

P.E.R.C. NO. 94-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-93-42
CU-H-93-9

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 225-4, AFL-CIO,

Charging Party-Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge and a petition for clarification of unit filed by Transport Workers Union of America, Local 225-4, AFL-CIO. The petition seeks to clarify TWU's unit of bus driver, bus aides, custodians and maintenance employees of the Lakewood Board of Education to include the new titles of non-instructional assistant and operations facilitator. The unfair practice charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it ignored all bid rights in the collective negotiations agreement. In the absence of exceptions, the Commission dismisses the Complaint and petition. The Board had no obligation to negotiate with TWU over any of the new positions with new responsibilities it created after subcontracting the work previously performed by custodians and bus drivers.

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OF AMERICA, LOCAL 225-4, AFL-CIO,

Charging Party-Petitioner.

Appearances:

For the Respondent, Richard K. Sacks, attorney

For the Charging Party-Petitioner, Susan A. Resch,
Secretary/Treasurer

DECISION AND ORDER

On July 27, 1992, the Transport Workers Union of America, Local 225-4, AFL-CIO ("TWU") filed a petition for clarification of unit. The petition seeks to clarify TWU's unit of bus drivers, bus aides, custodians and maintenance employees of the Lakewood Board of Education to include the new titles of non-instructional assistant and operations facilitator. TWU contends that the new titles have the same duties as unit employees, all of whom were discharged on July 6, 1992 when the Board subcontracted its custodial, maintenance and bus driving services.

On July 29, 1992, TWU filed an unfair practice charge alleging that the hiring of six unit employees into the new titles was discriminatory because it "ignore[ed] all bid rights in the collective agreement." The Board allegedly violated subsections

5.4(a)(2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On August 28, 1992, the cases were consolidated and a Complaint and Notice of Hearing was issued. On September 16 and 30, 1992, the Board filed an Answer and "supplemental" Answer admitting that it discharged unit employees, subcontracted unit work, and re-hired unit employees into the new non-instructional assistant and operations facilitator positions. The Board denies that the duties of the new positions are the same as those performed by negotiations unit members. It also asserts that the new positions and job descriptions are "evolving."

On October 13, 1992, TWU filed an amended charge alleging that the Board refused to negotiate over a successor agreement and terms and conditions of employment for new unit titles, and that the Board abrogated its obligation to recall employees by seniority. On October 26, the Board filed an amended Answer denying those allegations.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

On December 17 and 18, 1992, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by March 2, 1993.

On July 2, 1993, the Hearing Examiner issued his report and recommendations. H.E. No. 94-1, 19 NJPER 396 (¶24177 1993). He recommended that the Complaint and petition be dismissed except for the allegation concerning the Board's refusal to negotiate with TWU over terms and conditions of employment for non-instructional assistants between July 6, 1992 and the first school day in September 1992. He did not recommend that the Board cease and desist from that conduct or take any other action.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due July 16, 1993. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 4-22).

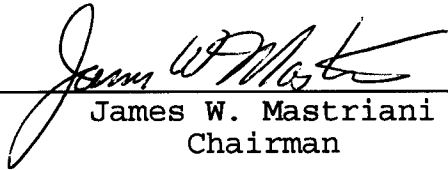
In the absence of exceptions, we dismiss the Complaint and the petition. The Board had no obligation to negotiate with TWU over any of the new positions with new responsibilities it created after subcontracting the work previously performed by custodians and bus drivers.^{2/}

^{2/} Although the job description for non-instructional assistants seemed to indicate that assistants would be performing duties of the former bus drivers, when the assistants actually began their duties, those duties were not ones traditionally performed by TWU unit employees. Under these circumstances, we find that the Board did not breach any negotiations obligation between the date the job description was created and the date the assistants began work.

ORDER

The Complaint and petition are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: October 25, 1993
Trenton, New Jersey

ISSUED: October 26, 1993

H.E. NO. 94-1

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

In the Matter of

LAKEWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-42
CU-H-93-9

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 225-4, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a public employer violated subsections 5.4(a)(5) and (a)(1) of the Act when it unilaterally set salaries for "unit" employees whose positions were created at the same time the employer subcontracted unit work and terminated about 180 employees. He recommended that other titles created at the time of subcontracting did not perform predominantly unit work and the employer had no obligation to negotiate their terms and conditions of employment.

The Hearing Examiner also recommended that the employer ended most of its unlawful acts when "unit" employees commenced their duties, which had changed, and which led to a finding that they did not perform predominantly unit work.

Finally, the Hearing Examiner recommended dismissing the clarification of unit petition because he found that subcontracting had decimated the negotiations unit and most disputed employees did not perform predominantly unit work. No posting was recommended.

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. 94-1

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

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TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 225-4, AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Richard K. Sacks, attorney

For the Charging Party
Susan A. Resch, Secretary/Treasurer

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 27, 1992, the Transport Workers Union of America, Local 225-4, AFL-CIO ("TWU") filed a petition for clarification of unit seeking to clarify its unit of bus drivers, custodians and maintenance employees of the Lakewood Board of Education. The TWU seeks the clarification for non-instructional assistants and operations facilitators, positions created by the Board on July 6, 1992. The TWU contends that the new titles have the same duties as unit employees, all of whom were discharged on July 6, 1992, when the Board voted to subcontract negotiations unit work. On or about July 14, the Board assertedly hired six "unit" employees into the new titles.

