P.E.R.C. NO. 86-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SPOTSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-19-35

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Charging Party.

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Respondent,

-and- Docket No. CE-84-20-131

SPOTSWOOD BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Spotswood Education Association filed against the Spotswood Board of Education. The charge had alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it allegedly negotiated in bad faith; allegedly threatened to lay off employess; terminated five employees allegedly because the Association would not accept its proposals; conducted employee meetings without the Association's consent; allegedly pressured employees and Association officials to capitulate to its demands and to repudiate the Association's leadership, and reassigned Association leaders to more onerous tasks allegedly because they would not accept Board demands. The Commission finds that the Association did not prove its allegations by a preponderance of the evidence. The Commission also holds that the Association violated the Act when it refused to sign a collective negotiations agreement not containing a clause preserving work hours.

P.E.R.C. NO. 86-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SPOTSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-19-35

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Charging Party.

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Respondent,

-and- Docket No. CE-84-20-131

SPOTSWOOD BOARD OF EDUCATION,

Charging Party.

Appearances:
For the Board, Golden, Shore, Zahn & Richmond, Esqs.
(John B. Wolf, of Counsel)

For the Association, Klausner & Hunter, Esqs.
(Stephen E. Klausner, of Counsel)

DECISION AND ORDER

On July 25, 1983, the Spotswood Cafeteria Employees Association ("Association") filed an unfair practice charge against the Spotswood Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey

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; (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; and (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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it allegedly negotiated in bad faith; allegedly threatened to lay off employees; terminated five employees allegedly because the Association would not accept its proposals; conducted employee meetings without the Association's consent; allegedly pressured employees and Association officials to capitulate to its demands and to repudiate the Association's leadership, and reassigned Association leaders to more onerous tasks allegedly because they would not accept Board demands.

On October 13, 1983, a Complaint and Notice of Hearing issued. The Board then filed an Answer denying the charge's material allegations.

On March 14, 1984, the Board filed a charge against the Association. This charge alleges that the Association violated subsections 5.4(b)(3),(4) and (5)[2/] of the Act when it refused to sign a collective negotiations agreement which did not contain a clause guaranteeing work hours.

On April 24, 1984, a Complaint issued on the Board's charge. The cases were then consolidated for hearing. The

---

2/ These subsections prohibit employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (5) Violating any of the rules and regulations established by the commission."

Association then filed an Answer denying that its refusal to enter a contract without a work hours guarantee was illegal.

On May 17 and 18, June 21, and July 24 and 25, 1984, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, made motions[3/] and argued orally. They filed post-hearing briefs by January 21, 1985.

On May 9, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-43, 11 NJPER ___ (¶_____ 1985) (copy attached). He recommended dismissal of all the Association's allegations that the Board violated the Act; essentially he found that the Board, while bargaining hard, acted in good faith and did not retaliate against the Association or otherwise interfere with the employees' rights.[4/] He also concluded that the Association violated the Act when it refused to sign a collective negotiations agreement which did not contain a clause guaranteeing work hours.

On June 17, the Association filed exceptions. It asserts that the Hearing Examiner erred in accepting the Board's economic

---

3/ Prior to the June 14 hearing, the Association sought permission to amend its Complaint to allege that the Board violated subsections 5.4(a)(6) and (7) by refusing to execute a contract continaing a clause guaranteeing work hours. The Hearing Examiner tentatively permitted the amendment insofar as it alleged a violation of subsection 5.4(a)(6), but denied the amendment insofar as it alleged a violation of subsection 5.4(a)(7).

4/ He also found, in retrospect, that the Association's attempt to amend the Compalint to allege a violation of subsection 5.4(a)(6) was untimely.

justification rather than the testimony of an Association witness attacking the Board's budget; finding that the Board negotiated in good faith; finding that the February 8, 1983 meeting was voluntary and proper; not finding that threats were made at the February 15, 1983 meeting; not finding that certain reassignments following the layoffs were retaliatory; and concluding that the Board had a legal right of free speech analagous to that private sector employers enjoy under the Labor-Management Relations Act, 29 U.S.C. §141 et seq. ("LMRA").

The Board has filed a response to each of the Association's exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-21) are thorough and accurate.[5/] We adopt them here. We specifically adopt the credibility determinations underlying these findings.

We also adopt the Hearing Examiner's recommended conclusions. We adopt his commendably thorough analysis (pp 21-42).[6/] We specifically reject the Association's exceptions.

5/ We add only that because a freezer malfunctioned in the summer of 1982, food worth $7000 spoiled. The Board, however, replaced this food with government commodities so it lost no money.

6/ We reserve judgment, however, on two questions. First, it is unnecessary to consider whether public employers enjoy the same right of free speech under our Act as section 8(c) explicitly provides private sector employers under the LMRA; it is sufficient to find, as we do, that the meetings in question were

(Footnote continued on next page)

The Hearing Examiner properly found that the Board had a financial problem with its cafeteria operation and that it took a hard, but honest negotiations line in light of that problem.[7/] We further agree that the February 8 meeting was voluntary and that the Board Secretary properly limited his comments to informing employees accurately of the Board's position in negotiations. We also agree that the February 15 meeting was voluntary and devoid of threats and that the reassignments following the layoffs were based on seniority and ability rather than a desire to retaliate against Association officials. Finally, we agree that the Association violated the Act when it refused to sign the parties' agreement unless the Board agreed to include the clause guaranteeing work hours which had expired on January 31, 1983. Accordingly, we enter the following order.

(Footnote continued from previous page)
voluntary and that nothing that occurred at these meetings restrained, coerced or interfered with the rights of employees to engage in protected activity. Second, it is unnecessary to consider whether the clause guaranteeing work hours was illegal; it is sufficient to find, as we do, that the clause explicitly expired on January 31, 1983 and that the Board therefore could refuse to include it in the successor contract.

7/ We concur with the Hearing Examiner's reasons (pp. 20-21, 34) for rejecting the testimony of the Association's witness concerning the Board's budget.

ORDER

The Spotswood Cafeteria Employees Association is ordered to:

A. Cease and desist from:

1. Refusing to sign the 1983-85 collective agreement between the parties, R-13, because it believed that a workhours guarantee clause should be included therein.

B. Take the following affirmative action:

1. Immediately sign the parties' 1983-85 collective agreement, R-13, without the inclusion of a work hours guarantee clause.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Association has taken to comply herewith.

3. The Complaint alleging that the Association violated subsections 5.4(b)(3) and (5) of the Act is dismissed.

D. The Complaint and Amended Complaint alleging that the Board violated subsection 5.4(a)(1),(3),(5),(6), and (7) of the Act are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

H. E. No. 85-43

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

In the Matter of

SPOTSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-19-35

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Charging Party.

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Respondent,

-and- Docket No. CE-84-20-131

SPOTSWOOD BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Spotswood Cafeteria Employees Association violated subsection 5.4(b)(4) of the New Jersey Employer-Employee Relations Act when it failed to sign a collective agreement which did not include a workhours guarantee clause. The Hearing Examiner recommended that the Association be required to sign the agreement but that no Notice be posted.

The Hearing Examiner also recommended that the Association's Charge against the Board be dismissed in its entirety. The Board did not violate the Act by instituting a reduction in force, by reassigning personnel as a result of the reduction, by meeting with employees during negotiations to inform them of the breakdown in negotiations, or by insisting that the new collective agreement did not include a workhours guarantee clause.

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

H. E. No. 85-43

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

In the Matter of

SPOTSWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-19-35

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Charging Party.

SPOTSWOOD CAFETERIA EMPLOYEES ASSOCIATION,

Respondent,

-and- Docket No. CE-84-20-131

SPOTSWOOD BOARD OF EDUCATION,

Charging Party.

