P.E.R.C. NO. 78-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

Docket No. CO-76-330-75

-and-

NEW BRUNSWICK EDUCATION ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The New Brunswick Education Association, Inc. filed an unfair practice charge against the New Brunswick Board of Education alleging that the Board unilaterally shortened the regular work year for certain professional employees from eleven to ten months, and then offered these employees substantially similar work during the summer at greatly reduced rates of pay. The Hearing Examiner found that, even though under the then existing law the Board could unilaterally reduce their work year from 11 to 10 months, the Board's subsequent action of offering these employees substantially similar summer work at a rate of pay less than the established practice constituted a unilateral change in terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).

The Commission accepts the Hearing Examiner's finding of fact, conclusions of law, and recommended order with certain modifications and amplification, necessitated by the additional arguments raised in the Board's exceptions. The Board contended that these employees are covered by Schedule F /Salaries, Summer School/ of the 1975-76 Agreement and, therefore, it could unilaterally eliminate the established salary practice and return to the contractual salary term. The Commission found contrary to the Hearing Examiner, that this provision does not apply to the employees in question, and concluded that, under N.J.S.A. 34:13A-5.3, there is a continuing obligation during the term of a collective negotiations agreement to collectively negotiate, among other things, the resolution of disputes relating to terms and conditions of employment not covered by the existing agreement. Accordingly, the Commission finds that the Board could not unilaterally alter the established salary practice for the eleventh month of employment without first negotiating the issue.

The Commission further finds that the issue in this case has not been rendered moot due to the signing of the negotiated agreement for 1977-79, and that this dispute should not be deferred

to arbitration.

In accord with the decision in Galloway Township Bd. of Ed. v. Galloway Ass'n of Ed. Sec., 149 N.J. Super. 346 (App. Div. 1977), pet. for cert. granted 75 N.J. 29, the Commission declined to adopt that portion of the Hearing Examiner's remedy which applies to those employees who did not work during the summer of 1976.

The Commission accepts the remainder of the Hearing Examiner's recommended order by ordering the Board to cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the act by refusing to negotiate in good faith concerning salaries for eleven month employees in the Pupil Personnel Services Department. The Board was further ordered to make whole those personnel who did work in the summer of 1976 for any pay they lost as a result of the Board's unilateral change in pay policy by the payment of 10% of their 1976-77 salary less the salary actually paid.

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NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-330-75

NEW BRUNSWICK EDUCATION ASSOCIATION, INC.,

Charging Party.

Appearances:
For the Respondent, Murray, Meagher & Granello, Esqs. (Mr. Robert J. Hrebek, On the Exceptions; James P. Granello argued orally.)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs. (Mr. Sanford R. Oxfeld, Of Counsel)

DECISON AND ORDER

On June 9, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the New Brunswick Education Association, Inc. (the "Association") alleging that the New Brunswick Board of Education (the "Board") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1, et seq. (the "Act"). Specifically, the Association alleges in its amended complaint that the Board unilaterally shortened the regular work year for guidance counselors, psychologists, learning consultants, social workers and special education teachers from eleven to ten months, and then offered these employees substantially similar work during the summer at greatly reduced rates of pay. This

action was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/]

The Charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 4, 1977. In accordance with an Order Rescheduling Hearing, a hearing was held on March 22, 1977 before Edmund G. Gerber, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearing the parties submitted memoranda of law, the final memorandum being received on July 14, 1977. On October 7, 1977, the Hearing Examiner issued his Recommended Report and Decision,[2/] which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy if attached to this Decision and Order and made a part hereof. Exceptions and a brief in support thereof were

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ H.E. No. 78-9, 3 NJPER 341 (1977).

filed by the Board on November 16, 1977. These were supplemented by a later submission dated December 15, 1977. At the request of the Board, oral argument was held before the Commission on December 20, 1977.

The Hearing Examiner found that in accordance with a well established practice, the personnel in question had previously worked under 11 month contracts and had been paid 10% of their ten month salaries for their eleventh month of work. Even though under the then existing law the Board could unilaterally reduce their work year from 11 to 10 months,[3/] the Hearing Examiner found that the Board's subsequent action of offering these employees substantially similar summer work at a rate of pay less than the established practice constituted a unilateral change in terms and conditions of employment. The Hearing Examiner concluded that the Board's refusal to negotiate this matter was a violation of N.J.S.A. 34:13A-5.4(a)(5) and derivatively, N.J.S.A. 34:13A-5.4(a)(1).[4/]

3/ In re Fairlawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975). This case has since been reversed by In re Piscataway Twp. Board of Education, P.E.R.C. No. 77-37, 3 NJPER 72 (1977), which held that public employers must negotiate a decision to shorten an employee's work year.