On July 29, the TWU filed an unfair practice charge, alleging that the hiring of the six unit employees is discriminatory because it "ignor[ed] all bid rights in the collective agreement." The Board's acts allegedly violate subsection 5.4(a)(2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On August 28, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing and an Order Consolidating Cases. On September 16 and 30, 1992, the Board filed an Answer and "supplemental" Answer,^{2/} acknowledging its discharge of unit employees, its subcontracting of unit work and its re-hiring of unit employees into the newly created non-instructional assistant and operations facilitator positions. The Board denies that the duties of the new positions are the same as those performed by negotiations unit members. It also asserts that the new positions and job descriptions are "evolving."

^{1/} These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) Violating any of the rules and regulations established by the commission."

^{2/} The first Answer did not, in my estimate, comply with N.J.A.C. 19:14-3.1.

On October 13, 1992, the TWU filed an amended charge, alleging that in May and June 1992, the Board refused to negotiate in good faith for a successor agreement. It alleges that on July 7, the Board refused to negotiate terms and conditions for the newly created non-instructional assistant and operations facilitator positions. On July 13, the Board allegedly abrogated the expired collective agreement "by failing to recall laid off employees in seniority order", violating subsections 5.4(a)(5) and (a)(1) of the Act.^{3/}

On October 26, the Board filed an amended Answer, denying the allegations. It asserts that on July 6, 1992, it terminated the TWU negotiations unit and awarded contracts to Marriott Corporation and Murphy Bus Company. It admits rehiring unit employees, but denies that the "work for which the unit members were hired was formerly bargaining unit work." It denies any obligation to recall employees in seniority order to negotiate with TWU over reemployment.

On December 18 and 19, 1992, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by March 2, 1993.

Upon the record, I make the following:

^{3/} The TWU also alleged that the decision to subcontract was motivated by anti-union animus, violating 5.4(a)(3) and (1) of the Act. This allegation was withdrawn at the start of the hearing (C-5). ("C" refers to Commission exhibits).

FINDINGS OF FACT

1. The Lakewood Board of Education is a public employer within the meaning of the Act. The Transport Workers Union of America, Local 225-4, AFL-CIO is a public employee representative within the meaning of the Act.

2. The parties' most recent collective agreement ran from July 1, 1990 to June 30, 1992. The recognition article covers these employees: bus drivers, bus aides, substitute drivers, custodial workers and building maintenance workers (C-7). The parties stipulated that in March or April 1992, the title "substitute custodian/maintenance" was added to the list of recognized employees (1T14).

3. Article VI covers "hours of work and overtime." A "straight time" rate is paid for overtime.

Article VI(c) states:

The work year for full-time twelve (12) month employees shall extend from July 1st through June 30th. The work year for full-time ten (10) month employees shall be every day that school is in session (up to 187 days) September 1st through June 30th.

Article VIII states:

A.1) Seniority shall be defined as length of continuous service as a permanent full-time employee with the Lakewood Township School District;

B. Permanent full-time vacancies and permanent new positions will be posted as the[y] [sic] arise for five (5) work days and will be filled by transfers from within the bargaining unit provided there are qualified employees who...have applied....

C.3) Where employees are laid-off and an opening occurs for reemployment, they shall be called back with classification in order of seniority.

A portion of Article IX states:

L. Summer school Drivers and Aides lists will be posted on or about April 1st, and those used will be taken in seniority order as indicated on sign-up list....

Work will be distributed as it is during the regular school year. Employees choosing to work in other than their full time classification, will only be allowed after the regular seniority list is exhausted....

Article IX M states:

Summer school employees shall receive the existing trip rate of pay.

Article XIV states:

It is the right of the Board, except as limited by the provisions of this Agreement, to determine the standards of services to be offered by its schools; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees of duty for legitimate reasons; maintain the efficiency of its operations; determine the methods, means and personnel by which its operations are to be conducted; take all necessary actions to carry out its mission emergencies and exercise complete control and discretion over its organization and the technology of performing its work. The Board's decisions on those matters are not within the scope of collective bargaining, but not withstanding the above questions the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining agreements.

Article XX has a salary guide for the 1990-91 term and a "reopener" provision for 1991-92, stating: "The parties agree that salaries and benefits shall be subject to negotiations for the year July 1, 1991 through June 30, 1992."

4. The Board also has a collective agreement with the Lakewood Education Association for a unit of "...certificated staff, clerical personnel, aides and law enforcement officers...." Clerical personnel include receptionists, clerk/typists, switchboard operators, administrative secretaries, machine operators and others. Aides include pupil personnel services aides and social worker and instructional aides. The agreement runs from July 1, 1991 to June 30, 1993 (C-8).

Schedule F of the agreement provides stipends for "stockroom clerk" in the elementary, middle and high schools (C-8).