Appearances:

For the Board: Golden, Shore, Zahn & Richmond, Esq.
(John B. Wolf, of Counsel)

For the Association: Klausner & Hunter, Esqs.
(Stephen E. Klausner, of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge (CO-84-19-35) was filed with the Public Employment Relations Commission ("Commission") on July 25, 1983 by the Spotswood Cafeteria Employees Association ("Association") alleging that the Spotswood Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq. ("Act"). The Association alleged that the Board proffered a "take it or leave it" proposal during negoiations, that it threatened to subcontract and lay off employees, that it terminated five employees because the Association would not accept the Board's proposals, that it conducted meetings with the employees without Association consent, at which it pressured and coerced employees and Association officials to capitulate to Board demands, and at which it recommended that the employees repudiate the Association leadership. Finally, the Association alleged that the Board improperly reassigned the Association leaders because they would not capitulate to the Board's demands, all of which was alleged to be in violation of subsections 5.4(a)(1), (3) and (5) of the Act.[1/]

On March 14, 1984 the Board filed a charge against the Association (CE-84-20-131) alleging that the Association violated subsections 5.4(b)(3), (4) and (5) of the Act by refusing to sign a negotiated agreement which did not include a workhours guarantee

---

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; (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."

clause.[2/]

On April 24, 1984, the Charges were consolidated and a Complaint and Notice of Hearing was issued. Both parties filed Answers denying they committed any violations of the Act. Hearings were held in this matter on May 17 and 18, June 21, and July 24 and 25, 1984, in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

On June 14, 1984, prior to the third day of hearing, the Association filed an Amendment to CO-84-19-35 alleging a violation of 5.4(a)(6) and (7) of the Act.[3/] At the hearing on June 21 the Board objected to the Amendment, and on June 26 it submitted a formal Motion to Dismiss the Amendment, alleging that it would complicate and lengthen the matters already in hearing.

The Association, in the Amended Charge, essentially argued

2/ These subsections prohibit employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the Commission."

3/ The Association's amendment actually listed 5.4(a)(5) rather than (a)(6). However, the Association communicated that its intent was to file an (a)(6) and not an (a)(5) Charge in that amendment.

The alleged subsections in the amendment provide that public employers, their representatives or agents are prohibited from: (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the Commission."

the antithesis of the Board's CE Charge. The Association alleged that the parties had negotiated and ratified a new collective agreement, and it asserted that the Board, in preparing the collective agreement, excluded a workhours guarantee clause that had been included in the preceding agreement. The Association sought to require the Board to sign an agreement which included the alleged workhours guarantee clause.

I denied the Board's Motion to Dismiss by decision on July 12, 1984 in In re Spotswood Bd.Ed., H.E. No. 85-3, 10 NJPER 470 (para. 15210 1984). Thereafter on July 23, 1984, the Board filed an Amended Answer and denied the Amended Charge. The Board asserted that the workhours guarantee clause in the preceding agreement had expired by its own terms, and that the Association had rejected a package offer for a workhours guarantee clause in a new agreement, and that it subsequently did not propose any other workhours guarantee clause for the new agreement.

After the close of the hearing process both parties submitted post-hearing briefs and reply briefs, the last of which was received on January 21, 1985.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The Spotswood Board of Education is a public employer within the meaning of the Act.

2. The Spotswood Cafeteria Employees Association is an employee representative within the meaning of the Act.

3. The sequence of events in these matters show that on December 21, 1981, the parties reached a memorandum of agreement (Exhibit R-14) which eventually became the basis for the parties' 1981-83 collective agreement (Exhibit J-1), which was effective from July 1, 1981-January 31, 1983. Item eleven (11) of R-14 provided for the following workhours guarantee clause:

> Employees employed prior to the effective date of this contract will be guaranteed their daily working hours which were in effect on 12/21/81. These employees are guaranteed working days consistent with the appropriate school's calendar (including any work assigned for another school district). Both guarantees are effective until the end of this contract. This clause expires on 1/31/83.

When J-1 was drafted it incorporated in Article 7, Section A(5), most of the language in item 11 of R-14, but not the exact language. The first and second sentences were essentially the same, but the bracketed language was not included, and the third (and last) sentence in Art. 7, Sec. A(5) was: "Both guarantees expire on January 31, 1983."[4/]

4/ The guarantees referred to in Art. 7, Sec. A(5) were the guarantees for workhours and workdays. The actual language in Art. 7, Sec. A(5) is as follows:

> 5. Employees employed prior to the effective date of this Agreement shall be guaranteed their daily work hours which were in effect on December 21, 1981. These employees are guaranteed working days consistent with the appropriate school's calendar. Both guarantees expire on January 31, 1983.

In October of 1982, prior to the start of negotiations for a successor agreement to J-1, the Board, because of declining enrollments and budget concerns, considered three options in an attempt to make the cafeteria operation self-sufficient. It considered increasing the price of the meals, reducing labor and/or hours, and subcontracting, and it chose to reduce labor. (Transcript ("T") 2 pp. 34-35, 61-63, 159).[5/] In November 1982, a Board committee informed their chief negotiator, Bruce Taylor, that the cost of the cafeteria operation was of major concern during the upcoming round of negotiations. (T 3 p. 28).

On December 6, 1982, the parties had their first negotiations session for a new collective agreement at which time they exchanged proposals. The Board's proposals, Exhibit CP-1, contained several language proposals but did not include a wage proposal. The Association's proposals, Exhibit R-15, contained both language and wage proposals. Neither the Board's proposals nor the Association's proposals contained any reference to a change in Art. 7, Sec. A(5) of J-1. In fact, there was no discussion at that session of the workhours guarantee clause (T 3 p. 36).

5/ The facts show that there was a sharp decrease in the number of cafeteria meals served between 1981-82 and 1983-84 (T 1 p. 166), and that the cafeteria budget had lost some subsidies. Although the Association contested the Board's allegation that the cafeteria was experiencing fiscal problems, I conclude that there is ample evidence to support the Board's assertion that a fiscal problem existed in the cafeteria operation. T 2 pp. 34-35, 133, 159. See further discussion infra.

A second session was held on December 20, 1982. The record shows that there was a discussion about subcontracting and some movement on language proposals at that session, and that some agreements were reached (T 2 p. 66; T 3 p. 37). However, there were still no discussions about wages or the workhours guarantee clause at that session (T 3 p. 37).

In late December 1982 the Board informed Taylor that it wanted to take a wage freeze position during negotiations (T 3 p. 28). Then in early January 1983, the Board informed Taylor that after January 31, 1983, it intended to reduce the hours in the cafeteria operation down to the federal guideline which established a ratio for the number of meals served versus the number of hours needed to prepare those meals (T 3 pp. 32-33).[6/]

On January 13, 1983, at the third negotiations session, the Board, through Taylor and Board Secretary/Business

---

6/ The Board's Food Service Director, Maurice Silverman, testified that the Board follows U.S. Department of Agriculture guidelines for cafeteria operations which provide that employees in the type of operation existing in Spotswood should produce 15 to 20 meals per man-hour (T 2 p. 133). In conjunction with that information, the evidence shows that the number of meals served in the school cafeteria has declined since 1982-83. (T 1 p. 166). The Board maintained that applying the guideline ratio to the decrease in meals served resulted in more employees necessary to provide the meals. The Board therefore concluded that a reduction in man-hours was necessary to make the operation more efficient.

Although the federal guidelines were not introduced into evidence, I credit Silverman's testimony and note that there was no evidence to contradict his testimony regarding the guidelines or need to decrease man-hours.