4/ Under a well established NLRB precedent, the Commission has held that an unfair practice under subsections (a)(2) through (7), by its very nature, interferes with employees in the exercise of their rights and thus derivatively violates subsections (a)(1) as well. In re Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976), motion for reconsideration on other grounds granted, P.E.R.C. No. 77-8, 2 NJPER 284, decision on reconsideration, P.E.R.C. No. 77-18, 2 NJPER 295 (1976), reversed on other grounds, 149 N. J. Super. 352, motion for rehearing denied May 5, 1977, pet. for cert. granted July 20, 1977 ___ N.J. ___ (appeal pending).

The Commission, after a careful consideration of the record, briefs, exceptions and oral argument, accepts the Hearing Examiner's findings of fact, conclusions of law, and recommended order with certain modifications and amplification necessitated by the additional arguments raised in the Board's exceptions.

In its major exception the Board contends that these employees fell within the provisions of Schedule F of their 1975-76 Agreement,[5/] which provided weekly compensation for summer school employment that was substantially lower than 10% of their 10 month salary. Numerous cases have been cited to support the contention that where there is clear and unambiguous contract language granting a benefit to employees, but through past practice the employer has granted a more generous benefit, the contract provision takes precedent over the past practice. The employer can only be held to the obligation he contracted for and, therefore, he may unilaterally return to the lesser benefits.

Schedule F being the term and condition of employment for which the Association negotiated and agreed to, the Board contends that it could not be found guilty of having unilaterally altered a

5/ SCHEDULE F - SALARIES
D. SUMMER SCHOOL

Step on Salary Guide 1976-76	Weekly Compensation
1 - 2	$128.00
3 - 4 - 5	$160.00
6 and over	$190.00

term of employment when it returned to the negotiated contract provision. It is argued that, since under the then existing law the Board could unilaterally reduce the work year, the elimination of eleven month contracts had the effect of eliminating the remuneration under these contracts.

The Commission does not question the validity of the cases cited by the Board. However, the principle that contract language is controlling over past practice applies only where the contract is sufficiently clear and unambiguous in respect to the issue that the mutual intent of the parties can be discerned with no other guide than a simple reading of the pertinent language.[6/] Thus, the question is whether the language of the 1975-76 Agreement evinces that these employees were to be included under the terms of Schedule F.

Article XII, Salaries, section B.1., states that "all professional employees employed on a ten (10) month basis shall receive their final checks and the pay schedule for the following year on the last working day in June." By implication, at least, this provision indicates that there are other professional employees, whose normal working year being more than ten months, are paid according to a different procedure. Article 28 refers only to the procedure to be followed in hiring "teachers"[7/] for "summer school".

6/ Arbitration and Collective Bargaining, Prasaw and Peters, McGraw-Hill Book Company, (1970), Chapter 4.

7/ Under Article I, Recognition, the word "professional" applies to all employees represented by the Association, while the word "teacher" refers only to all male and female teachers.

Finally, Schedule F, Salaries, section D, applies only to "summer school". Considering all of these provisions together, it is not clear that they apply to non-teaching personnel whose regular work year is eleven months. Rather, it appears that they cover only teachers whose regular work year being ten months are paid according to Schedule F for the additional services they provide in "summer school".

Accordingly, the Commission declines to adopt the Hearing Examiner's finding that Schedule F, on its face, pertains to the personnel in question. As a result of this ambiguity the Commission will consider the surrounding circumstances and conduct of the parties.

Witnesses for the Association testified that for a significant number of years, 18 in one case, they had been employed in their positions as a social worker and guidance counselor for eleven month terms, being paid 10% of their ten month salaries for the eleventh month of work. During this eleventh month pension benefits were deducted from their salaries. Copies of salary notices were submitted into evidence which specifically stated that their term of employment would be for eleven months.[8/] There was submitted into evidence a letter dated June 23, 1972 addressed to the Acting Superintendent which requested clarification as to the total number

8/ The Board submitted other salary notices into evidence which were silent on the question of duration. One salary notice stated that it was for only ten months, but since it was issued after the instant dispute arose, it was not probative.

of days an employee would have to work under his eleven month contract. One witness testified that he was automatically given an eleven month contract each year, while another witness stated that prior to the beginning of each school year[9/] he was asked whether he wished to be employed under an eleven month contract for the upcoming year. Further, there was testimony that during the eleventh month these employees did not work in a separate "summer school program" as such, rather they containued doing the same work they performed during the other ten months.[10/]

The Board's conduct in not posting summer school employment notices for these positions,[11/] granting these employees eleven month contracts, and passing two resolutions specifically reducing their contracts from eleven to ten months, establishes that the Board did not consider these professionals to be ten month employees who were hired separately for an additional month of summer school employment. Additionally, it strains credulity that for such a long period of time the Board would have paid such a substantially larger salary to these employees[12/] if it believed that they came within the provisions of Schedule F.

