P.E.R.C. NO. 91-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CARLSTADT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-90-87

CARLSTADT EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Carlstadt Education Association against the Carlstadt Board of Education. The Complaint alleged that the Board violated the New Jersey Employer-Employee Relations Act when it increased seventh and eighth grade teachers' instructional time by 34 minutes per day without additional compensation. The Commission finds that the Board increased instructional time within the confines of contractual workload protections and therefore did not refuse to negotiate in good faith.

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Appearances:

For the Respondent, Janeczko & Cedzidlo, attorneys
(Mark T. Janeczko, of counsel)

For the Charging Party, Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel)

DECISION AND ORDER

On October 2, 1989, the Carlstadt Education Association filed an unfair practice charge against the Carlstadt Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by unilaterally increasing seventh and eighth grade teachers' instructional time by 34 minutes per day without additional compensation.[2/]

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...."

2/ At the hearing, the charge was amended to include seventh and eighth grade special area teachers.

On January 12, 1990, a Complaint and Notice of Hearing issued. The Board's Answer asserts that it complied with the parties' collective negotiations agreement and exercised its managerial prerogative to provide for proper educational policy considerations. It also asserted that a consistent past practice constitutes a waiver of the charging party's negotiations rights.

On March 12, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by May 21, 1990.3/

On December 19, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-17, 17 NJPER 69 (¶22033 1990). He found that although the increase in instructional time was mandatorily negotiable, it was within the limits of relevant contractual provisions.

The Association filed timely exceptions. It claims that the contract does not define the length of a teaching period and that since the parties did not contemplate this increase, the contract is not a defense.

The Board's reply urges adoption of the Hearing Examiner's recommendations. It claims that even though it had granted more preparation time than was contractually mandated, it could only be

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3/ The Hearing Examiner was asked not to issue a decision pending settlement negotiations. The case was not settled and on August 13, 1990, the Hearing Examiner was asked to proceed.

held to the obligation it contracted for and, therefore, it could unilaterally return to the contractual level of benefits. It incorporates its post-hearing brief.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-6) are accurate. We incorporate them with this minor modification. In prior years, the 30 minute class period did not require homework or testing, but did require teaching. Subjects such as library science, music and science enrichment were taught.

It is well-established that the extent of pupil-teacher contact time is mandatorily negotiable. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). But an employer will not be found to have violated its negotiations obligation if an increase in pupil contact time is authorized by the collective negotiations agreement.

The facts of this case closely parallel the facts in Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980). There, 30 minutes of pupil contact time were substituted for 30 minutes of duty-free time. The contract set the length of the workday and the maximum number of teaching periods and the number of duty-free and planning periods within the workday. Because the disputed increase was within the contractual limits we dismissed the Complaint.

Here, the Board increased instructional time by eliminating ten minutes per day of homeroom duty and 24 minutes per day of special assignments (supervision of audio/visual aids, equipment, student council and locker room/playground duty). But in doing so, it did not violate any of the contractual workload protections. Consistent with the contract, the length of the school day remained at seven hours and teachers received their 50 minute duty-free lunch period, had 280 or 260 minutes per week of preparation time, and taught no more than six periods per day.

Under these circumstances, Pascack controls this case. We find no refusal to negotiate in good faith and dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991

H.E. NO. 91-17

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

In the Matter of

CARLSTADT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-90-87

CARLSTADT EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1) or (5) of the Act when it unilaterally and without negotiations with the Charging Party implemented a schedule change for its 7th and 8th grade teachers for the 1989-90 school year, which reduced the number of periods per day from eight to seven and increased the instructional time by 34 minutes per day. The Hearing Examiner found that although the change was mandatorily negotiable it was within the limits of the contractual provisions between the parties: Maywood Bd. of Ed. and Pascack Valley Bd. of Ed.

Also, there was the threshold issue of whether or not the Association had clearly and unmistakably waived its right to litigate the Unfair Practice Charge but the evidence was found wanting since this was a workload increase case and there was no prior obligation on the part of the Association to request negotiations.

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. 91-17

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Appearances:

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For the Charging Party, Bucceri & Pincus, Attorneys
(Sheldon H. Pincus, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 2, 1989, by the by the Carlstadt Education Association ("Charging Party" or "Association") alleging that the Carlstadt Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that for the school years 1986 through 1989, the Board scheduled an eight-period school day in the 7th and 8th grades but that on September 5, 1989, it instituted a seven-period school day in the same grades, the result of which was that each 7th and 8th grade teacher is now required to provide an additional 34 minutes of instructional time per day [an

additional 170 minutes of instructional time per week]; and such increases in instructional time were instituted without additional compensation for the affected teaching staff members;[1/] all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[2/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 12, 1990. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 12, 1990, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the Charging Party's case, the Board elected to call no witnesses and stated it would argue upon the record made (Tr 89). Oral

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1/ The Association was permitted to amend ¶5 of its Unfair Practice Charge at the hearing on March 12, 1990, infra, over the objection of the Board, to provide that the terms "teacher" and "teaching staff members" include "special area teachers" in the 7th and 8th grades (Tr 8-11).