Administrator John Nemeth, advised the Association of the financial condition of the cafeteria including the matter regarding the federal guidelines and the number of hours worked (T 1 p. 14; T 3 p. 29). They further advised the Association of the options the Board considered to deal with the excessive number of hours worked, and of its decision to reduce labor (T 2 p. 67). The Board then made a package offer to the Association. The Board offered to guarantee the hours that would be in effect for February 1, 1983-June 30, 1984, after it made a unit-wide reduction of 20 hours, in exchange for a wage freeze that would be in effect for the same period of time (T 1 p. 15; T 3 p. 38). The Association's chief negotiator, Lynn Mouncey, testified that Taylor couched the proposal as a "take it or leave it proposal" (T 1 p. 15), but Taylor denied using that expression (T 3 p. 42).7/

The record shows that the Board did not offer the Association any economic data to prove the need for its reduction in hours (T 1 p. 16), but the Association did not request such data. (T 1 pp. 33, 39; T 2 p. 55). However, Mouncey admitted that the Board strengthened its position by advising the Association that it was

---

7/ On cross-examination Mouncey was asked whether Taylor used the phrase "take it or leave it" and she said "essentially." (T 1 p. 34). She further testified that Taylor "made it clear" that that was the only offer the Board would make (T 1 p. 35). But she never testified as to what he actually said. Finally, Mouncey testified that she asked Taylor whether she could come back and give a counter proposal and would it do any good, and that he responded "no," at which point she said she would take the Board's offer back to the Association (T 1 pp. 37-38).

considering subcontracting the cafeteria service as an alternative to reducing hours (T 1 p. 16). In fact, Mouncey testified that Taylor had mentioned subcontracting to her on several occasions (T 1 p. 17).

After the Board's workhours guarantee/wage freeze proposal was delivered, the Association indicated that it intended to discuss the proposal with the entire membership before issuing any response.

On January 13, 1983, and again on January 27, 1983, the fourth negotiations session, Taylor advised the Association that the workhours guarantee clause, Art. 7, Sec. A(5), automatically expired on January 31, 1983 and would have no force and effect after that date.[8/] (T 4 pp. 72-73).

Early in the fourth negotiations session on January 27, Nemeth advised the Association that, although the Board was willing to honor and respect the workhours guarantee clause as part of its package offer, the Board did not believe that the clause was mandatorily negotiable. (T 2 p. 71). Nemeth admitted, however, that the Association did not agree with that position, but neither party ever filed a scope of negotiations petition regarding that clause (T 4 p. 32). Nevertheless, during that session the Association rejected the Board's wage freeze/workhours guarantee proposal (T 3 pp. 39-40; T 4 p. 34). After January 27, 1983 the

---

8/ Taylor, however, admitted that the Association said that any reduction in hours would be illegal and that it would file a charge with PERC if any reductions were made. (T 4 pp. 73-74).

Association neither discussed nor proposed an extension of the workhours guarantee in Art. 7, Sec. A(5) of J-1, nor did it propose any modifiction of the wording of that clause (T 4 pp. 33-34, 38; T 5 pp. 38-39). Similarly, after that date the Board never proposed deleting that clause from J-1 after January 27, 1983 (T 3 pp. 71-72).[9/]

Despite the lack of any agreement on January 27 regarding workhours, there was movement by both sides on several proposals (T 2 p. 70). However, by the conclusion of the fourth session the Association believed that an impasse had been reached (T 1 pp. 12-13).

On February 1, 1983, the Association held a formal membership vote on the Board's wage freeze/workhours guarantee proposal. The membership rejected the Board's offer on February 2, 1983 (T 1 pp. 20-22). Mouncey alleged that after the Association rejected the Board's offer, Taylor, at that February 2nd meeting, told the Association that, rather than reducing the hours for all

---

9/ The Board argued that the workhours guarantee in Art. 7, Sec. A(5) expired by its own terms on January 31, 1983 and did not continue as part of the status quo. Consequently, the Board contended that since that clause expired on January 31 there was no reason to propose its elimination. The Association argued that the clause did not expire by its own terms, and that it did survive the contract as part of the status quo. Therefore, the Association argued that since the Board did not seek the elimination of the clause, and since its language was not altered, that it was unnecessary for the Association to propose an extension of the clause since it would continue as part of the status quo.

employees and getting involved in a question of negotiating workload, the Board would reduce force by five employees to account for the 20 hours of reduced time, and that it would notify the affected employees the following payday (T 1 p. 25).

Mouncey alleged that Taylor delivered those remarks in a threatening tone and referred to the "spectre of subcontracting." At that point she felt the parties were at impasse (T 1 p. 25). However, she admitted that the Board did not generally refuse to meet to negotiate a new agreement (T 1 p. 45).

On February 4, 1983, Nemeth sent a letter (Exhibit R-9) to the cafeteria employees inviting them to a meeting at 2:15 p.m. on February 7 where the Board intended to explain its negotiations position and advise the employees of certain staff actions it intended to implement. The letter clearly indicated that attendance was voluntary,[10/] and since it was scheduled after the workday (which ended at 2:00 p.m.), it was conducted on employee time. Nemeth also telephoned Mouncey on February 4th to tell her about

---

10/ R-9 was worded as follows:

> I am writing in reference to pending staff adjustments for cafeteria employees for the 1982-1983 school year.
>
> In order to explain this matter and to provide information concerning the Board's position this is to notify you that a meeting will be held on Monday, February 7, 1983 at 2:15 p.m. in the Conference Room of Birchall School.
>
> Attendance at this meeting is encouraged but is voluntary.

the meeting and he invited her to attend (T 1 p. 43; T 2 p. 74). Due to inclement weather on February 7th, however, the meeting was rescheduled for February 8th, and everyone, including Mouncey, was notified.

On the morning of February 8th, Mouncey advised Nemeth that she could not attend the meeting, but she did not voice any significant objection to the conduct of the meeting (T 1 p. 28). The meeting, the first such meeting of its kind in the district, began at its scheduled time, or later, and was attended on a voluntary basis by all but one of the cafeteria employees. Association President Lorraine Dougherty, and Vice President Julia Gehling attended.[11/] The Board's representatives at the meeting included Nemeth, Superintendent Christine Conover, Food Service Director Maurice Silverman, and Cafeteria Manager Betty Meszaros (T 1 p. 125).

Nemeth began the meeting by indicting that the meeting was being tape recorded. (A copy of the tape and a copy of a transcript

---

11/ Both Dougherty and Gehling admitted that R-9 indicated that attendance at the February 8th meeting was voluntary, but Dougherty felt she was under compulsion to go, and Gehling felt that she had to go because she was on the Association's negotiating committee (T 1 pp. 66, 95-96). However, the evidence also shows that employee Helen Makowski knew that attendance was not required at the February 8th meeting and she did not attend (T 2 p. 8).

Dougherty's explanation for believing that attendance on February 8th was required is without foundation and not reliable. Gehling's explanation is more an admission that she went to the February 8th meeting only in her role as Association Vice President, and not because the Board compelled attendance. Consequently, I believe that the attendance at the February 8th meeting was on a voluntary basis.

of the tape were admitted into evidence as Exhibits R-10A and R-10B). He further indicated that the cafeteria had a $37,000 deficit (in the year ending June 1982), and the Board wanted to make the operation more efficient by reducing labor. He reviewed the three options with the employees that the Board had considered, and indicated that the Board preferred reducing labor because its ratio of employee hours to meals prepared was too high. He informed the employees that the hours could be reduced either by completely eliminating about five positions, or by an across the board reduction of approximately one hour for each employee. Nemeth also advised the employees of the subcontracting option, but expressed the Board's preference for an across the board reduction. He further indicated that the Association opposed such a reduction, and he stated that the Board had not made a final decision.

Nemeth concluded by asking the employees to discuss the matter with the Association, and he gave the employees, and Association President Dougherty, the opportunity to ask questions, or make statements, but no questions were asked, and Dougherty indicated she had no statement to make at that time.12/

12/ Some pertinent parts of Nemeth's remarks on February 8 are as follows:

> ...The Board of Education through negotiations has presented this information during negotiations and your association has indicated that potential legal action could result if there was an across-the-board reduction. The Board has the

(Footnote continued on next page)

(Footnote continued from previous page)
right to reduce staff positions without any questions in regard to labor and so forth. Across the board is questionable.

