have waived its right to ratify.47/

46/ It is certainly arguable that a positive recommendation from the Board's team may have influenced at least five Board members to approve the agreement since the record reflects that there were certain Board members who favored an "incremental salary guide system" and others who approved of the salary increase that had been negotiated.

47/ See, for example, In the Matter of Putnam County Chapter, Civil Service Employees Association, 8 PERB 4592 (1975); In the Matter of Union Springs Central School Teachers 6 PERB 3120 (1973); N.L.R.B. v. Coletti Color Prints, Inc. 387 F 2d 298, 66 LRRM 2776 (1967); N.L.R.B. v. Beverage Air Co. 402 F. 2d 411, 69 LRRM 2369 (1968).

Having discussed and rejected the Board's argument that inasmuch as there was no possible cause and effect relationship between the conduct of the Board's negotiators in failing to recommend ratification and the action of the Board in rejecting the agreement the Board could not be considered to have violated N.J.S.A. 34:13A-5.4(a)(5), it is necessary to refer to the additional defenses raised by the Board concerning the Association's "a(5)" charge.

The Board contended that the lack of authority on the part of a negotiator to conclude an agreement was only circumstantial evidence consistent with the possibility that the employer may have been acting in bad faith. The Board maintained that more proof was required before it could be determined that Board had not negotiated in good faith. The undersigned has concluded, based on the findings of fact as set forth earlier, that substantial evidence has been proffered that has established that the actions or inaction of the Board and its agents and representatives demonstrated its refusal to negotiate in good faith with the Association. The undersigned has placed very little reliance on the fact that the Board did not apparently invest in its negotiating team the actual authority to conclude an agreement with the Association in determining that the Board violated N.J.S.A. 34:13A-5.4(a)(5).

The Board further contended that it had not negotiated in bad faith with the Association by failing to provide specific guidelines to its negotiating team and by failing to be kept informed as to the progress of negotiations. The only specific evidence referred to by the Board to support this argument concerned the fact that the record had revealed that guidelines had taken the form of comments and suggestions by individual Board members that the Board contended provided a very functional guide to its team. The Board submitted that more rigorous and detailed guidelines might have been appropriate in a situation where negotiating representatives had the authority to bind their principal, and that "the reason for such stringent instuctions tends to dissolve as the power of the representatives to enter into a contract decreases." The undersigned finds however, based on the findings of fact as set forth earlier, that the Board's actions in not developing more specific guidelines for the benefit of its negotiating representatives and in not making any meaningful attempt to be kept informed of the status of negotiations [including the proposals and counterproposals of the Board and Association negotiating committees], given the absence of any enunciated specific guidelines, constituted one basis for the finding that the Board violated N.J.S.A. 34:13:5.4(a)(5).

POSITION OF THE BOARD ON THE SCOPE PETITION

The Board stated that at least certain aspects of the Charge filed by the Association concerned the matter of the withholding or granting of a salary increment - an issue that the Board maintained was not an appropriate subject for collective negotiations inasmuch as this issue concerned the Board's established right to pass upon the quality of a teacher's (or administrator's) performance [as defined, in part, in N.J.S.A. 18A:29-14] and as such was beyond the scope of negotiations, in accordance with judicial precedent and specific decisions of the Commission of Education. The Board submitted that, to the extent that the Association's Charge was based on the resolution of this salary increment issue, that Charge must be dismissed.

POSITION OF THE ASSOCIATION ON THE SCOPE PETITION

The Association maintained that the Board's contention regarding the "withholding of increment" issue constituted no defense to the Charge filed by the Association. The Association in its brief stated, in part, the following:

> There is no evidence in the record herein, testimonial or documentary, to support the Board's contention that it refused to execute the contract negotiated by its duly designated and authorized negotiating committee, or that the negotiations were conducted by the Board and/or its negotiating committee (in bad faith, as alleged) due to the managerial prerogative claimed as hereinabove. Other than the Scope Petition itself, and the Board asserting it as a defense, the Board presented no testimony that same was ever discussed or asserted in those negotiations, making crystal clear that the filing of the Scope Petition was a belated after-thought to attempt to defend or excuse the Board's unfair practices herein.
>
> The issue in the instant case concerns the allegations of Board misconduct in collective negotiations, by the Board and/or its negotiating committee, which is covered in the Association's main Brief already submitted herein. How those negotiations were conducted, and the legal implications of same are unrelated to the question of whether withholding an increment is a managerial prerogative. The latter question is totally irrelevant to an evaluation and judgment regarding the conduct of the Board and/or its negotiating committee herein. The issue in the Unfair Practice

> Charge is not whether the Board can be compelled to negotiate regarding the withholding of an increment, since the record makes clear that an agreement has been negotiated, with the issue being whether it should be enforced.

The Association argued that the only portion of J-2 (the agreement negotiated and agreed to by the respective negotiating committees) that could conceivably be disturbed by a finding that the withholding of an increment was not either mandatorily or permissively negotiable [and was thus an illegal subject for collective negotiations] was condition #5, on pages 9 and 10 of J-2,which stated:

> The Board upon recommendation of the Superintendent reserves the right to withhold a salary increment, and no Administrator will be disciplined, reprimanded, reduced in rank or compensation or have an increment withheld without just cause.

The Association maintained that if the decisions cited by the Board are still considered to be the law at this time this would merely mean that the withholding of an administrator's increment could be pursued only in accordance with the procedures set forth in N.J.S.A. 18A:29-14, and would not be grievable or arbitrable under the parties collective negotiations agreement (J-2). The Association concluded that if condition #5, on pages 9 and 10 of J-2,was therefore deemed to be void and unenforceable this particular clause would be severed from the remainder of the agreement, while all other provisions of the contract would be valid and enforceable.

Nevertheless, the Association submitted that the Clifton and Westwood decisions cited by the Board were no longer the law with regard to the negotiability or arbitrability of the question of the withholding of increments. The Association stated that the above decisions were determined under Chapter 303, Laws of 1968. The Association contended that the 1974 amendments to the New Jersey Employer-Employee Relations Act (Chapter 123, Laws of 1974) mandated the conclusion that since "compensation" was clearly within the category of mandatorily negotiable "terms and conditions of employment", the withholding of same belonged in the same category in terms of impact upon public employees, and in no event could be denied to be at least permissively negotiable and thus properly includable within a contract.

DISCUSSION AND ANALYSIS - SCOPE PETITION

The undersigned, on the basis of the foregoing and the record as a whole, does not find that the Board's contentions concerning the "withholding of increment" negotiability issue constitute a defense to any aspect of the Charge filed by the Association.

Assuming arguendo that local boards of education, pursuant to N.J.S.A. 18A:29-14, [48] have the sole discretion to withhold their employees' salary increment "for inefficiency or for other good cause" and that this right is not mandatorily or permissively negotiable under the provisions of N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13-5.4, general principles of contract law as well as Article VIII, Subsection F of J-2 [49] would mandate that only condition #5, on pages 9 and 10 of J-2, be deemed to be null, void and unenforceable while all other articles and clauses of J-2 would be considered to be valid and binding and would continue in full force and effect.[50] The undersigned however concludes that the issue of the withholding of an increment is a required

[48] 18A:29-14 Withholding Increments; causes; notice of appeals

Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

[49] This "separability" clause states the following: If any provision of this Agreement of (sic) any application of this Agreement to any employee or group of employees is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting, except to the extent permitted by law; but all other provisions or applications shall continue in full force and effect.
This "separability" clause was also included within the prior contract negotiated between the Board and the Association (J-1 - Article VIII - E)

[50] The Board has not argued that any other aspects of J-2's "salary schedule" concerned illegal subjects for collective negotiations. In fact the Board in its submissions on the Scope Petition did not specifically refer to the illegality of even condition #5. The Board simply contested the negotiability of the "withholding of increment" issue in general.