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

argument was waived and the parties filed post-hearing briefs by May 21, 1990.[3/].

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

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Carlstadt Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Carlstadt Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. There are three schools in the District, one of which is the Washington School (K-8) and its 7th and 8th grade teachers involved herein (Tr 13).

3/ In or around the date of receipt of the parties' post-hearing briefs, the Hearing Examiner was requested to defer the preparation of his decision since settlement negotiations were in progress. However, by letter received August 13, 1990, the Hearing Examiner was informed that an amicable resolution had not occurred and that he should proceed with his recommended report and decision.

4. The two most recent collective agreements between the parties, effective, respectively, July 1, 1986 through June 30, 1989 [J-1] and July 1, 1989 through June 30, 1991 [J-2] provide for a school day of seven hours duration [J-1 and J-2 at p. 23]. The Association's witnesses acknowledged that the seven-hour length of the school day has remained unchanged during the term of each of the above agreements (Tr 40, 62).

5. Each of the above collective agreements provides for 280 or 260 minutes per week of professional or preparation time for 7th and 8th grade teachers. This term and condition has remained unchanged during the cumulative term of the agreements from 1986 to date for the 7th and 8th grade teachers. [J-1 & J-2 at p. 23; Tr 30-32, 40, 41, 63]. Similarly, each agreement provides for a duty-free lunch 50 minutes daily and this term and condition remained unchanged since 1986 (Tr 40, 62).

6. Further, each of the collective agreements provide that no 7th or 8th grade teacher involved in the teaching of a major subject shall "normally" be scheduled to teach more than six periods per day and this requirement has remained unchanged (J-1 & J-2, p. 24; Tr 24, 25, 41). However, the collective agreements do <u>not</u> define the duration of the specified six teaching periods per day and this has remained unchanged (Tr 64, 85). None of the 7th and 8th grade teachers involved herein were required to teach more than six periods per day during the 1989-90 school year as in the prior year (Tr 15, 16, 24).

7. In the 1988-89 school year, the 7th and 8th grade teachers were scheduled for a total of eight periods per day, of which six were teaching periods and two were non-teaching periods. Further, the first seven periods were of 40 minutes duration and the eighth period, at the end of the day, was of 30 minutes duration for a total of 310 minutes per day. There were approximately 20 students in each teaching period. [Tr 13-18, 31].

8. The master schedule for the 1989-90 school year became known to the Association's President and negotiator in August of 1989 during the course of collective negotiations for J-2 (Tr 23, 52, 53, 63; CP-5). This schedule, which was implemented in September 1989, had the following impact upon 7th and 8th grade teachers: (1) teachers were scheduled for a total of seven periods per day, of which six were teaching periods; (2) the length of each period was increased from 40 minutes to 44 minutes compared to the prior school year for a total of 308 minutes per day; (3) the number of minutes of instructional time was increased by 34 minutes per day or 170 minutes per week; and (4) there was no change in the number of students per teaching period. [Tr 15, 23-25; CP-5].

9. The additional 34 minutes per day of instructional time under the 1989-90 master schedule were obtained by eliminating ten minutes per day from homeroom duty and 24 minutes per day from special assignment periods or central detention (Tr 26-28, 32-34).

10. The impact of the increase in instructional time during the 1989-90 school year was that a major subject is now

taught within the increased allotment of time (34 minutes), which involves planning, testing, etc. and increased pupil contact, as opposed to the 30-minute class at the end of each day in the prior year where teaching duties were not involved (Tr 34; 56-61).

11. Negotiations for J-2 commenced on December 8, 1988, and continued for almost a full year until J-2 was executed in November 1989. Exhibit J-1 had expired on June 30, 1989. [Tr 46, 47, 52-54, 73]. Notwithstanding that the Association's President learned of the 1989-90 master schedule change in August 1989, and that additional negotiations sessions followed, the Association never requested negotiations on the subject of additional compensation for the affected 7th and 8th grade teachers (Tr 37, 62, 63, 82).