As of today, the administrative recommendation to reduce hours has been accepted by the Board. There will be a reduction in hours. There will be personnel reductions. The method, whether it is full position cuts, or across the board reductions has not been determined.

Myself, Mr. Silverman, Mrs. Conover, we thought that the Association would have preferred an across-the-board reduction to keep everyone working. We anticipated your support in this matter. As I indicated, the Association has indicated a potential legal action regarding the across-the-board reduction.

Another possibility that the Board has is to subcontract. Bring in an outside contractor which would replace Mr. Silverman and in my opinion, possibly a large number of workers. Outside contracting has been a possibility.

The Board, through the administration, does feel that you people, the workers, are better off working, even if it is less than an hour that you are currently working today. Again, this is an average....

I, on behalf of Chris and the Board would ask you to share your opinion with regards to these options with your association leadership and ask them to consider it. We are not asking for any deals, agreements, or things like that. We wanted you to hear directly from us what was planned. You have heard it. Consider it, talk about it, think about it.

I would ask that you talk to Lorraine and let her know what your feelings are in regard to this matter. Before we go into comments or statements, Lorraine, I am hitting you cold, but do you have any comments or want to make any statements?

[Lorraine]: I don't want to respond at all at this time because Lynn is not here.

[John]: She was called and she was advised of this.

Are there are [sic] any other comments, questions, statements that you wish to make....

On February 9, 1983, the Board discussed the layoffs in an agenda meeting (T 2 p. 90), and on February 14, 1983, the five least senior employees, including Makowski, were handed envelopes by Meszaros containing layoff notices which were to be effective on March 3, 1983 (T 1 pp. 126-127, 171). None of the five laid off employees were officers of the Association (T 2 p. 94). Immediately upon receipt of those notices the five affected employees asked Meszaros to call a meeting with Nemeth regarding their layoffs, and that meeting was held later that day. Meszaros indicated that Nemeth told the employees about the $37,000 deficit, that he had discussed across the board reductions with the Association which rejected the same, and that the Board had no alternative but to layoff by seniority (T 1 pp. 127-128).

On February 15, 1983, the same five employees asked Meszaros to schedule a meeting with the remaining cafeteria employees in order to permit them (the five employees) to discuss alternatives to the layoffs with the other employees (T 1 pp. 85, 126-127; T 2 pp. 9-10). That meeting was held after work (approximately 2:00 or 2:15 p.m.) and attended on a voluntary basis (T 1 pp. 71, 101; T 2 p. 10). Meszaros opened the meeting and turned it over to Makowski, who explained what Nemeth had said the day before (T 1 p. 130; T 2 p. 10). Makowski asked the employees if they would agree to cut their hours to keep the five employees employed (T 2 p. 10), and Meszaros apparently asked for a show of hands (T 1 p.97). The record shows that even Meszaros agreed to a

one-hour cut in her own hours, but the employees voted against any across the board reduction.[13/]

On February 16, the Board, in a regular meeting, officially terminated the five employees effective March 3, 1983. The following announcement was made in the Board minutes (Exhibit R-11) regarding the terminations:

> President Luttman announced that the Board action to terminate the cafeteria workers was with deep regret. She commented that the action was necessary in order to maintain a sound financial cafeteria operation and that the reduction in force was necessary. She indicated that these employees would be retained on a substitute list and would be considered for future opening on the staff.[14/]

At that point, having reached impasse, the parties sought mediation assistance from the Commission. The first mediation session was held on March 29, 1983, at which time the Board continued

---

13/ The Association alleged that Meszaros "held" the meeting on February 15; that the meeting was conducted during working hours at 1:30 p.m.; and that she was responsible for generating hostility in the unit. However the facts show that the five laid off employees decided to call the meeting (T 1 p. 127), that although Meszaros opened the meeting (T 1 p. 130), Helen Makowski actually ran the meeting (T 1 p. 130, T 2 p. 10); that the meeting was conducted after work (T 1 p. 71), that Meszaros did not attend the entire meeting (T 1 p. 130), and that it was the subject matter and the employees, and not Meszaros, that generated the hostility (T 2 p. 11). Although Meszaros was present at the meeting for periods of time, and although she may have asked for a show of hands, that does not establish that she "held" or conducted the meeting. In fact, Makowski testified clearly that it was the five laid off employees, and not Meszaros, who asked the other employees to cut their hours. (T 2 p. 19).

14/ The record shows that three of the five laid off cafeteria employees have been rehired (T 1 p. 47).

to offer no wage increase. However, with the mediator's assistance the parties finally reached a memorandum of agreement on August 10, 1983 (Exhibit R-12), which contained a wage increase but made no reference to a workhours guarantee clause. By letter dated September 9, 1983 (Exhibit R-1), the Association notified the Board that it ratified the agreement on August 19, 1983. Then by letter dated September 16, 1983 (Exhibit R-17) Taylor forwarded a draft of the new agreement (Exhibit R-13) to Mouncey asking for corrections. Having received no response to R-17, Taylor, by letter dated January 3, 1984 (Exhibit R-16), asked Mouncey if there were problems with R-13. On or about January 6, 1984, Mouncey advised Nemeth that there were two problems with the draft, one problem concerned personal leave, the other concerned the workhours guarantee clause (T 3 p. 52). Mouncey advised Taylor that the Association thought they had a workhours guarantee clause in the agreement (T 3 pp. 54-55). Subsequently, on or about January 18, 1984, Taylor told Mouncey that the Board agreed to correct the personal leave matter, but there was no agreement on a workhours guarantee clause. Taylor told her that the Memorandum of Agreement was silent as to a workhours guarantee clause, and that there had been no discussions regarding that clause after January 13, 1983 (T 3 pp. 55-56).

4. After the reduction in force of the five instant employees, the Board changed the assignments of most of the remaining cafeteria employees in order to cover the work. Association President Dougherty admitted that the cafeteria job description

(Exhibit R-2) did not distinguish between various types of work, and both she and Makowski testified that assignment changes have been made in the past (T 1 pp. 81, 89-90; T 2 pp. 13-14). Nevertheless, the Association alleged that the Board violated the Act by making more onorous assignments to Association officials, and by reducing break time.

The facts show that the reassignments made by Meszaros and Silverman were based upon seniority where possible, but were also based upon which employee(s) was best for each assignment (T 1 pp. 140-141; T 2 pp. 136-137). Both Meszaros and Silverman testified that each employee's skills and productivity were considered in making assignments (T 1 pp. 140-141; T 2 p. 137). Although Meszaros and Silverman admitted that they might have known which employees were Association officials when they made the assignments, they testified that union activity was not a factor in making those assignments (T 1 p. 143; T 2 p. 137).15/

15/ I credit both Meszaros and Silverman's testimony that union activity was not a factor in their decision to reassign employees. Silverman is not a full-time Board employee and is not involved in negotiations with the Association (T 2 p. 137). Since he has not been involved in negotiations, and since he has very little day to day contact with the employees he is essentially a disinterested party with regard to union activity and I do not believe that such activity played any role in his reassignment decisions. In addition, I found Silverman to be a cooperative and forthright witness under both direct and cross-examination.

Although Meszaros is a full-time Board employee with daily contact with the employees she also plays no role in

(Footnote continued on next page)

The record shows that Association President Dougherty was reassigned to another school because of her ability to handle a larger number of lunches (T 1 p. 143), and Association Vice-President Gehling was reassigned to another school because she worked as a team with employee Corrado (T 1 p. 141).

Regarding the break time allegation, Dougherty admitted that after the layoffs and reassignments the employees still received their contractual break time (T 1 p. 89). It appears that the only break time that may have been eliminated was unofficial break time, such as for a cigarette break, which was not provided for in the parties' collective agreement.

5. Although the Association was aware of the Board's position in January 1983 of reducing labor because of cafeteria expenses, the Association never requested financial information from the Board during the negotiations process (T 1 p. 33). At hearing the Board relied upon several budgets and/or audits (Exhibits R-4, R-5, R-6, R-7, and R-8), and Nemeth's and Silverman's testimony to support its position that the cafeteria operation had not been cost efficient.