5. The parties stipulated that, "on January 13, 1992, the Board hired the Helfgott Group to conduct feasibility studies for non-instructional services, including transportation, custodial and maintenance" (2T34).^{4/}

6. In February 1992, the parties negotiated a 5% wage increase for unit employees for 1991-92, pursuant to Article XX of the agreement (1T89-1T90). The Board did not advise TWU of its interest in subcontracting and specifically, of its hiring a consulting firm for that purpose (1T90).

7. On or about March 4, 1992, the Helfgott Group, Inc. issued a forty-page, final report on "non-instructional areas: transportation, maintenance, custodial and grounds" (S-1).

^{4/} 2T refers to transcript of December 18, 1992; 1T refers to transcript of December 17, 1992; "S" refers to stipulated exhibits; "CP" refers to charging party exhibits; "R" refers to respondent exhibits.

The transportation section addressed "contracted services", "vehicle maintenance" and "contracted vs. [d]istrict-owned operations." The Group issued fifteen recommendations, the last of which stated that the Board would be "better served at this time, at cost savings to the district by moving toward contracted services." The report stated, "as district costs, due to salaries, benefits, et al., increase, the transportation dollar is becoming static from the state, only increasing if student members increase" (S-1 at p. 25). Murphy Bus Company was one of six listed contractors who expressed interest in "a formal bid request."

The custodial/maintenance/grounds section of the report has a statistical analysis of salaries, including overtime and absenteeism costs. It recommended a "central district-wide inventory of materials and supplies" (compared to the then-current system of separate inventories at each building). This section of the report presented three options; two contemplated more efficient use of the staff and the hiring of a custodial/maintenance management service organization at "small" or "minimal" cost savings; the third option was to "outsource the entire operation of custodial, maintenance and grounds work to effect substantial cost savings...." Marriott Corporation was one of five listed contractors interested in responding to a formal bid.

The report does not suggest the creation of non-instructional assistant and operations facilitator positions.^{5/}

8. William Ernst is president of Local 225 of the TWU. His unrebutted testimony is that the TWU first learned of the Board's interest in subcontracting in April 1992, when an article on the topic appeared in the Asbury Park Press (1T90). Ernst spoke with the Board superintendent about possible subcontracting and was not given "any hope" (1T92-1T93).

9. On or about May 15, 1992, the assistant superintendent issued a memorandum to Ernst detailing "...pertinent information relative to the bids opened on May 15, 1992,...[for] both transportation and buildings and grounds" (CP-11).^{6/}

The memorandum provides budgeted appropriations for 1992-93 transportation and buildings and grounds costs, totalling about \$7,445,000. It also lists bids received for those departments, the

^{5/} The report suggests the creation of a "maintenance person" title to "provide the supervisor and assistant supervisor with information necessary for the analysis of fuel cost and vehicle usage" (S-1 at p. 22).

The report recommends that all custodial, maintenance and grounds staff "be approved and be trained in the contents of their various individual assignments...." (S-1 at p. 28). The report also recommends other "job description changes in other supervisory titles (S-1 at p. 32). It also recommends that the Director of Buildings and Grounds job description be "reworked."

^{6/} The record does not reveal if the Board passed a resolution at a public meeting authorizing the issuance of bid specifications.

lowest of which totalled \$20,853,000 for 1992-96 (CP-11). The low bidders were Marriott Corporation and Murphy Bus Services.

10. On or about May 18, 1992, the Board gave the TWU "Proposals for Modification of the Agreement...", a 13-page negotiations proposal (CP-3, 1T96, 2T76).

11. On May 21, 1992, the TWU filed a response, a "package...based on the premise that all TWU bargaining unit positions remain in-house" (CP-4). The TWU "accepted" many of the Board concessionary proposals and it offered a wage freeze in the first year (1992-93) and 3% increases in each of the two remaining contract years (1993-94 and 1994-95). The first year of the TWU proposal had "\$500,000 in give-backs" (1T95). TWU president Ernst conceded that even with the concessions that Board would save millions of dollars by subcontracting (1T107).

12. On May 27, 1992, the Helfgott Group final report was "presented publicly" (2T34). On June 1, 1992, the Board conducted a public meeting at which the report and attendant issues were discussed (2T35).

13. On June 3, 1992, Ernst sent a letter to the Board superintendent, advising of his disappointment over the Board's failure to decide "...whether to retain in-house services or go private..." (CP-6). Ernst asked for a decision no later than June 24 because some unit employees "will have completed their employment contracts..." (CP-6).

14. On June 4, 1992, William Hybbeneth, Board labor consultant and negotiator, sent TWU president Ernst a letter advising that the TWU proposal, "...with slight modification, could form the basis of an agreement between the parties" (CP-5, 1T97-1T98, 2T87). The letter continued:

On June 24, the Board intends to make a final decision as to whether or not it intends to sub-contract (sic) for custodial, maintenance and transportation services. Should the Board determine to keep these services in-house, I will contact you to arrange for a negotiating session as quickly as possible.

[CP-5]

15. On June 15, 1992, Ernst sent a letter to the Board superintendent requesting to negotiate salaries for TWU unit employees who "continued to work during the summer. Subsequent to the decision to subcontract, but prior to the subcontractor taking over the bus functions...." Hybbeneth's unrebutted testimony is that the TWU wanted to "negotiate a raise for them for the 1992-93 school year" (2T80).