9/ The Commission accepts the Hearing Examiner's finding that summer work is considered part of the upcoming, not the preceding school year.

10/ The August 6, 1976 daily log of one of the employees in question was submitted into evidence to support this contention.

11/ Under Article 28, Summer School, of the 1975-76 Agreement, all summer school positions were posted.

12/ The salary differential amounts to over $1,100 per employee.

Based on the foregoing the Commission finds that Schedule F. applies only to those teachers whose normal work year is 10 months, and who agreed to work for an additional month in a summer school program. We conclude that the professionals in question perform their regular services during a normal working year of eleven months and were paid according to the established practice of 10% of their ten month salaries.[13/]

N.J.S.A. 34:13A-5.3 states in pertinent part that: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. It is well established in the private sector that during the term of a collective negotiations agreement there is a continuing obligation to collectively negotiate, among other things, the resolution of disputes not covered by the existing agreement.[14/] This above provision of the Act evidences the Legislature's acceptance of this principle. Where, during the term of an agreement, a public employer desires to alter an

13/ The Board's assertion that these employees are covered by Schedule F and, therefore, it could unilaterally eliminate the established practice and return to the contractual salary term, is in the nature of an affirmative defense which the Board has the burden of proving by a preponderance of the evidence. Except for the salary notices it submitted into evidence (see footnote 7), the Board has failed to submit any other evidence to support its contention. Rather, it is relying on the language of the 1975-76 Agreement. Based on the Commission's analysis of this language, the Board has failed to meet its burden of proof.

14/ Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957); NLRB v. Sands Mfg. Co., 306 U.S. 332, 4 LRRM 530 (1939), NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 6 LRRM 786 (CA 4, 1940).

established practice governing working conditions [15] which is not an implied term of the agreement though a "maintenance of benefits" or other similar provison, the employer must first negotiate such proposed change with the employees' representative prior to its implementation.

By first reducing the work year of these employees from eleven to ten months, and then offering "summer positions" which amounted to substantially the same work they had previously performed under their eleven month contracts, the Board, through a circuitous method, was attempting to bring these employees within the ambit of Schedule F, thereby eliminating the established salary practice. Even though under the then existing law the Board could unilaterally alter the practice of eleven month contracts, [16] it could not unilaterally alter the established salary practice for this eleventh month of employment without first negotiating the issue. [17] This unilateral alteration of an existing term and condition of employment during the term of an agreement constituted an unfair practice complete in itself. [18]

15/ The Commission has determined that terms and conditions of employment may arise from sources other than the parties' collective negotiations agreement. In re Galloway Township Board of Education, P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev. on other grounds, 149 N.J.Super. 352 (App. Div. 1977); In re Burlington Cty Board of Ed., P.E.R.C. No. 77-4, 2 NJPER 256 (1976).

16/ See footnote 3, supra.

17/ Under the decision in Fairlawn the Board was required to negotiate the impact of its decision on the employees' terms and conditions of employment.

18/ Cf. In accord with the U.S. Supreme Court's decision in NLRB v. Katz, 369 U.S. 763, 50 LRRM 2177 (1962), the Commission has held that a public employer's unilateral alteration of a term and condition of employment during the course of collective

(continued)

The Board excepts to the Hearing Examiner's finding that the Association did request negotiations. As previously discussed, under N.J.S.A. 34:13A-5.3 the obligation is on the public employer to negotiate, prior to implementation, a proposed change in an established practice governing working conditions which is not explicitly or impliedly included under the terms of the parties' agreement. Accordingly, the Association was under no obligation to request negotiations subsequent to the Board's unilateral action. It is, therefore, unnecessary for the Commission to consider the correctness of this finding.

Next, the Board, citing Galloway Township Bd of Ed. v Galloway Township Ed. Ass'n, 149 N.J. Super. 352 (App. Div. 1977), argues that the issues in this case have been rendered moot due to the signing of a negotiated agreement for 1977-79.