Both Nemeth and Silverman testified that there was a high labor to meal ratio in Spotswood accompanied by declining

---

(Footnote continued from previous page)
negotiations with the Association (T 1 p. 149). She appeared very forthright under a probing cross-examination and I credit her testimony that union activity was not a factor in making the reassignments.

enrollments and a decrease in the number of school lunches purchased in the years prior to the 1982-83 school year (T 2 pp. 34, 133-135). Silverman testified that there was a reduction in Federal food subsidies and as a result of that reduction, and the loss of participation in the lunch program, he recommended a cut in labor prior to any negotiations with the Association (T 2 p. 159).

In addition, Nemeth testified that the cafeteria did not have sufficient money to cover all expenses (T 2 p. 35), and that the workhours guarantee clause in Art. 7 of J-1 prevented him from reducing labor until after January 1983 which kept the labor to meals ratio too high (T 2 pp. 34, 62).

Finally, Nemeth testified that the decision to reduce labor was made in October 1982 in anticipation of negotiations (T 2 pp. 62-63). Nemeth indicated that the Board had hoped to reduce labor by reducing hours in order to keep as many people working as possible (T 2 p. 63-64). That hope generated the Board's offer to reduce the hours across the board in order to preserve as many jobs as possible.

6. The Association attempted to discredit the Board's financial and labor cost information through the testimony of Richard Gray, an NJEA employee, and through the introduction of its own documents (Exhibits CP-2, CP-3, CP-4). However, Gray's testimony and documents fell short of convincing me that adequate money existed to avoid a reduction in labor, or that the Board's budgets and audits were incorrect, or that the Board intentionally

misread those audits or improperly relied upon them in reaching its decision to reduce labor. The Board budgeted for depreciation and Gray admitted that if depreciation were included in expenditures there would be a deficit (T 4 p. 126). Gray further admitted that it was not improper for the Board to budget for depreciation and then not automatically purchase new equipment (T 5 pp. 10-15). Gray also admitted that salaries account for the cafeteria's largest expense, and that he was unaware of the extent of the cafeteria's cash flow problem and of how much money was owed to the Board from its cafeteria operation (T 5 pp. 23-25).16/

Analysis

Having reviewed all of the pertinent facts herein I find that the Board did not violate the Act by any of its actions, but that the Association violated N.J.S.A. 34:13A-5.4(b)(4) by failing to sign R-13, the new collective agreement.

Negotiations 1982-1983

The Association maintained that the Board violated subsection 5.4(a)(5) of the Act by failing to negotiate in good faith. It argued that the Board presented insufficient proposals

---

16/ Gray's testimony was limited to his interpretation of the Board's budget figures and in sum resulted in his belief that more money existed in the budget than the Board believed. But Gray clearly was not fully aware of all factors regarding the cost of the cafeteria operation or to what extent the Board was financing that operation as opposed to the operation being maintained on a self-sufficient basis. More significantly, however, Gray's testimony did not establish that the Board acted illegally by deciding in October 1982 that a reduction in hours was necessary.

during negotiations, that during negotiations it threatened to subcontract the cafeteria operation, and that it presented a wage freeze proposal in a "take it or leave it" attitude. I do not agree.

The standard for determining whether a party has refused to negotiate in good faith was established by the Commission in In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. (App. Div. 1976) wherein it held that:

> It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refual to negotiate may have occurred....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. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [Id. at 40, footnotes omitted].

The totality of the Board's conduct before, during, and after negotiations demonstrates that it acted in good faith. The Board had made a decision in October 1982 to reduce labor in the cafeteria due to financial considerations. It then informed its chief negotiator, Bruce Taylor, to take a wage freeze position during negotiations, and Taylor followed that instruction. The Board did make language proposals at the first session, and there was movement and agreements on some of those proposals at the second session. Taylor made the wage freeze/workhours proposal at the third session, and the Association, apparently recognizing the validity of the offer, presented it to the membership for consideration. Although

the parties subsequently reached impasse, the Board engaged in mediation which resulted in a collective agreement which included a salary increase without a workhours guarantee.

I believe that the Board engaged in nothing more than "hard bargaining." It entered negotiations determined not to grant both a wage increase and a workhours guarantee clause, and offered the clause in exchange for the freeze. When that offer was rejected by the Association the Board subsequently agreed to a wage increase but no workhours guarantee.

In State of New Jersey, supra, and again in In re Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (para. 15020 1983) the Commission held that a proposal freezing wages was not necessarily a failure to negotiate in good faith.

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith. 1 NJPER at 40 and 10 NJPER at 36.

In the instant case the Board did nothing more than maintain an adamant position regarding a wage proposal. In that regard I find that the Association's assertion that Taylor presented the wage freeze workhours guarantee proposal in a take it or leave it fashion was not established by a preponderance of the evidence. Mouncey only testified in general terms as to what Taylor had said, she could not recall the actual language that he might have used. Subsequently, when Mouncy asked Taylor if she could present a

counter proposal she testified that he said "no." Such a response hardly demonstrates a take it or leave it attitude. Taylor may simply have wanted the Association to first consider his proposal which is exactly what occurred. I am convinced that the Board did nothing more than engage in hard bargaining up to that point. Subsequently, the Board's behavior in mediation clearly manifested an intent to reach an agreement.

In sum, the Board entered negotiations knowing it had a financial problem and with the intent to reduce labor. It bargained hard for a wage freeze but was willing to guarantee hours. Once the workhours guarantee clause proposal had been rejected, and the existing clause expired, the workhours were reduced through a reduction in force, and the Board was then willing to agree to a wage increase. The Board's actions were not inconsistent, and under a totality of conduct test I find that it negotiated in good faith.

The Association's allegation that the Board violated the Act by threatening to subcontract the cafeteria operation is similarly rejected. Subcontracting is a managerial prerogative. In re Local 195, IFPTE, 88 N.J. 393 (1982). It could not be a violation of the Act (at least in this case) for the Board to inform the Association that it was considering doing what it had a legal right to do. Moreover, the evidence shows that the Board first considered subcontracting in October 1982, prior to negotiations, and prior to even knowing whether the Association would agree to a reduction in hours. It then informed the Association at the second

session that it was considering subcontracting, and Mouncey admitted that Taylor mentioned subcontracting to her on several occasions.

I conclude that Taylor's mention of subcontracting during negotiations, and at the meeting on February 2, 1983, was consistent with its pre-negotiations position, and was not a violation of the Act.

Nemeth Meeting - February 8, 1983

The Association alleged that Nemeth's meeting with the employees on February 8, violated the Act by circumventing the bargaining relationship with the Association and by dealing directly with the employees, which had a coercive affect on the exercise of their protected rights. The Association relied upon at least two Commission decisions to support its argument. See In re Rockaway Twp., P.E.R.C. No. 82-72, 8 NJPER 117 (para. 13050 1982), and In re State of N.J. (Dept. of Law and Public Safety), I.R. No. 83-2, 8 NJPER 425 (para. 13197 1982). However, those cases are not relevant here. In Rockaway the employer failed to submit a proposed agreement to the union president for ratification, and in State of N.J. the employer was adjusting grievances with an employee group which was not the majority representative. Those cases do not, however, deal with the free speech right of an employer to communicate with its employees during contract negotiations if those communications contain no threat of reprisal or force or promise of benefit.

The free speech rule was established in the private sector several years ago by the Court in N.L.R.B. v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953), 32 LRRM 2136 where it held:

> But the First Amendment of the Constitution of the United States protects an employer with respect to the oral expression of his views on labor matters provided his expressions fall short of restraint or coercion (NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 477 [9 LRR Man. 405] (1941)), and section 8(c) of the Act, supra, protects an employer with respect to like expressions in written, printed, graphic or visual form, provided his expressions contain "no threat of reprisal or force or promise of benefit." 32 LRRM at 2139.