The Board acknowledged that although the school year runs from September 1 to June 30, some bus drivers are employed in the summer months (1T24). This testimony is confirmed by Article IX of the agreement. The record also shows that Jorge Quiles, a delivery person, and Joseph Romano, a maintenance foreman, were employed in the 1992 summer months (1T37, 1T39, 2T38-2T39).

16. On July 6, 1992, the Board conducted a public meeting and passed resolutions. It "abolished" the custodian, maintenance

worker and substitute custodian/maintenance worker positions and "terminated" 77 named unit employees. Among them were Phil Attorelli, Jorge Quiles, Lorraine Woolery, Joseph Romano and Lee Briscoe. The Board then awarded a four-year contract to the Marriott Corporation to provide custodial, maintenance and grounds operations (S-2, 2T35).

The Board next abolished the bus driver, van driver, bus aide and substitute bus driver/van driver/aide positions and "terminated" 103 named unit employees. Among the drivers were Roseann Work, Charlotte Rubin, Elaine Swindell, Nancy Pugliese and Emma Streaser. It also passed a resolution setting hours and rates of pay for bus drivers, bus aides and bus aides/driver substitutes on "summer routes", i.e., those working between June 24, 1992 and August 31, 1992. Among them were all five named drivers.

17. The Board then awarded a four-year contract to Murphy's Bus Service^{7/} to provide student transportation services.

The Board also approved job descriptions for Director of Transportation, Assistant Director of Transportation, operations facilitator, non-instructional assistant and security liaison (C-10). (See finding 18, fn. 8).

18. On July 7, 1992, the Board assistant superintendent issued a memorandum directing that the approved operations

^{7/} I assume that Murphy's Bus Service is the same corporation as Murphy Bus Company cited in the Helfgott report (finding 7).

facilitator and non-instructional assistant job descriptions be posted in all school buildings as job solicitations (CP-1).^{8/}

The operations facilitator "job goal" is to "safeguard the district's investment materials through efficient and effective warehousing practices and serve as liaison between the contractor and the district." The position is responsible for "district liaison for overseeing contracted custodial and maintenance program...planning and directing warehousing and delivery...inventory and stock control programs...supervising and participates in necessary cleaning, painting and general repairs...receiving, sorting and delivery central office incoming mail..." (CP-1; S-2). The title also exercises budgetary control under direction of the business administrator, evaluates contracted personnel and investigates complaints.

^{8/} C-10(a) and (b) were entered into the record as "job descriptions adopted by the Lakewood Board of Education on July 6, 1992" (1T12). The descriptions are not typed on Board letterhead and are neither dated nor incorporated into any document. C-10 is a FAX copy from respondent counsel sent August 13, 1992.

C-10(b) is a non-instructional assistant description which differs from the one in the Board's July 6, 1992 meeting minutes (S-2) and the July 7, 1992 job posting (CP-1). S-2 and CP-1 share identical non-instructional aide job descriptions. S-2 is a bound and numbered 57 page document in which the job descriptions appear on pages 50-53. CP-1 is on Board letterhead and is a typed memorandum from the assistant superintendent directing a posting of the two titles. S-2 and CP-1 appear to be more authentic than C-10, which may have been produced in connection with this litigation. Accordingly, I rely on S-2 and CP-1.

The non-instructional assistant needs a school bus driver license and the job "goal" is to "provide safe and efficient transportation and lunch programs...." Ten of the first twelve enumerated "responsibilities" concern the role of bus driver. The non-instructional assistant reports to the Director of Transportation. The position also "assists building personnel in keeping our lunchrooms clean" (CP-1).

19. Board assistant superintendent Luick testified that the positions were created,

...first as a recommendation of the reports, it came out that we should keep some people in some key positions for overseeing, acting as liaisons between the...contractor...and to assist in emergencies....

[2T93].

This testimony is vague as it concerns the non-instructional assistant and not corroborated by the final Helfgott report (S-1 states an "interim" report was issued; it was not introduced into evidence and not relied upon by the Board). The final report suggests that a "maintenance person" description be created, and that this employee provide "information...for analysis of fuel costs and vehicle usage..." and perform other related duties (S-1 at p. 22).

The report also recommends that the director and assistant director of custodial maintenance and grounds job descriptions are "adequate" but could be "reworked" (S-1 at p. 37).

Luick also explained that the positions would help establish a centralized warehousing system and provide the "board secretary some support." He also testified that hall and cafeteria monitoring would ease the burden on teachers, enabling them to teach an extra class (2T94). Finally, Luick testified that the Board created the positions because it was concerned about a smooth transition to subcontracting of services (2T94).

The report recommended a central warehousing system, confirming a portion of Luick's testimony.

20. On the same date, Ernst filed a request to negotiate "over the impact of the out-sourcing" (2T80-2T81). On July 13, Hybbeneth responded for the Board, requesting more specific information. On July 17, Ernst outlined "four specific areas" and parties agreed to negotiate on August 26, 1992 (2T81).