The decision in Galloway is clearly distinguishable from the present facts. In Galloway the Association charged that the Board had violated N.J.S.A. 34:13A-5.4(a)(5) by withholding, during negotiations for a successor agreement, payment of teachers increments according to a previously existing, but expired, salary schedule. The Court held that this issue was rendered moot due to the

18/ (continued) negotiations constitutes a per se violation of the duty to negotiate In re Piscataway Township Board of Education, P.E.R.C. No. 91, 1 NJPER 49 (1975) appeal dism. as moot, App. Div. Docket No. A-8-75 (1976), N.J.Super. ___, rehearing den., certif. den., ___ N.J. ___, Sept. Term 1976 (9-28-76), In re Cliffside Park Board of Education, P.E.R.C. No. 77-2, 2 NJPER 252 (1976). In the private sector it has been held that an employer violates its duty to bargain when it unilaterally alters a term and condition of employment that was a past practice never set forth in a contarct. Granite City Steel Co., 167 NLRB 310, 66 LRRM 1070 (1967).

Board's subsequent negotiations with the Association over this issue and signing a collective negotiations agreement which provided for the retroactive payment of increments.

The present issue is whether or not these employees come within the ambit of the contractually negotiated Salary Schedule F, thereby justifying the Board's unilateral alteration of the established salary practice to conform with the Schedule. Since it has been found that Schedule F does not apply to these employees, the signing of an agreement for 1977-79, with the continued inclusion of this schedule, does not resolve this issue.[19/] Nor has the signing of this agreement resolved the issue of whether those employees in question, who worked during the summer for the salary provided by Schedule F, are entitled to additional compensation for their services under the established salary practice. This instant decision will affect the salaries of these employees, determine the meaning of those provisions of the parties' collective negotiations agreements which relate to this issue, and whether the established salary practice continues to exist as an aspect of the parties' relationship. Accordingly, the questions in this case are not deprived of practical significance, nor are they purely academic and abstract in nature.

19/ Association President Sincaglia's uncontroverted testimony, that both sides knew the charge was outstanding, and that the Board never stated it considered the agreement for 1977-79 as resolving the instant dispute, establishes that the Association, in signing the agreement, was not accepting the Board's position that Schedule F applies to the employees in question.

The Board contends that under N.J.S.A. 34:13A-5.4[20/] the Association was required to arbitrate this dispute prior to the institution of any procedures before the Commission.[21/]

Concerning the question of deferral to arbitration, the Commission has consistently held that it will defer only in those cases where it is apparent that arbitration will provide an adequate forum for the resolution of the dispute.[22/] The parties' contractual grievance procedure provides for binding arbitration only on matters concerning interpretation, application, or alleged violation of the agreement. Both parties

20/ N.J.S.A. 34:13A-5.3 provides in part that: "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.

21/ The Board contends that the actions of Association President John Sincaglia, in discussing the problem with the Superintendent and Assistant Superintendent, being a level one grievance proceeding, constituted an election of the contractual grievance machinery. It is further contended that failure to proceed to the next level of the grievance procedure should, under Article III, subsection C.3, of the 1975-76 Agreement, be deemed an acceptance of the decision rendered at that step. It appears from the testimony of President Sincaglia that he did not consider these "discussions" as being an initiation of the formal grievance procedure. He stated that he decided to bring the question before the Commission, rather than proceeding to arbitration because he felt that the Board's conduct was a violation of the Act.

22/ In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975), In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975), In re Hunterdon County Board of Chosen Freeholders, E.D. No. 76-29, 2 NJPER 97 (1976), In re Borough of Glassboro Board of Education, P.E.R.C. No. 77-12, 2 NJPER 355 (1976), In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977).

agree that the employees in question have been paid according to an established practice and the Commission has found that Schedule F does not apply to these employees.[23/]

In addition, there is no "maintenance of benefits", zipper clause, or other similar provision in their Agreement which would encompass past practices. There being a real question as to whether this grievance would be arbitrable under the contractual grievance procedures, the Commission concludes that in all likelihood, a deferral to arbitration would be a futile gesture.

In its next exception the Board contends that under the decision in Galloway Township Bd. of Ed. v. Galloway Township Ass'n. of Ed. Sec., 149 N.J. Super. 346 (App. Div. 1977), pet. for cert. granted 75 N.J. 29, the Commission lacks the authority ot order the relief of back pay. The Commission does not read the decision in Galloway so expansively. The court held only that the Commission cannot order back pay for services which have not been rendered. This is not the situation in the present case where the employees in question have been denied full compensation under the established salary practice for the eleventh month of service they actually provided.

Under the decision in Galloway, however, the Commission does decline to adopt that portion of the Hearing Examiner's remedy which applies to those employees who did not work during the summer of 1976. Although we believe that only by such an award would the

23/ The Commission will not defer to arbitration when the contract is silent on the issue in dispute. In re Borough of Glassboro Board of Education, supra.

Board's violation be adequately remedied, we read Galloway as precluding such action.