That Court had the benefit of considering section 8(c) of the National Labor Relations Act ("NLRA") which provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Subsequently, the National Labor Relations Board ("NLRB") issued several decisions protecting an employer's right to communicate to its employees during the period of contract negotiations. See Proctor & Gamble Mfg. Co., 160 NLRB 334, 62 LRRM 1617 (1966); Safeway Trails Inc., 216 NLRB No. 171, 89 LRRM 1017 (1975); T.M. Cobb Co., 224 NLRB No. 104, 93 LRRM 1047 (1976) and PPG Industries Inc., 172 NLRB No. 61, 69 LRRM 1271 (1968). In Proctor & Gamble, supra, for example, the employer sent letters to the employees during negotiations criticizing the union's bargaining strategy. The NLRB found no violation because the employer's communiciations were motivated solely by the desire to relate its

version of the breakdown of negotiations. The NLRB in that case held:

> As a matter of settled law, Section 8(a)(5) does not, on a per se basis, preclude an employer from communicating in noncoercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith...(62 LRRM at 1620)

Similarly, in PPG Industries, supra, the NLRB found no violation where the employer sent letters to the employees outlining its proposals which had been rejected by the union, and indicated a readiness to "discuss problems" directly with employees.

Although the specific language in Section 8(c) of the NLRA is not present in our Act, the Commission, through the adoption of Hearing Examiner recommendations, has adopted the 8(c) standard in New Jersey.[17/] In re Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (para. 13137 1982) adopting H.E. No. 82-34, 8 NJPER 181 (para. 13078 1982); In re Rutgers, The State University, P.E.R.C. No. 83-136, 9 NJPER 276 (para. 14127 1983) adopting H. E. No. 83-26,

---

17/ See Lullo v. Int'l Assn. of Fire Fighters, 55 N.J. 409 (1970), and Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Ed'l Secys., 78 N.J. 1, 4 NJPER para. 4162 (1978) to support the recommendation that 8(c) of the NLRA be adopted in New Jersey. In Galloway the New Jersey Supreme Court reasoned that our Act was based upon the NLRA and, accordingly,

> ...the absence of specific phraseology in a statute may...be attributable to a legislative determination that more general language is sufficient to include a particular matter within the purview of the statute without further elaboration...78 N.J. at 15.

9 NJPER 177 (para. 14083 1983).[18/]

But even prior to issuing those decisions, the Commission in In re Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (para. 12223 1981) established certain communication rights for public employers when the comments (letters) are directed at the parties' labor relations. The Commission held:

> It must be noted that the Hearing Examiner did not find that writing the letters were per se violative of the Act, nor do we. A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. 7 NJPER at 503.[19/]

Subsequently, Camden Fire Dept., supra, and Rutgers, supra, were issued. In Camden the Fire Chief distributed a memorandum to

---

18/ The first recommendation to the Commission to adopt the NLRB standard was actually issued by Hearing Examiner Howe in In re Jersey City, H. E. No. 79-2, 4 NJPER 276 (para. 4141 1978). However, that case was settled and withdrawn prior to Commission action. Nevertheless, the facts therein are relevant to a consideration of the instant matter.

In that case the City sent a letter to the employees during negotiations informing them of their proposals and position. The Hearing Examiner found that the letter did not contain any threat to the employees and he recommended that the complaint be dismissed.

19/ The Commission found a violation in Black Horse Pike, supra, because the Board failed to distinguish between an employee's status as an employee representative, and his status as an employee. The Board had by letter criticized the actions of a union official but placed the letter in his personnel file rather than in the file related to union documents.

employees during negotiations criticizing the union president. The Hearing Examiner concluded that there was no threat of reprisal or force or a promise of benefit and the Commission adopted his recommendation that the complaint be dismissed.

In Rutgers, supra, the University sent notices to unit employees during negotiations advising them that, as a result of negotiations, the salary figure could be the same, higher or lower. The Commission adopted the Hearing Examiner's recommendation that there was no threat of reprisal or force or promise of benefits and it dismissed the complaint.

Finally, in In re Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (para. 15195 1984) the Commission held that statements made by a school principal to a union vice president/ grievance chairperson concerning her role on the Advisory Council were not violative of the Act. The Commission held that the principal's comments were within the sphere of permissible criticism and discussion under Black Horse Pike, supra. In addition, it held that the principal did not threaten any employees, change any terms and conditions of employment, or seek to undermine the union's exclusive majority status.

Regardless of which standards are used to judge Nemeth's remarks, the private sector/Camden and Rutgers approach, or the Black Horse Pike approach, his remarks were not a violation of the Act. Nemeth made no threat of reprisal or force or a promise of benefit, nor did he change any negotiable term or condition of

employment, nor did he seek to undermine the Association's majority status. I believe that Camden and Rutgers are more applicable here than Black Horse Pike, thus I find that, as in Proctor & Gamble, and PPG Industries, Nemeth here was only advising the employees during negotiations of the Board's proposal regarding a reduction in workhours, and that the Association had rejected the same. There was no threat of reprisal, and Nemeth was motivated solely by the desire to relate the Board's version of the breakdown in negotiations on that issue.

Moreover, I find that the meeting was attended on a voluntary basis and on employee time. I do not credit Dougherty's and Gehling's assertions that the meeting was mandatory (see note 11 infra). In addition, the Association's President and Vice President were at the meeting, Nemeth specifically asked the employees to discuss the matter with the Association leadership, he promised nothing in return, and he then gave President Dougherty the opportunity to make her own statement.[20/] Under all of these circumstances neither the meeting itself nor Nemeth's speech was violative of the Act.

20/ See also In re Mt. Olive Bd. of Ed., supra, where the Commission found that a meeting with employees over a proposed reduction in hours was not unlawful where 1) the meeting was held at the employees request, 2) the union shop steward was present, and 3) there were no threats or coercion.

The facts in the instant case are similar to Mt. Olive. The meeting here was voluntary, the Association officials were present, and there were no threats or coercion.

Nemeth Meeting - February 14, 1983

On February 14, 1983 the five employees that had been notified that they were being laid off requested a meeting with Nemeth. Nemeth essentially reiterated the remarks he had made on February 8. For the same reasons discussed above, I find that those remarks were not a violation of the Act in this second meeting. Once again, Nemeth made no threat of reprisal or force or promise of benefit. The meeting was called for by the employees and attended on a voluntary basis.

Employee Meeting - February 15, 1985

The Association alleged that Meszaros' involvement and participation in the meeting held on February 15, 1983 coerced and intimidated employees and was, therefore, a violation of the Act. I disagree.

I am aware of the standards for finding independent 5.4(a)(1) violations of the Act and recognize that motive is unnecessary. In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (para. 4189 1978); In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (para. 10285 1979). I am equally aware that proof of actual interference or coercion is unnecessary to establish an independent 5.4(a)(1) violation of the Act. "The tendency" of an employer's conduct to interfere with employee rights is the controlling element. In re Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (para. 13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83). In re City of Hackensack, P.E.R.C. No.

78-71, 4 NJPER 190 (para. 4096 1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79); In re City of Hackensack (City of Hackensack v. Winner, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd on other grounds 162 N.J. Super. 1 (App. Div. 1978), aff'd as modified 82 N.J. 1 (1980).

However, in this case I find that Meszaros' limited participation in the February 15 meeting did not have even "the tendency" to interfere with employee rights. I credit Meszaros and Makowski that it was Makowski and the other laid off employees, and not Meszaros, who actually called and conducted the meeting, and that the meeting was held after working hours, and on a voluntary basis. Both Dougherty and Gehling attended the meeting and admitted that attendance was voluntary.

I do not credit Dougherty's "impression" that Meszaros instigated the meeting or generated hostility. That "impression" is inconsistent with the facts as a whole. Rather, I credit Makowski's testimony that it was the subject matter and the employees themselves, and not Meszaros, that generated hostility. See note 13 infra.