21. The Board interviewed about 25 applicants for three positions in each of the two titles (2T98). Non-instructional aides applicants were interviewed by a superior, probably the Director of Transportation (CP-7; 2T73). On August 10, 1992, the Board passed a resolution naming the applicants hired, starting dates and salaries (CP-7). Former unit employees Attorelli, Briscoe and Romano were hired as operations facilitators (retroactive to July 14) at \$23,500, \$25,000 and \$28,000 respectively. Former unit employees Pugliese, Streaser and Work were hired as non-instructional assistants (beginning September 1) at \$17,500 each (CP-7).

22. On August 26, the parties met for several hours and Board negotiator Hybbeneth agreed to present a TWU proposal to the Board (2T81). The Board responded on September 15, 1992, proposing a "memorandum of agreement...to resolve all the issues raised at the...August 26 meeting" (2T82).

On September 25, the TWU sent a letter to the Board, acknowledging receipt of the proposed memorandum, requesting "some information", and stating it would consider the offer (2T82).

23. On October 19, the Board asked the TWU about the status of the proposal. On October 26, a TWU representative spoke with the Board negotiator, advising the proposed memorandum would be presented to the membership for ratification (2T82-2T83). There was some discussion about distribution of the proposed 4% wage increase. On October 27, the Board negotiator sent the TWU a letter responding to all questions (2T83).

24. On November 2, the Board negotiator received proposed salary guides and he suggested some changes; he also asked the TWU representative to inform him about the vote (2T84). On November 3, 1992, the TWU sent the Board a letter advising that the proposed memorandum of agreement was rejected and asking the Board to negotiate further.

25. On November 18, 1992, the Board negotiator asked the TWU for a list of "the specific areas" to discuss. Hybbeneth testified that certain "information" was sent to the TWU and there has been "no further correspondence" (2T84-2T85).

26. On November 23, 1992, the Board approved modified operations facilitator and non-instructional assistant job descriptions (1T12, C-11(a)-(c)). The qualifications and job goal of the non-instructional assistant title are the same as the title approved on July 6, 1992 (see findings nos. 14, 15). The "responsibilities" differ; the new description emphasizes "assisting building personnel" in preparation for assemblies, monitoring halls and the cafeteria, and assisting the "district safety officer [on]...tasks relevant to the district's safety program." (C-11(a)). Transporting students is a responsibility in "emergencies or unforeseen situations." Keeping the cafeteria clean is listed as the eleventh of twelve responsibilities.

Operations facilitator was changed to operations facilitator (1) and operations facilitator (2). Operations facilitator (1) is required to have "some experience in routing mail" and its "job goal" is to "safeguard the district's investment in materials through efficient and effective warehousing practices, and serve as liaison between the contractor and the district." Responsibilities include opening, sorting and routing mail arriving at the Board secretary office, helping to "prepare Board agenda packets including confidential materials..." (C-11(b)). Operations facilitator (2) requires "warehousing supervision" experience and it share the same job goal as operations facilitator (1). Primary responsibilities include acting a "supervisory liaison for maintenance and custodial services with the subcontractor, assisting

planning and directing the inventory control program for the central warehouse and recommending replacement of "movable equipment" (C-11(c)).

27. Luick testified that the Board changed the operations facilitator job description because Marriott Corporation provided "sufficient administrative staff and sufficient reporting processes for us [the Board] to keep track exactly what they are doing on a day-to-day basis" (2T95). The non-instructional assistant description was changed because "Murphy Transportation is quite willing to work with us and make adjustments on almost a daily basis in any run" (2T95).

28. Unit employees "terminated" on July 6, 1992, and then hired a week or two later into the new titles testified at the hearing.

Work, Pugliese and Streater were bus drivers before September 1992 (2T6, 2T16, 2T28, C-6(i)). They transported children, primarily. They also drove school vehicles about ten times annually to an inspection station in Toms River (2T10, 2T20, 2T28). They performed other duties, including security patrol on October 30, recording mileage logs and assisting in removing snow from the school bus yard (2T6, 2T10, 2T18, 2T20, 2T29). Taking vehicles for inspection and removing snow from school premises were not part of a bus driver's regular duties. Drivers performed those duties for extra compensation, pursuant to the terms of the collective agreement (2T20, 2T21, 2T22).

Streaser is listed seventh on a 1991 seniority list of bus drivers and aids, Pugliese is thirteenth and Work is sixteenth ((CP-2), 1T64-1T66). The first, second and sixth ranked employees on this seniority list had applied unsuccessfully for the positions now held by Work, Pugliese and Streaser. Charlotte Rubin is ranked ninth on the list (1T33, CP-2).

29. In September 1992, these three employees began working as non-instructional assistants. Elaine Swindell is a former unit bus driver terminated in July 1992. She is also recording secretary for the TWU. In early September 1992, she observed all three non-instructional assistants meet in the bus compound, climb into "their vehicles and drive off." She also saw Streaser drive a full-size school bus "full of students" (1T77-1T78).

The assistant superintendent conceded that the non-instructional assistants drove school buses in September but termed those occasions "emergencies", adding that "every district has busing emergencies that come up during the first week of school" (2T95, 2T96). The testimonies are consistent, the latter explaining the former.

Work performed various tasks that fall including, answering telephones in the business office, monitoring students in the cafeteria and assisting them, wiping tables and transporting students in emergencies (2T7). In October and November 1992, when schools closed, she performed mileage checks on vehicles and kept a log and took buses for inspection about five times (2T10, 2T12). In

December, her duties changed; she was assigned to the office and answers phones, delivers mail, helps prepare purchase orders and uses the copying machine (2T8, 2T9).