In its final exception, the Board objects to the Hearing Examiner's ruling allowing the Association to amend its charge at the beginning of the hearing to include psychologists, social workers, learning disability consultants, and special education teachers in the group of affected employees. On the face of the charge the Association states that it anticipated that the Board would take the same unilateral action against these employees. Therefore, the Board had adequate notice that the Association intended to include these individuals in its charge, should the Board take such action in relation to them in the interim period between the filing of the charge and the commencement of a hearing. Contrary to the Board's contention, the amendment did not constitute an entirely new charge since it merely added additional personnel who were affected by identical Board action.

ORDER

Accordingly, for the reasons set forth above, it is hereby ordered, that the Board shall:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act by refusing to negotiate in good faith with the New Brunswick Education Association, Inc., concerning the terms and conditions of employment of professional employees in the Pupil Personnel Services Department.

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

(1) Make whole those certified personnel who did work in the summer of 1976 for any pay they lost as a result of the Board's unilateral change in pay policy by the payment of 10% of their 1976-77 salary less the salary actually paid.

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

(3) Notify the Chairman of the Commission in writing, within twenty (20) days of receipt of this ORDER, what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Parcells voted for this decision. Commissioner Hurwitz abstained; Commissioners Hartnett and Hipp were not present.

DATED: Trenton, New Jersey
January 19, 1978
ISSUED: January 24, 1978

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,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed by the Act by refusing to negotiate in good faith with the New Brunswick Education Association, Inc., concerning the terms and conditions of employment of professional employees in the Pupil Personnel Services Department.

WE WILL take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

Make whole those certified personnel who did work in the summer of 1976 for any pay they lost as a result of the Board's unilateral change in pay policy by the payment of 10% of their 1976-77 salary less the salary actually paid.

_____
(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 78-9

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

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-330-75

NEW BRUNSWICK EDUCATION ASSOCIATION, INC.

Charging Party.

SYNOPSIS

In a Recommended Report and Decision, a Hearing Examiner recommends to the Commission that it find the New Brunswick Board of Education guilty of unfair practices.

The Hearing Examiner found the Board unilaterally changed the salary of its professional summer staff for the summer of 1976 without negotiating this change with the Association. The Board claimed that it simply was paying said personnel in accordance with the salary schedule in the existing collective negotiations agreement. The Hearing Examiner found, however, that the schedule had not been in use for a number of years and the established practice for paying for the work in dispute governed the salary of the employees in question.

Accordingly, the Hearing Examiner recommends to the Commission that it order the Board to pay all its regular summer staff who worked in the summer of 1976 the difference between what they in fact earned and what they should have earned and further to negotiate with the Association over the regular summer staff who did not work in the summer of 1976 in an effort to make these employees whole.

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

H.E. No. 78-9

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

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-76-330-75

NEW BRUNSWICK EDUCATION ASSOCIATION, INC.,

Charging Party.

Appearances:

For the New Brunswick Board of Education
Murray, Meagher & Granello
(Robert J. Hrebek)

For the New Brunswick Education Association, Inc.
Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The New Brunswick Education Association, Inc. (the "Association"), employee representative of all certified nonsupervisory personnel employed by the New Brunswick Board of Education (the "Board"), filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on June 9, 1976, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (the "Act") [1/] by unilaterally shortening the regular work year for guidance counselors from eleven to ten months,

1/ It is specifically alleged that the Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (5). These subsections provide that an employer, its representatives and agents are prohibited from:

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

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

and then offering the same or substantially similar guidance counselor work during the summer at greatly reduced rates of pay. 2/

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 4, 1977 and a hearing was held before the undersigned in Newark, New Jersey on March 22, 1977. 3/

FINDING OF FACTS

Four witnesses testified for the Association at the hearing. All were cross-examined by counsel for the Board but the Board presented no witnesses of its own.

For at least the last three or four years prior to the summer of 1976, and longer in some cases, certain personnel in the Pupil Personnel Services Department of the high school, which includes those categories of professionals listed in the original and amended charge, normally worked four weeks during the course of each summer in addition to the regular ten month school year. For this extra month's work, they were paid 10% of their base salary for the upcoming school year. 4/

2/ The original charge anticipated that the Board would take similar action with respect to school psychologists, learning consultants, social workers and special education teachers. The undersigned allowed the charge to be formally amended at the beginning of the hearing to allege that such action had, in fact been taken by the Board.

3/ All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Each party filed either a post-hearing memorandum or brief by July 14, 1977. Upon the entire record in this proceeding, I find that the Board is a public employer within the meaning of the Act and is subject to its provisions and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. An Unfair Practice Charge having been filed with the Commission alleging that the Board has engaged or is engaging in an unfair practice within the meaning of the Act, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

4/ It should be noted that summer work is considered part of the upcoming, not the preceding school year.