ANALYSIS

The Association Did Not Clearly And Unmistakably Waive Its Statutory Rights Under The Act By Its Conduct Herein.

The Board argues that the Association has by its conduct waived its right to negotiate additional compensation for the 7th and 8th grade teachers affected by the changes in the 1989-90 master schedule. It points to the fact the changes occurred during the negotiations for s successor agreement to J-1 yet the Association never requested negotiations (see Finding of Fact No. 11). From this, the Board contends that this record satisfies the requirement

that the Association clearly and unmistakably waived its rights under the Act.[4/]

The Board claims that two decisions of the Commission support its position that a waiver has occurred: Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984) and Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987). However, both cases are inapposite since each involved the exercise of a non-negotiable managerial prerogative, following which the union failed to demand negotiation of a severable term and condition, which was otherwise negotiable. Therefore, a waiver was found.

In Monroe the Board made a managerial decision to subcontract its cafeteria operation and the union failed to demand negotiations as to severance pay and recall rights, contending that the Board had the duty to negotiate prior to implementing its decision. The Commission disagreed, holding that since the subcontracting decision was not negotiable, it was the union's burden to demand negotiations on the severable aspects of the Board's decision. [10 NJPER at 570, n.6]. To the same effect, see Trenton where the Board made a non-negotiable decision to abolish a job title.

4/ Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); So. River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986); State of N.J., P.E.R.C. No. 86-64, 11 NJPER 723, 725 (¶16254 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980); No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 452 (¶4205 1978); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 112 LRRM 3265, 3271 (1983); and Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636, 111 LRRM 2165, 2168 (2nd Cir. 1982).

Thus, the Board's waiver argument must fall under the weight of Commission precedent, dating back to New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (1979). There it was held that "...Where, during the term of an agreement, a public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement though a 'maintenance of benefits' or other similar provision, the employer must first negotiate such proposed change with the employees' representative prior to its implementation..." (4 NJPER at 85)(Emphasis supplied). This proposition was derived from Section 5.3 of the Act, which provides, in part, that "...Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established..."

Since the Association has proven that the Board unilaterally increased teacher workload without prior negotiations, Monroe and Trenton, supra, are inapposite because a workload change is a mandatorily negotiable term and condition and not an inherent managerial prerogative. This being so, the New Brunswick principle is applicable, i.e., the employer, not the union, must initiate collective negotiations prior to the proposed changes: Red Bank Bd.

of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); East Newark Bd. of Ed., P.E.R.C. No. 82-123, 8 NJPER 373 (¶13171 1982); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (1982); Middletown Tp. Bd.Ed., P.E.R.C. No. 88-118, 14 NJPER 357 (¶19138 1988); Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322 (1989) aff'g App. Div. Dkt. No. A-5558-86T8 (1988). See also, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

There being no evidence of a clear and mistakable waiver by the Association, the Hearing Examiner next addresses the substantive issue of whether or not the 1989-90 schedule changes were consistent with the terms of the collective negotiations agreement or were a mandatorily negotiable increase in the workload of the 7th and 8th grade teachers.

The Respondent Board Did Not Violate Sections 5.4(a)(1) And (5) Of The Act When It Unilaterally Changed The Schedule For Certain Of Its Teaching Staff From Eight To Seven Periods Per Day, Beginning With The 1989-90 School Year Since This Change Was Within The Limits Established By The Collect Agreement.

During the collective negotiations between the parties for a successor agreement to J-1, which spanned a period from December 1988 through November 1989, the Board informed the Association about its 1989-90 master schedule in August 1989 (See Finding of Fact No.

11). This schedule contained a change from eight to seven periods per day for 7th and 8th grade teachers, the result of which was a 34-minute increase of instructional time per day or 170 minutes of instructional time per week (see Finding of Fact No. 8). The increased instructional time allotment was obtained by eliminating ten minutes per day from homeroom duty and by eliminating 24 minutes per day from special assignment periods, each of which had existed in the prior school year (see Finding of Fact No. 9).

Consistent with the terms of each collective negotiations agreements (J-1 and J-2): the length of the school day has at all times remained at seven hours; the duty-free lunch period of 50 minutes has remained unchanged; the 280 or 260 minutes of "professional" or "preparation" time has remained unchanged; the contractual limit of six teaching periods per day has remained unchanged; and the undefined length of the teaching periods per day has remained unchanged (see Findings of Fact Nos. 4, 5 & 6).

Initially, it cannot be gainsaid but that a unilateral change in teaching schedules, i.e. substituting instructional time for homeroom duty and special assignment periods[5/] would normally constitute a mandatorily negotiable increase in workload: See Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); In re Byram Tp.