In early September 1992, Pugliese answered phones in the transportation department and two days later was transferred to a school, where she monitored hallways, helped children in the cafeteria (and cleans tables) and answered phones and used the copying machine in the office (2T18-2T19). When school was not in session, she took vehicles for inspection three times and performed mileage checks (2T19; 2T21).

In September and October 1992, Streaser worked in the transportation department and in one school (2T28). In the transportation department, she answered phones, routed vehicles and transported students in emergencies (2T29). At the school, she answered phones in the office, assisted visiting parents, separated office mail and cleaned tables in the cafeteria (2T30). Beginning in November, Streaser worked in the Board business office, filing documents and answering phones (2T30-2T31).

30. Former unit employees testified about their job duties before the Board subcontracted. Jorge Quiles was a "delivery person" whose duties were to "deliver mail and/or packages throughout the school district and other local communities to include Trenton, New Jersey" (C-6(f)). He delivered interoffice mail, sorted other mail and delivered to the post office (1T38). When not tending to the mail, Quiles had custodial duties at one of

the Board schools (1T38). His last day at work was July 22, 1992 (1T39).

Lorraine Wooley was "head custodian" from 1984-1992. She disputed the proffered job description (C-6(b)), asserting she opened one of the schools in the morning, supervised the breakfast program and cleaned the cafeteria afterwards, prepared the auditorium for programs, assisted in the cafeteria at lunch -- washing tables, sweeping floors, picking up lunch trays and cleaning afterwards (1T43-1T44; 1T49). She did not directly supervise children.

Wooley also received a stipend as "stockroom clerk", in which she delivered supplies to classrooms in her assigned building (1T52). Hired as head custodian by the Marriott Corporation, she now recommends supply purchases to the Board Director of Buildings and Grounds (1T50).

Charlotte Rubin was a bus driver and transported students, primarily (1T17). She wrote mileage logs, took buses for inspection and occasionally delivered documents to the Board Superintendent in Toms River (1T18, 1T19). She sometimes trained new drivers and dispatched when secretaries were unavailable or when "someone was lost" (1T21). She also drove during the summers.

She applied for the non-instructional assistant and operations facilitator positions and was not hired (1T27).

She reviewed the non-instructional assistant job description and agreed that the job goal providing safe and

efficient transportation, was the same goal shared by bus drivers. She denied sharing a goal of providing "lunch programs" (1T30).

31. Joseph Romano was employed as a "maintenance/working foreman" before July 1992 (CP-8, 2T39).^{9/} His duties were to both "work on" and supervise Board building repairs and maintenance, including "utility systems." He was also responsible for checking on carpentry, plumbing and electrical repairs in the buildings (2T40, CP-8). He did not supervise private contractors or purchase supplies (2T41).

Romano was hired as an operations facilitator in July 1992 (2T38). He later became operations facilitator 2, the principal duties of which also concerned the central warehousing system (2T37, CP-1, C-11(c)). Romano also acts as liaison between Marriott Corporation and the Board to ensure proper construction of the warehouse (2T45). Romano now works under the central purchasing agent, keeping supplies "in an orderly manner" (2T47).

32. Philip Attorelli was employed as night custodial foreman before July 1992 (2T50). He cleaned his assigned school and secured the building at midnight (2T50). He also directed other maintenance employees and distributed supplies to them (2T51, C-6(a)). Attorelli also cleaned and arranged furniture in the Board's meeting room. After the meetings, he disconnected wires, etc. (2T52).

^{9/} Romano testified that one other maintenance department employee had more seniority than he (2T43). But the record is unclear if that employee applied to work for the Board in the summer of 1992.

On or about July 23, Attorelli was hired as an operations facilitator. He has assisted in processing books for non-public schools in the district, compiled lists of necessary repairs, monitored alternative lunch programs (2T49). His work hours became "flexible" and he no longer handles cleaning supplies. He is not limited to one job site -- he travels throughout the district (2T53-2T54). He describes his current position as "ombudsman", informing Board personnel on major facility repairs (2T54).

33. Lee Briscoe was a custodian before July 1992. He cleaned building hallways, the school cafeteria and he wiped tables (2T61-2T62).

In July, Briscoe was hired as an operations facilitator. His duties include collecting mail from Board buildings and delivering it to the post office (2T60, CP-1). In November, he became employed as an operations facilitator 1 (2T59). The Board also acquired a postage meter machine and Briscoe is generally assigned to a mail room for most afternoons (2T60). He now stamps (or meters) all Board mail (2T66). In past years, each school stamped or metered its own mail (2T100). He also helps prepare all information packets for Board members and delivers them (2T60).

34. No seniority list of maintenance employees was entered into the record (2T43-2T44).

ANALYSIS

In recommending findings, I consider the amended charge, charge and petition in a factual chronology, reversing the order in

which these matters were filed. A linear approach is used often and it simplifies my discussion; I am unaware of the TWU's intention (if any) concerning the order in which these cases were filed. A benefit of a chronological review is that one may more easily gauge what the parties knew and when they knew it.