At a Board of Education meeting on April 20, 1976, a written proposal "That all guidance counselor contracts be changed to 10 month contracts effective July 1, 1976." 5/ The Board admits having adopted and implemented the proposal. 6/ A similar proposal "That the contracts for all School Psychologists, Learning Consultants, Social Workers, and Special Education Teacher be reduced from 11 months to 10 months for the 1976-77 school year effective July 1, 1976." 7/ was subsequently adopted and implemented by the Board.

Stephen Kalman, a school social worker, testified that for several years he had worked an extra month during the summer. Tenured personnel didn't receive individual contracts from the Board, but rather a simple salary notice each year indicating their salary for the ensuing school year. Kalman's salary notice for the 1972-73 school year specifically stated that it was for an 11 month period. 8/ Subsequent notices were silent as to the term of employment. 9/ But Kalman testified that every year, usually at a meeting in June, he would be notified that summer work was available and would be asked to sign up for it. The work was voluntary, he said, but he felt it was expected that he would accept it. He testified that his financial situation and family left him no choice but to accept the work that was offered in the summer; work, which he claimed varied somewhat as the needs of the school system varied, but was essentially a continuation of his work during the school year. And each year for at least the last three or four prior to 1976, Kalman claimed, he had been paid 10% of his ten month salary for the eleventh month of work. In June 1976, Kalman was offered and accepted summer work again, but for only $190 per week, instead of 10% of his ten month salary.

Following Mr. Kalman's testimony counsel for the Association represented that Vincent Woods, a school psychologist, and David Kerman, a learning consultant were both prepared to testify regarding their employment

5/ Proposal attached to Complaint, Exhibit C-1.

6/ Answer, Exhibit C-2.

7/ Proposal attached to Complaint, Exhibit C-1.

8/ Exhibit B-2.

9/ Exhibits B-1, B-3 and B-4. No salary notice for Stephen Kalman for the 1973-74 school year was offered in evidence.

with the Board and that their testimony would be substantially similar to Kalman's. Counsel for the Board agreed to stipulate that their testimony would be similar to Kalman's. Accordingly, neither witness testifed.

Klemens Figulski, a guidance counselor in the senior high school of New Brunswick since 1956, was the Association's next witness. Mr. Figulski testified that for about 18 years, up until 1976, he had worked in the summer and had been paid 10% of his ten month salary for the eleventh month of work. His 1972-73 salary notice stated specifically that it was for 11 months. 10/ He claimed that most, if not all, of his copies of his salary notices for other years up to 1976 also stated somewhere on their face that they covered 11 month employment terms. However, the only other notices offered in evidence were submitted by the Board. 11/ They covered the years 1973-74, 1974-75, 1975-76 and 1976-77. The first three were silent as to term, and the 1976-77 notice specifically for ten months.

Unlike Kalman, and presumably Woods and Kerman as well, Figulski testified that he was not asked at a meeting each year in June if he would sign up for summer work. He said it was automatic each year until 1976. 12/ Figulski testified that his 1976-77 salary notice received in April or May, specified a ten month term and he assumed the Board was economizing and cutting out summer work. Then, according to Figulski, in late May he saw the job posting for a summer guidance counselor, 13/ and his building principal came to his office and told him about it stating that the salary would be $190 per week.

Figulski claims he asked the principal if he was taking a pay cut too, but the principal did not reply and left the office. Figulski then consulted the Association President who said he would contact the Superintendent and suggested he not accept the job for that salary. Figulski took his advice. According to Figulski's uncontroverted testimony, he made his feelings known to the other counselors; each counselor was contacted in turn and offered the

10/ Exhibit B-6.

11/ Exhibits B-5, B-7, B-8 and B-9.

12/ Transcript, p. 58.

13/ Attached to Complaint, Exhibit C-1.

summer work, and each one turned it down. Apparently, no one filled the job in the summer of 1976.

Vincent Woods, the school psychologist referred to earlier, testified briefly, mostly regarding the effect of the Board's action on his pension. He claimed that prior to 1976, when he worked in the summers, deductions had been made from his salary and allocated to his pension account, but when he worked in the summer of 1976 for $190 per week, no pension deductions were made. Figulski had also claimed that prior to 1976, pension deductions were made from his summer salary. Kalman had been questioned about his pension as well but claimed no knowledge as to the effect of the change on his pension.