subject for collective negotiations, subject to certain conditions to be delineated hereinafter, given its direct relationship to the question of the compensation to be accorded public employees. The issue of "compensation" is clearly within the category of required subjects for collective negotiations as recognized by the Commission and the Courts.[51] The decisions cited by the Board were decided under Chapter 303, Laws of 1968 not under Chapter 123, Laws of 1974 (effective as of January 20, 1975) that amended and supplemented the Act, in part, to enable the Commission to serve as a quasi-judicial administrative forum for the determination of negotiability questions.[52] The undersigned further concludes that although parties must negotiate upon demand regarding the matter of the "withholding of increments" it must be in a way that is not inconsistent with N.J.S.A. 18A:29-14, subject to the proviso that, in accordance with N.J.S.A. 34:13A-5.3 (as amended by Chapter 123), the parties may provide for another forum to be utilized to resolve disputes, controversies or grievances arising out of an alleged violation, misinterpretation, or misapplication of the clause negotiated concerning the "withholding of an increment."[53] This approach would permit negotiations on a term and condition of employment

51/ See In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976), Board of Education of Englewood v. Englewood Teachers Assn., 64 N.J. 1 (1973).

52/ In Section 1(d) of Ch. 123 [N.J.S.A. 34:13A-5.4(d)] the Legislature provided as follows:

> The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The Commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the Commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

See In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24 2 NJPER 76 (1976) and In re Board of Education of the City of Englewood P.E.R.C. No. 76-23, 2 NJPER 73 (1976) for a general discussion of the relevant changes effected in the Act by Ch. 123, P.L. 1974 that concern the issue of negotiability.

53/ The following sentence was added to N.J.S.A. 34:13A-5.3 by Chapter 123:

> ...Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

i.e. the withholding of a salary increment, except to the extent that the Legislature has previously specifically addressed this term and condition of employment by enacting N.J.S.A. 18A:29-14. This approach would moreover give effect to the "shall be utilized" sentence of N.J.S.A. 34:13A-5.3.

It is the undersigned's determination that the wording of condition #5, on pages 9 and 10 of J-2, (as it refers to the withholding of an increment) negotiated by the Board and Association negotiating teams is not inconsistent with N.J.S.A. 18A:29-14 from a substantive standpoint. The Board maintains its right to withhold a salary increment for "just cause." 54/ Viewing condition #5 of J-2's salary schedule together with Article III of J-2 entitled Grievance Procedure (designated as Appendix "C" and attached hereto and made a part hereof) it would appear to indicate that the parties have provided for an arbitration forum to resolve disputes or grievances arising out of an alleged misapplication or violation of condition #5, consistent with the "shall be utilized" clause of N.J.S.A. 34:13A-5.3. It is therefore the undersigned's conclusion that condition #5, on pages 9 and 10 of J-2, insofar as it concerns the withholding of increments, concerns a required subject for collective negotiations.

ORDER CONCERNING THE CHARGE

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED, the the Respondent, East Brunswick Board of Education, shall:

A. Cease and desist from:

1. Failing to formally execute and implement in its entirety, upon request, the collective negotiations agreement [designated as Exhibit J-2] that was agreed upon and reduced to writing by the duly authorized negotiating teams of the East Brunswick Board of Education and the East Brunswick Administrators' Association on July 3, 1975.

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

B. Take the following affirmative action:

1. Formally execute and implement, in its entirety, upon request, the collective negotiations agreement [designated as Exhibit J-2] that was agreed upon and reduced to writing by the duly authorized negotiating teams of the East Brunswick Board of Education and the East Brunswick Administrators' Association on July 3, 1975.

54/ The undersigned does not perceive any substantive difference between the phrase "for inefficiency or for other good cause" used in N.J.S.A. 18:29-14 and the phrase "just cause" included within condition #5 of J-2's salary schedule.