I first review allegations about the Board decision to subcontract and its negotiations duties to the TWU. I next evaluate the Board's creation of the non-instructional assistant title (including the hiring of employees) and implementation of that decision in the fall of 1992. In this section, I also compare job duties of the former unit bus drivers and other unit titles with those of the non-instructional assistants. I then repeat this evaluation for the "new" operations facilitator and former unit custodial employees. Finally, I consider the merits of the clarification of unit petition.

I

In State of New Jersey and Local 195, IFPTE, 88 N.J. 393 (1982), the New Jersey Supreme Court ruled that subcontracting is not mandatorily negotiable. The Court wrote:

The decision to contract out work or to subcontract is...an area where managerial interests are dominant.... We therefore hold that to the extent the contractual provision at issue...includes negotiation on the ultimate substantive decision to subcontract, it is a non-negotiable matter of managerial prerogative.

[Id. at 408].

Local 195 also restricts a public employer's right to subcontract. The Court cautioned:

[O]ur holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.

[Id. at 411].

See also, Deptford Tp. Bd. of Ed., P.E.R.C. No. 83-44, 8 NJPER 603 (¶13285 1982); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

The Commission has recently determined that an employer's decision to subcontract during the life of a collective negotiations agreement is not a per se violation of the Act, specifically the subsection prohibiting "bad faith" negotiations. Ridgewood Bd. of Ed., P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993), app. pending App. Div. Dkt. No. A-3903-92T2. The Commission noted that the public employer engaged in negotiations, entered an agreement, explored subcontracting, negotiated over the subcontracting and entered into an agreement over severance for unit employees.

The Board in this matter reached a reopener agreement with the TWU on 1991-1992 wages in February 1992. It hired the Helfgott Group in early 1992 to evaluate the "non-instructional areas" and received the final report in March 1992. The report recommended subcontracting at considerable savings.

The Board next solicited bids from private corporations to provide non-instructional services. In May 1992, the Board opened the bids and issued a memorandum to the TWU detailing both current appropriations for transportation and maintenance services and the bids received for those services for the next five years. A couple of days later, the Board gave the TWU a detailed negotiations proposal on a successor agreement. The current agreement would expire June 30, 1992.

The TWU acknowledged the Board's interest in subcontracting unit work, and offered wage concessions in the first year and modest wage increases in the second and third year of a proposed three-year agreement.

On June 1, 1992, the Board conducted an open meeting at which the Helfgott report and its recommendations were discussed and the public, including the TWU, commented.

The Board also responded to the TWU proposal, advising that it "could form the basis of an agreement", but warned that a decision on subcontracting was pending. Although that decision was reached on July 6 and not June 24 (as projected by the Board negotiator), no facts suggest that the delay was intended to suspend negotiations or undermine the TWU.

On July 6, 1992, the Board "terminated" about 180 unit employees and awarded transportation and maintenance services contracts to Murphy's Bus Service and Marriott Corporation, respectively. The next day, the TWU demanded to negotiate the

"impact of the out-sourcing" and, after several communications identifying the items, the parties met on August 26.

On September 15, 1992, the Board proposed a memorandum of agreement to settle all items discussed at the session. On October 26, the TWU advised the Board that the memorandum would be presented to the membership for ratification. The parties then clarified some items on the memorandum, including distribution of a proposed wage increase. On November 3, 1992, the TWU advised that the memorandum was rejected and asked to continue negotiating. The Board agreed. Communications then ceased.

The record shows that the Board did not inform the TWU of its initial interest in subcontracting, or that it hired a consulting firm to evaluate "non-instructional" services, or that it received interim and final reports and recommendations, or that it intended to issue bid specifications. The TWU first learned of the Board's interest in subcontracting in April 1992 from a local newspaper article.

The Lakewood Board was not "up front" in disclosing the possibility of subcontracting, but the record also shows that after May 15 and until July 6, 1992, the Board kept both options open. Not only did the Board provide a public forum for debate on subcontracting, it gave the TWU copies of the bids received and a detailed proposal on a successor agreement. It also responded positively (and conditionally) to the TWU's counteroffer.

The parties met one time only in these two months and reached agreement on several issues by correspondence. One inexorable fact was that the Board would save millions of dollars by subcontracting over the projected five year period. The TWU had the opportunity, or as the Supreme Court stated in Local 195:

...the procedural right to present their position on the economic issue...they could seek to show the employees that the employees are willing to perform the same job at a price competitive with private replacements.

[Id. at 409].

The TWU's \$500,000 concession in the first year and modest wage increases in the second and third years of its proposed successor agreement were not sufficiently competitive with the low bids from Marriott Corporation and Murphy's Bus Service.

The Board continued negotiating the "impact" of subcontracting through the late summer and fall of 1992, consistent with Article XIV of the agreement (and with Local 195). Its proposal was rejected by the TWU membership in October.

I cannot conclude from these facts that the Board negotiated in bad faith -- that is, it failed to bring to the negotiating table "an open mind and 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." State of N.J. and CNJSCL, AFL-CIO, E.D. No. 79, aff'd P.E.R.C. No. 76-8, 1 NJPER 39 (1975); aff'd 141 N.J. Super. 470 (App. Div. 1976). The Board's failure to inform the TWU that it had solicited

or received bids is not, standing alone, a violation of the Act. See Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). The TWU has not demonstrated that the Board knew all along that it was going to subcontract and entered sham negotiations.