John Sincaglia, a social studies teacher and Association President, was the last witness. He testified that when the contract reductions were first proposed, he spoke to the Board President regarding the impact on the professionals involved, and received public assurances that "they weren't expecting those people to do in 10 months what they used to do in 11." 14/ Only when it discovered that the Board planned to offer the same people, the same summer work for lower wages, claimed Sincaglia, did the Association decide to do something about the Board action. Sincaglia complained to both the Superintendent and the Assistant Superintendent, Earl Bartholm. Then on advice of counsel, he filed the instant charge.

About three months later, Sincaglia testified, negotiations began for the 1977-79 contract. Although both sides knew this charge was outstanding, the Board never stated that its resolution was part of the negotiations, according to Sincaglia. And the 1977-79 contract contains the same Schedule F as the previous contract, the schedule the Board relies on to justify its payment of $190 per week for summer work in 1976. Sincaglia testified that the Association never officially proposed a change in Schedule F for the 1977-79 contract, that their priorities were not in that area.

ANALYSIS

The Board claims it could not be deemed to have unilaterally altered terms and conditions of employment when it merely proposed to pay for summer

14/ Transcript, p. 96.

work according to the terms of the collective negotiations agreement. Absent any contrary argument from the Association, the undersigned will accept that Schedule F, on its face, does pertain to the personnel in question. However, testimony at hearing clearly established that for several years this schedule had not been followed for these personnel. They had always worked 11 months, and had been paid 10% of their ten month salary for their eleventh month of work. The Board's action in the summer of 1976 unilaterally altered an established past practice which had been well understood by both parties. 15/

The Board also claims there was no demand for negotiation made by the Association, that the Association should have been required to pursue internal grievance procedures, and that this issue is now moot anyway because a new collective negotiations agreement has been reached since the charge was filed. Sincaglia admitted he had not made a written demand for negotiations, but nothing in the law requires demands to be in writing. Figulski complained to his building principal and then went to Sincaglia. Woods also testified that he complained vigorously to Sincaglia. Sincaglia spoke with the Board President, the Superintendent and the Assistant Superintendent. Under the circumstances, the undersigned is satisfied that a request for negotiations was made.

It should be noted that at the time the Board announced its intention to change contracts from 11 to 10 months, the Association was unaware that the Board intended to offer summer work to these people for less pay. It assumed there would be no summer work at all. Under the rule of In re Fairlawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975) (still good law at the time of the Board's action), 16/ the Commission had ruled that a Board of Education could unilaterally shorten the work year of its principals and must negotiate only the impact of its decision on the terms and conditions of those employees' shorter work year. Sincaglia had spoken to the Board

15/ The Commission has held that terms and conditions of employment can arise from "some other source" than the collective negotiations contract. Galloway Township Board of Education v. Galloway Township Education Association, P.E.R.C. No. 76-32 (1976), 149 N.J. Super 353 (App. Div. 1977); cert. granted Sup. Ct. Docket No. C-890 & C-891, vac. as moot, in accord Burlington City Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976).

16/ Fairlawn has since been reversed by In re Piscataway Tp. Board of Education, P.E.R.C. No. 77-37, 3 NJPER 72 (1977). Boards must now also negotiate a decision to shorten an employee's work year.

President regarding such impact and was publicly assured there would be none, so he demanded no negotiations at the time. As soon as he found the work year was not really being shortened, but rather the pay was being decreased, he complained to the Superintendent and the Assistant Superintendent. This constituted a negotiations demand.

Sincaglia's uncontroverted testimony that neither the Association nor the Board ever characterized the negotiations for a 1977-79 contract as settlement negotiations for the underlying dispute is enough to refute the Board's mootness argument. As to the Board's claims that the Association should have gone through negotiated grievance procedures, N.J.S.A. 34:13A-5.3 clearly states that negotiated grievance procedures if any, will be utilized to resolve disputes notwithstanding procedures established by any other statute. Nowhere does the Act state or imply that parties cannot file Unfair Practice Charges prior to exhaustion of internal grievance procedures. The Commission will in some instances find that it would best effectuate the policies of the Act by deferring a matter raised in an Unfair Practice Charge to arbitration, if arbitration will resolve the underlying merits of the dispute. 17/ But this is not such a case; counsel for the Board claims that Figulski's complaint to his principal represented a Level I grievance, and that his failure to carry the matter up the grievance ladder constituted an acceptance of the Board's action. The Board does not now recognize the Association's continuing right to arbitration of the matter and this forum is, therefore, the appropriate one for ascertaining the merits of the controversy.

Based upon a thorough examination of the entire record in this case, and noting especially the language of the Board's proposals, and the cumulative testimony of several Association witnesses, not controverted by any Board witnesses, the undersigned concludes that the Board did fail to negotiate in good faith upon demand a change in terms and conditions of employment, and that such refusal necessarily interfered with employees' rights under the Act. The Board's action was therefore, violative of N.J.S.A. 34:13A-5.4(a)(1) and (5).