2. Upon the execution and implementation of the aforesaid agreement, give retroactive effect to the provisions thereof..

3. Post at its central office building in East Brunswick, New Jersey, copies of the attached notice marked "Appendix D". Copies of said notice, on forms provided by the Commission shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by any other material.55/

4. Notify the Executive Director, in writing, within 20 days from the date of receipt of this Recommended Report and Decision what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the particular section of the complaint that alleges that the Respondent engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(3) be dismissed.

ORDER CONCERNING THE SCOPE PETITION

With respect to the matter concerning the withholding of increments which the undersigned has determined to be a required subject for collective negotiations, subject to the conditions enunciated hereinbefore, the East Brunswick Board of Education is hereby ordered to negotiate in good faith upon demand of the East Brunswick Administrators' Association.56/

Stephen B. Hunter
Hearing Examiner

DATED: Trenton, New Jersey
June 16, 1976

55/ Additional copies of the notice marked as "Appendix D" will be supplied to the Respondent upon request.

56/ The order in the instant matter will have prospective impact only inasmuch as an agreement has already been concluded by the parties on the issue of the withholding of increments that is memorialized within condition #5, on pages 9 and 10 of J-2.

APPENDIX "A"

EAST BRUNSWICK ADMINISTRATORS' ASSOCIATION
SALARY RANGE GUIDE 1973 - 75

March 21, 1973

MANAGEMENT COMPENSATION LEVELS	COMPENSATION INDEX RANGE	COMPENSATION SALARY RANGE 1973-74	COMPENSATION SALARY RANGE 1974-75
1.			
2.			
3. High School Principal	1.42-1.93	$21,584. - 29,336.	$22,720. - 30,880.
4. Jr. H.S. Principal Director	1.31-1.78	$19,912. - 27,056.	$20,960. - 28,480.
5. Elementary Principal Supervisor Vice Principal	1.22-1 64	$18,544. - 24,928.	$19,520. - 26,240.
Supervisor - 10 month	1.22-1.64	$15,006. - 20,172	$16,266. - 21,866.

6. Conditions
1973 - 75 The base salary for 1973-74 shall be $15,200. and the salary
7. base for 1974-75 shall be $16,000.

8. A performance increase in the ratio and subsequent dollar amount may be added at the Superintendent's discretion.

Increases based on performance or lack of increase based on performance is not subject to formal grievance procedure.

The existing ratio in the particular management compensation level may not be reduced.

Salary assignment by the Superintendent of Schools is not subject to the formal grievance procedure.

All personnel will receive their contract stating salary on or prior to the first official Board meeting in April.

The stipend for teaching principal shall be $1,100. for the 1973-75 school years.

APPENDIX "B"

SALARY RANGE GUIDE FOR 1975-76

Range Levels		M	M+30	D
3. High School Principal	Minimum	1.42	1.42	1.42
	Maximum	1.93	1.94	1.95
4. Junior High School Principal Director	Minimum	1.31	1.31	1.31
	Maximum	1.80	1.81	1.82
5. Elementary Principal Supervisor Vice Principal	Minimum	1.22	1.22	1.22
	Maximum	1.64	1.65	1.66
10 Month Supervisor 10/12				

Conditions

1. All personnel in administrative and supervisory positions are considered to be at least at the Master's Degree level of training whether or not they actually hold the degree.
2. The base that ratios will be applied to for the 1975-76 school year will be $16,700.
3. Each administrator shall receive an additional 5 ratio points added to their 1974-75 ratio where such does not exceed the maximum range. Salary for 1975-76 shall be the 1974-75 ratio plus 5 ratio points where applicable. This new ratio times a base of 16,700 equals the 1975-76 salary and increase.
4. Salary increase shall not exceed the maximum of the administrators range.
5. The Board upon recommendation of the Superintendent reserves the right to withhold a salary increment and no administrator

will be disciplined, reprimanded, reduced in rank or compensation or have an increment withheld without just cause.