5/ Defined as supervision of audio/visual aids, equipment, student council and locker room/playground duty (Tr 17).

Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/20/80); City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. A-954-79 (1980), certif. den. 87 N.J. 310 (1981); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82); East Newark Bd. of Ed., P.E.R.C. No. 82-123, 8 NJPER 373 (¶13171 1982); Wharton Bd. of Ed., P.E.R.C. No. 83-35, 8 NJPER 570 (¶13263 1982); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1982). Buena Reg. School Dist., P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985); Deptford Tp. Bd. of Ed., P.E.R.C. No. 86-54, 11 NJPER 706 (¶16244 1985); Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987).

The remaining question is whether or not the Complaint must be dismissed because the change in the 1989-90 master schedule was consistent with the limitations established by the collective negotiations agreement between the parties. The controlling decisions on the point begin with Maywood Bd., supra, and Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

The Court in Maywood stated, inter alia that although pupil contact time was mandatorily negotiable if the Board acted within the terms of the contract or past practices, then it did not violate the Act. Maywood was cited and relied upon by the Commission in Pascack which, similar to the case at bar, involved a unilateral

change in teacher schedules from nine periods to eight periods per day. The teachers there continued to be assigned five teaching periods, one supervisory period and one homeroom period as in the prior year. The result of the change was a 25-minute increase in actual teaching time and a five-minute increase in supervisory time, i.e. an increase of 30 minutes in pupil contact time per day. There was also a corresponding 30-minute decrease in unassigned time due to the loss of an unassigned or duty-free period. The duty-free lunch period and the unassigned duty-free "prep" periods remained changed. Finally, the contractual length of the school day remained constant at six hours and 51 minutes. [6 NJPER at 470].6/

The Hearing Examiner in Pascack had concluded intitially that the unilateral change was mandatorily negotiable but that the Board's action was permissible under the terms of the agreement. The Commission adopted this conclusion since the change was "...within the limits established by the collective agreement between the parties..." (6 NJPER at 555). It was noted specifically that the normal teaching load did not exceed the contractual limit of five teaching periods per day, the duty-free time remained unchanged and the changes did not affect the length of the contractual school day.

Several subsequent cases worthy of note are also based upon the Pascack principle. For example, in Randolph Tp. Bd. of Ed.,

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6/ See H.E. No. 81-6, 6 NJPER (¶11239 1980).

P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982) the Commission reiterated the necessity of reading "...the contract as a whole...," particularly provisions setting the length of the workday, the number and length of the teaching periods and the number of preparation or other duty-free periods. These, when read together, may sanction a unilateral change (8 NJPER at 601).

The most recent Commission decision on point, which relies, inter alia, upon Pascack is Glen Ridge Bd. of Ed., P.E.R.C. No. 90-33, 15 NJPER 619 (¶20258 1989). In that case the record established that the agreement provided for a 7-1/2 hour workday; that teachers must perform duties beyond assigned class periods, including student supervision; that there shall be at least a 30-minute duty-free lunch; that elementary teachers were to be provided eight 40-minute preparation periods and were to retain 123 minutes of unassigned time each day. The unilateral change in Glen Ridge was an increase in minimum pupil contact time of 70 minutes every six days or an average increase of 11.66 minutes.

The Commission concluded that, notwithstanding that a mandatorily negotiable workload increase had occurred, the change was within the limits of the contractual requisites negotiated by the parties. Thus, no unfair practice had been committed by the Board: Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Linden Bd. of Ed., P.E.R.C. No. 84-137, 10 NJPER 349 (¶15162 1984); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11,

8 NJPER 439 (¶13207 1982); Freehold Bd. of Ed., P.E.R.C. No. 82-38, 7 NJPER 604 (¶12269 1981); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley Bd. of Ed., supra; and Maywood Bd. of Ed., supra.

* * * *

In conclusion, although the Hearing Examiner initially rejected the Board's "waiver" argument and has considered the Association's Unfair Practice Charge on the merits, he must, nevertheless, recommend dismissal of the Complaint on the basis of the Maywood and Pascack line of cases and, most recently, Glen Ridge.

Therefore, based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Charging Party did not "waive" its right to litigate the instant Unfair Practice Charge since there was no clear and unmistakable evidence to support such a conclusion.

2. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) when it unilaterally changed the master schedule for the 7th and 8th grade teachers in the 1989-90 school year to provide an increase in instructional time of 34 minutes per day since it occurred within the limits of the collective negotiations agreement between the parties.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

DATED: December 19, 1990
Trenton, New Jersey