In sum, I find that the factors discussed in Mt. Olive, supra, are controlling here. The meeting was called and held at employee request, it was attended on a voluntary basis, the Association President and Vice President were present, and Meszaros made no threats, nor did her remarks have the tendency to interfere with employee rights. Consequently, neither the meeting nor Meszaros' limited participation therein violated the Act.

The Board's Financial Condition - Reduction in Force - Reassignments

The Association alleged that the Board's layoff of five employees, ostensibly due to fiscal reasons, was pretextual. The Association asserted that there was, or should have been, adequate money in the cafeteria budget to retain the employees, and that the Board laid off those employees in retaliation for the Association's failure to agree to a reduction in hours or a wage freeze. Finally, the Association alleged that the reassignments and loss of break time subsequent to the layoffs were in violation of the Act. I disagree.

In order to establish that the layoffs were a violation of subsection 5.4(a)(3) of the Act, the Association must establish an anti-union motive. In re Borough of Haddonfield Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); In re Cape May City Bd. of Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (para. 11022 1980). Where, as here, the Board alleges business justification for its actions, the dual motive test established by the N. J. Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) applies.[21/] That test requires the Association to first prove the existence of the elements of an unlawful motive which

---

21/ The Court in Bridgewater merely adopted the dual motive test that had been developed by the U. S. Supreme Court and the NLRB, and that had been previously adopted by our Appellate Division. See NLRB v. Transportation Mgt. Corp., ___ U.S. ___, 113 LRRM 2857 (1983); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980); E. Orange Public Library v. Taliaferro, 180 N.J.Super. 155 (1981).

then shifts the burden to the Board to prove that legitimate business justification existed for its actions.

Assuming, arguendo, that the Association proved an anti-union motive for the layoffs, I find that the Board clearly established legitimate business justification for its actions, and that the Association failed to prove that the Board's asserted business justification was pretextual. First, I cannot credit Gray's testimony regarding the Board's financial condition since he was not aware of all the factors involved in a consideration of the cost of the cafeteria operation and the use of Board funds therein. Second, neither Gray nor any other Association witness or piece of evidence contradicted the Board's evidence that the meal to labor ratio in Spotswood was too high and not in compliance with Federal guidelines. Finally, the Association did not establish that any anti-union motive existed in October 1982 when the Board first made the decision to reduce labor.

The timing of the Board's decision is a critical factor. The evidence clearly shows that the Board decided to reduce labor in October 1982 based upon its "belief" that fiscal problems existed, and because of the inappropriate meal to labor ratio. But even if the Board misinterpreted its own budget figures and sufficient money existed therein to avoid a layoff, it is clear that the Board at least "believed" in October 1982 that a fiscal problem existed and it therefore made its decision to reduce labor. The Board believed that a fiscal problem existed because of declining enrollment, and an increase in the lunch meal which resulted in a loss of student

participation in the lunch program. In reaction to that the Board decided to reduce labor to save money rather than increase the cost of the lunch which would result in a further loss of student participation in the lunch program. I credit that explanation as the reason for the Board's decision to reduce labor. The Board could not have made that decision at that time based upon an unlawful motive since no such motive existed at that time. The Board could not have known in October 1982 that the Association would rejct its offer to negotiate a reduction in hours.22/

Although the Board formally reduced its force subsequent to the Association's rejection of the wage freeze/workhours guarantee offer, that action did not constitute a violation in this case. The Board followed the very procedure intended for a proposed reduction in hours. It sought to negotiate the reduction. But having failed to reach an agreement on the proposal to reduce hours, the Board had the managerial right to institute a reduction in force. Maywood Ed. Assn. v. Maywood Bd. of Ed., 168 N.J.Super. 45 (App. Div. 1979), pet. for certif. den. 81 N.J. 292 (1979). The Commission,and the courts, have consistently held that, although a reduction in hours must be negotiated, a public employer may cut

---

22/ Thus, even assuming that Gray's testimony was correct and sufficient money existed in the cafeteria budget to avoid a layoff or reduction in hours, there was still no violation herein. Since no unlawful motive existed for the Board's decision in October 1982 to reduce labor, the Board obviously believed that a fiscal problem existed. Even though the actual reduction in force occurred after an unlawful motive could have existed, the initial decision was lawfully based, and the Board's subsequent actions were all consistently based upon its initial decision and belief.

staff, i.e., abolish positions, without prior negotiations. Piscataway Twp. Bd. of Ed. v. Piscataway Twp. Principals Assn., 164 N.J.Super. 98 (App. Div. 1978); In re East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (para. 13145 1982); In re Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (para. 14066 1983); In re Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (para. 16024 1984).

That is exactly what the Board did here. It attempted to negotiate a reduction in hours, but when that was rejected, it had the right to reduce force. I find that both the decision to reduce labor, and the eventual reduction in force were motivated by only one thing, the Board's effort to reduce the cost of the cafeteria operation and lower the meal to labor ratio because of an anticipated budget shortfall. Union activity was not a motivating factor for either of the Board's decisions.[23/]

23/ The Commision's decision in In re Belvidere Bd. of Ed., P.E.R.C. No. 81-13, 6 NJPER 381 (para. 11197 1980) is similar to the instant case. In Belvidere the Board threatened and eventually dismissed an employee. The Board defended the dismissal through evidence of a financial crisis, but the union argued that the financial crisis was pretextual because the Board had placed itself into financial difficulty by not expanding its budget to its CAP law limits. The Commission found the threats in violation of the Act, but credited the business justification for the dismissal. The Commission rejected the union's assertions that the Board created the financial crisis. See also In re Jackson Twp., P.E.R.C. No. 81-76, 7 NJPER 31 (para. 12013 1980).

Similarly, in the instant case, the Association implied - based on Gray's testimony - that the Board may have created some of its own budget problems by the way it handled depreciation, by mishandling some food storage, and other complaints. However, that "implied" argument is without merit. The Board believed a budget problem existed and it took action to minimize expenses. Therefore, no violation was committed.

Finally, the Association's argument that the Board violated the Act because of the reassignments it made after the reduction in force is without merit. I credit Silverman and Makowski who testified that the assignments were based upon seniority and/or work ability, and not union activity. Moreover, I note that reassignments or redistribution of work as a result of a reduction in force is non-negotiable. In re Maywood Bd. of Ed., supra; In re Kingwood Twp. Bd. of Ed., P.E.R.C. No. 82-31, 7 NJPER 584 (para. 12262 1981); In re Edison Twp. Bd. of Ed., P.E.R.C. No. 83-106, 9 NJPER 142 (para. 14067 1983); In re Pequannock Twp. Bd. of Ed., P.E.R.C. No. 83-167, 9 NJPER 404 (para. 14184 1983).

The Workhours Guarantee Clause

The Association alleged that Article 7, Sec. A(5) did not expire on January 31, 1983, that it was a negotiable term and condition of employment, that it continued unchanged as part of the status quo after January 1983, and that it was therefore to be included in R-13 because the Board never succeeded in removing that clause from the agreement. I disagree. The clause, by its own terms, expired on January 31, 1983, and was, in any case, a non-negotiable clause as worded. Thus the Association had an obligation to sign R-13 without the inclusion of Art. 7, Sec. A(5) of J-1.

Generally, under standard contract construction and interpretation guidelines, every word, phrase, or sentence in a contractual clause has meaning. The last sentence in Art. 7, Sec. (A)(5) of J-1 provides that:

> Both guarantees [the one for workhours and the one for workdays] expire on January 31, 1983. (bracketed language added)

The Board argued that the last sentence means exactly what it said, that the guarantees expire on January 31, 1983. The Association argued that the language in the last sentence had no meaning. It argued that the contract expiration date was January 31, 1983 and that the last sentence in Art. 7, Sec. A(5) was merely superfluous, and that the clause remained alive as part of the status quo just like the remainder of the agreement.