6. Ten month employees will be paid 10/12 of the salary designated in this guide for their position.

7. The existing ratio in the particular management level may not be reduced.

8. Contracts shall be issued, when possible, no later than the 1st official Board meeting in April.

ARTICLE III
GRIEVANCE PROCEDURE

A. Definition

A "grievance" shall mean a complaint by an employee (1) that there has been as to him a violation, misinterpretation or inequitable application of any of the provisions of the agreement, or (2) that he has been treated unfairly or inequitably by reason of any act or condition which is contrary to established Board policy or administrative practice governing or affecting employees except that the term "grievance" shall not apply to any matter as to which (a) a method of review is prescribed by law or by any rule or regulation of the State Commissioner of Education having the force and effect of law, or (b) the Board of Education is without authority to act. As used in this definition, the term "employee" shall mean also a group of employees having the same grievance.

B. Any individual employee of the district shall be assured freedom from restraint, interference, coercion, discrimination, or reprisal in presenting his appeal. An employee shall have the right to present his own grievance appeal and to have a representative of the Association appear with him following the informal grievance level of appeal.

The Administrators Association shall have the right to be present following the informal grievance level of appeal.

C. Procedure

1. Any employee who has a grievance shall discuss it first with his immediate superior within fifteen (15) work days of occurrence of such grievance in an attempt to resolve the matter informally. A work day shall be determined by the work calendar for twelve (12) month employees.

2. If as a result of the discussion, the matter is not resolved to the satisfaction of the employee within ten (10) work days, he shall set forth his grievance in writing to the immediate superior specifying:

(a) nature of the grievance,
(b) the results of previous discussions,
(c) his dissatisfaction with decisions previously rendered,
(d) relief requested by the grievant.

The immediate superior shall communicate his decision in writing to the employee within ten (10) working days of receipt of the written grievance.

3. If dissatisfied, the employee may appeal the immediate superior's decision to the Superintendent of Schools within ten (10) work days. The appeal to the Superintendent must be made in writing specifying:

(a) nature of the grievance,
(b) the results of previous discussions,
(c) his dissatisfaction with decisions previously rendered,
(d) relief requested by the grievant.

The Superintendent shall meet with the concerned parties. He shall attempt to resolve the matter as quickly as possible but within a period not to exceed ten (10) work days. The superintendent shall communicate his decision in writing to the employee and the superior involved.

4. If the grievance is not resolved to the employee's satisfaction, he may request a review by the Board of Education within ten (10) work days. The request shall be submitted in writing through the Superintendent of Schools who shall attach all related papers and forward the request to the Board of Education.

The Board, or a committee thereof, shall review the grievance, hold a hearing with the employee if requested, and render a decision in writing within thirty (30) work days. If the employee is dissatisfied with the decision of the Board of Education, the Administrators Association may request the appointment of an arbitration committee or arbitrator. Such request shall be made known to the Superintendent no later than ten (10) work days after the decision of the Board of Education was made known to the employee and/or the Administrators Association.

D. The arbitrator shall limit himself to the issues submitted to him and shall consider nothing else. He can add nothing to, nor subtract anything from the Agreement between the parties or any applicable policy of the Board of Education.

E. The recommendations of the Arbitrator shall be binding on grievances processed as a violation, misinterpretation or inequitable application of the provisions of this Agreement per III.A.1; and shall be advisory for all grievances processed per III.A.2.

F. The costs of the arbitrator shall be borne equally by the Association and the Board.

APPENDIX D

NOTICE TO ALL 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,

we hereby notify our employees that:

WE WILL formally execute and implement, in its entirety, upon request, the collective negotiations agreement [designated as Exhibit J-2] that was agreed upon and reduced to writing by the duly authorized negotiating teams of the East Brunswick Board of Education and the East Brunswick Administrators' Association on July 3, 1975.

WE WILL give retroactive effect to the terms and conditions of said agreement.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act.

EAST BRUNSWICK BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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 Executive Director of the Public Employment Relations Commission, Labor & Industry Bldg., P.O. Box 2209, Trenton, N. J. 08625 Telephone (609) 292-6780

PERC-23 (8-69)