17/ See In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975); In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975).

THE REMEDY

Having found that the Respondent has engaged in an unfair practice within the meaning of the Act, I will recommend that the Commission order that the Respondent cease and desist therefrom and take certain affirmative action.

As to those employees who worked during the summer of 1976 at $190 per week and who worked a prior summer for 10% of their regular salary, [18] they are to be paid the difference between what they should have earned, [10% of their salary for the upcoming year] and the $190 per week which they in fact paid. [19]

As to Mr. Figulski and those other employees, if any, who chose not to work [20] their decision not to work was based upon the unlawful action of the Board and accordingly, it is recommended that the Board negotiate with the Association upon demand in an effort to make them whole. [21]

18/ The undersigned is not aware of anyone who worked in the summer of 1976 who had not worked in prior summers. If such a class of employees exist they would not be entitled to any award as their salary would have been governed by the contract.

19/ In Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31 (1976), aff'd in part, rev'd in part, 149 N.J. Super 346 (App. Div. 1977), cert. granted, ___ N.J. ___ Sup. Ct. Docket No. C-892 & C-893, July 20, 1977, the Court voided the Commission's order requiring the employer to make payment to employees whose hours were unilaterally reduced in violation of the employer's negotiation obligation under the Act. The Court voided such payments as ultra vires because they would be made for services not rendered. In the instant matter, the individuals in question were denied their proper salary for a time actually worked.

20/ Counsel for the Association recognizes the difficulty of fashioning a remedy for those employees who chose not to work, as stated in his brief, "the individuals herein are not seeking to be paid for work not performed but are rather seeking to be paid their appropriate rate of pay for work which they had performed."

21/ Perhaps this could be achieved through a prospective, temporary, lightening of duties without reduction in pay, or through voluntary assumption of additional duties for additional pay. It is also noted that there is a possible limitation to this part or the award; again, this would depend upon whether or not a class of employees exist who worked in the summer of 1976, but never worked in the summer before. If the Board did expend money on salaries for such a class of employees, the money spent on these salaries

(Cont'd)

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, it is hereby recommended that the Commission ORDER that the Respondent, New Brunswick Board of Education shall

1. Cease and desist from:

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

(b) Refusing to negotiate in good faith with the New Brunswick Education Association, Inc., concerning the terms and conditions of employment of professional employees in the Pupil Personnel Services Department.

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

(a) As to those professionals in the Pupil Personnel Services Department who worked in prior summers at 10% of their salary and chose not to work in the summer of 1976, negotiate upon demand with the Association in an effort to make them whole.

(b) Make whole those certified personnel who did work in the summer of 1976 for any pay they lost as a result of the Board's unilateral change in pay policy by the payment of 10% of their 1976-77 salary less the salary actually paid.

(c) Post at its central administrative building in New Brunswick, New Jersey, copies of the attached notice marked Appendix "A". Copies of such notice on forms to be provided by the Director of Unfair Practices of the Public Employment Relations Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or

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21/ (Cont'd.) must be deducted from the total pool of money available to comply with the portion of the award. This pool of money is equal to the amount of money that the board would have paid in salaries in the summer of 1976 if they did not violate the law. It is not expected that the Board should pay out more money for summer school salaries as a result of this award, than they would have paid had they paid the employees in question at the rate of 10% of their regular salaries of course, if there is no class as described above, there is no problem.

covered by any other material.

(d) Notify the Commission in writing, within twenty (20) days of receipt of this ORDER, what steps the Respondent has taken to comply herewith.

Edmund G. Gerber
Hearing Examiner

DATED: October 7, 1977
Trenton, New Jersey

APPENDIX "A"

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,

AS AMENDED

We hereby notify our employees that:

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

WE WILL NOT refuse to negotiate in good faith with the New Brunswick Education Association, Inc., concerning the terms and conditions of employment of professional employees in the Pupil Personnel Services Department.

WE WILL upon demand of the Association, negotiate its decision to pay 1976 summer professionals in the Pupil Personnel Services Department according to Schedule F of the then current collective negotiations agreement instead of according to established past practice.

WE WILL make whole those certified personnel who did work in the summer of 1976 for any pay they lost as a result of the Board's unilateral change in pay policy by the payment of 10% of their 1976-77 salary less the salary actually paid.

WE WILL upon demand negotiate with the Association in an effort to make whole those professionals in the Pupil Personnel Services Department who worked in prior summers at 10% of their salaries and chose not to work in the summer of 1976.

New 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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780