The Association's argument in that regard is without merit. The last sentence of Art. 7, Sec. A(5), on its face, indicates that the clause expires on a particular day. That sentence was intended to have some special or particular meaning or it would not have been placed in the agreement. The Association's argument is an attempt to circumvent the clear meaning of the language. The N. J. Supreme Court in Washington Construction Co., Inc. v. Spinella, 8 N.J. 212, 217 (1951) held:

> ...the court will not make a different or a better contract than the parties themselves have seen fit to enter into.

In the instant case the parties agreed that Art. 7, Sec. A(5) would expire on January 31, 1983. Any parol evidence provided by the Association suggesting that the last sentence of Art. 7, Sec. A(5) was not intended to prevent that clause from expiring on January 31, 1983 is irrelevant. Casriel v. King, 2 N.J. 45 (1949); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953); Cherry Hill Bd. of Ed. v. Cherry Hill Assoc. School Administrators,

App. Div. Docket No. A-26-82T2, December 23, 1983. Any such parol evidence could only have been offered for the purpose of giving effect to an intent at variance with the clear meaning of the language in that clause. As the Court in Casriel v. King held:

> So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. 2 N.J. at 51.

Although I have found that Art. 7, Sec. A(5) expired on January 31, 1983, even assuming that the Association was correct and the clause survived as part of the status quo, I find the clause, as worded, to be an illegal subject of negotiations and therefore inappropriate for inclusion in either J-1 or R-13.

The clear intent and purpose of the clause, on its face, was to guarantee the workdays and workhours, i.e. the jobs, of particular employees, those employees employed prior to July 1, 1981, the effective date of J-1. The effect of that language was to prevent the Board from instituting a reduction in force that would include any employees employed prior to July 1, 1981. That was illegal. The Courts of this State have clearly held that a reduction in force is a non-negotiable managerial prerogative. Maywood, supra. Since the language in Art. 7, Sec. A(5) prevented the Board from exercising its managerial prerogative it is a non-negotiable and unenforceable clause.[24/]

24/ The instant case is similar to In re Trenton Bd. of Ed., P.E.R.C. No. 85-62, 10 NJPER 25 (para. 16013 1984). In that case the union sought to negotiate the following clause:

(Footnote continued on next page)

The facts of this case support this very finding. Nemeth testified that Art. 7, Sec. A(5) prevented him from reducing staff prior to January 31, 1983 which, in turn, contributed to the high meal to labor ratio. If Art. 7, Sec. A(5) had not been in effect the Board would not have felt compelled to avoid a reduction in force to save money. Without such a clause this Board would be free to exercise its managerial prerogative.25/

Having found that Art. 7, Sec. A(5) expired on January 31, 1983, and having found that, even if that clause survived beyond that day, it was still non-negotiable, I have no alternative but to find that the Association violated subsection 5.4(b)(4) of the Act by refusing to sign R-13 which did not include the instant workhours guarantee clause. The facts show that after a minor language problem over personal leave was resolved, the only reason R-13 was

---

(Footnote continued from previous page)
The Board agrees that except for the right to reduce positions consistent with the law and this agreement, all unit titles and responsibilities shall remain in effect.

The Commission held that even though the clause recognized the Board's right to reduce positions, it would interfere with its right to reorganize its operations and realign positions, and was therefore non-negotiable. The instant clause similarly interferes with the Board's exercise of a managerial prerogative and is therefore non-negotiable as worded.

25/ By finding Art. 7, Sec. A(5) to be non-negotiable I am not suggesting that workhour guarantee clauses, in general, are non-negotiable. See for example In re Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, supra, where a union negotiated to guarantee six hours of work for certain cafeteria personnel. Rather, the problem in the instant case was that Art. 7, Sec. A(5) guaranteed hours for particular employees which, in turn, prevented the Board from reducing those employees.

not signed by the Association was because of its insistence that the language in Art. 7, Sec. A(5) of J-1 be included therein. Under the instant circumstances that refusal to sign was a violation of the Act.26/

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

Conclusions of Law

1. The Spotswood Cafeteria Employees Association violated N.J.S.A. 34:13A-5.4(b)(4) by refusing to sign the parties 1983-85 collective agreement, R-13.

2. The Association did not violate N.J.S.A. 34:13A-5.4(b)(3) or (5) because there was no showing that the Association otherwise refused to negotiate, and there was no showing that any Commission rules were violated. Those portions of the Board's Complaint should be dismissed in their entirety.

3. The Spotwwood Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5), (6) or (7) by its negotiations conduct, by instituting a reduction in force, by conducting or participating in certain meetings with employees, or by insisting

---

26/ The Association essentially took a chance that Art. 7, Sec. A(5) did not expire on January 31, 1983, and took a chance that said clause was negotiable. Since the Association did not propose a negotiable workhours clause during negotiations or mediation, and since the other clause was non-negotiable, there was nothing left for the parties to negotiate on that issue. Consequently, there was no longer a reason for the Association to refuse to sign R-13.

that a workhours guarantee clause was not included in R-13. The Association's Complaint and Amended Complaint should be dismissed in their entirety.27/

27/ In addition to dismissing the Association's Amended Complaint on its mereits, I find that it could also have been dismissed based on procedural grounds. On June 14, 1984 the Association moved to amend its Complaint to allege that the Board violated subsection 5.4(a)(6) and (7) of the Act. Although I was unaware at that time of all of the facts regarding the Amendment, I permitted the Amendment to be included in the Complaint at that time because it concerned the same issue as raised by the Board in its allegation that the Association violated subsection 5.4(b)(4) of the Act. I had not, however, concluded at that time whether the Amendment was actually timely filed. I only found that it appeared to be timely.

Having reviewed all facts and evidence, however, I now conclude that the Amendment was not timely filed in accordance with the six-month statute of limitations in N.J.S.A. 34:13A-5.4(c). The facts show that the Board forwarded a copy of R-13 to the Association on September 16, 1983 asking for any corrections, but the Association did not respond. It was only through the Board's prodding that the Association finally responded on January 6, 1984 that the workhours guarantee clause was not included in R-13. The Board confirmed on January 18, 1984 that no workhours guarantee was to be included in R-13.

The six-month statute of limitations period was that time from June 14, 1984 back to December 14, 1983. I find the operative date here to be September 16, 1983, the time R-13 was provided to the Association, and not January 18, 1984, the time the Board merely confirmed that the workhours guarantee clause was not included in R-13.

The Association had ample time between September 16 and December 14, 1983 to review R-13 and verify whether the workhours guarantee clause was to be included therein. The Association had to know during that three-month period that the workhours guarantee clause was not included in R-13, yet it took no action to verify the situation. It cannot now benefit from its own delay and argue that January 18, 1984 is the operative date.

Recommended Order

I recommend that the Commission ORDER:

A. That the Association cease and desist from:

Refusing to sign the 1983-85 collective agreement between the parties, R-13, because it believed that a workhours guarantee clause should be included therein.

B. That the Association take the following affirmative action:

1. Immediately sign the parties' 1983-85 collective agreement, R-13, without the inclusion of a workhours guarantee clause.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Association has taken to comply herewith.28/

C. That the Complaint be dismissed regarding the allegation that the Association violated subsections 5.4(b)(3) and (5) of the Act.

28/ I believe that the posting of a notice is unnecessary in this case. It would not serve to further effectuate the purpose of the Act, and may very well only exacerbate an already very unstable relationship between the parties. It is enough that the Association simply sign R-13. I note that R-13, itself, is about to expire and the parties presumably are in negotiations for a successor agreement. It is better that the parties' new agreement begin on an amicable note, and the posting of a violation in 1983 will not contribute to that goal.

D. That the Complaint and Amended Complaint be dismissed regarding the allegation that the Board violated subsection 5.4(a)(1), (3), (5), (6), and (7) of the Act.

Arnold H. Zudick
Hearing Examiner

Dated: May 9, 1985
Trenton, New Jersey