The totality of the Board's conduct during negotiations indicates that it kept the TWU apprised of its efforts to subcontract unit jobs. State of N.J.; Monroe Tp. Bd. of Ed.; Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304 (¶22134 1991). The facts also show that the Board's decision to subcontract was for economic reasons. Accordingly, I recommend that the Board did not act in bad faith during successor contract negotiations and in subcontracting unit work.

II

I next consider if the Board violated the Act between its July 6, 1992 decision to subcontract and implementation of that decision the next fall. Under the circumstances of this case, I find that it did.

The Board created new titles in name only at the same time it lawfully subcontracted unit work. The non-instructional assistant title created by the Board on July 6, 1992, "provides safe and efficient transportation and lunch programs...." Two-thirds of the enumerated job duties concerned bus operations and about one-third concerned cafeteria monitoring. One duty was to assist in "keeping [] lunchrooms clean."

The description comported with the more specific "transportation work rules" which bus drivers followed in previous years. It was also consistent with the testimonies of non-instructional assistants Work, Pugliese and Streaser describing their duties as former unit bus drivers. Former Board employee Rubin agreed that many of her duties as bus driver matched those of the non-instructional assistant. Former unit custodian Wooley cleaned a school cafeteria during and after the lunch period but did not supervise children. The record does not show that these employees had "lunch program" duties before September 1991.

I conclude from the testimonies and job descriptions that in July 1992, the non-instructional assistant was a "new" title in name only; about two-thirds of its duties were performed by former bus drivers and somewhat less than one-third was performed by former unit custodians. The remaining monitoring duty was not performed by the TWU unit.

Although the factual chronology is that the Board terminated all bus drivers and about three weeks later hired some back as non-instructional assistants, I must conclude, in view of the simultaneity of the July 6 acts, that the Board was retaining unit titles to perform negotiations unit work.^{10/}

^{10/} The Helfgott report did not recommend the creation of another bus driving title and the non-instructional assistant description did not "oversee", act as "liaison" or "assist in emergencies" as stated by the assistant superintendent. Furthermore, cafeteria monitoring was not a principal job duty -- these employees were interviewed by and reported to the Director of Transportation.

The subcontracting was therefore not complete, leaving the TWU as a majority representative with a legitimate interest in preserving unit work (as defined by the recognition clause and the job descriptions approved on July 6). See Essex Cty. Educ'l. Serv. Comm'n, P.E.R.C. No. 86-68, 12 NJPER 13 (¶17004 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T1 (5/24/82) (in which the Commission found that a "semantic" change in a unit title and the hiring of a new employee to perform unit work did not obviate the employer's duty to negotiate).

By July 29, the date the charge was filed, the Board hired three employees at salary into the non-instructional assistant position (formal Board approval was August 10). The recall provision of the expired agreement should have alerted the Board to its contractual obligations. Its unilateral setting of the \$17,500 salary -- a mandatorily negotiable term and condition of employment -- is a violation of the Act. Hunterdon Cty. Bd. of Freeholders and CWA, 116 N.J. 322, 331-332 (1989).

In September 1992, the Board assigned predominantly non-unit work to the non-instructional assistants. They transported students in emergencies only, reducing significantly their former duties as Board bus drivers and their assigned "performance responsibilities" as non-instructional assistants to provide "safe and efficient transportation...."

They continued taking vehicles to inspection at Toms River and they logged mileage, etc., but these duties were typically performed on weekdays when school was not in session. They more often answered phones, monitored students and cleaned tables in the cafeteria. Only the last of these is traditional TWU negotiations unit work.

No facts rebut the assistant superintendent's testimony that the transportation subcontractor performed its job well, enabling the Board to assign non-bus driving duties to non-instructional assistants. Even assuming that the Board limited the bus driving duties of non-instructional assistants in September in response to the TWU charge, I recommend that the change in duties signalled an end to the Board's obligations under the Act.

The record shows that after September 1, 1992, the non-instructional assistants performed relatively little traditional unit work. That work -- driving buses and cleaning tables -- decreased through November 1992. Nothing in the record suggests that the Board's November 1992 modified non-instructional assistant description, emphasizing support of building personnel, is inaccurate. The non-instructional assistants confirmed their performance of monitoring and "safety programs" duties set forth in that description, and they agreed that they transported students "in an emergency or unforeseen situation" only. These facts show that the Board did not unlawfully assign unit work to non-unit employees, and disposes of rights the TWU would have had to negotiate over

terms and conditions of employment for non-instructional assistants.

III

I next consider whether the Board violated any duty to negotiate with the TWU concerning the operations facilitator. This title was inspired in part by recommendations in the Helfgott report for a central warehousing system (see finding 7). The title is also a "district liaison" for subcontracted custodial and maintenance services.

Former unit employee Romano was hired in July 1992 to "more or less [be] a liaison between Marriott and the Board" on the construction of a new supply warehouse. He oversaw for example, installation of the sprinkler system. He has not done actual construction work. As the construction progressed, Romano's duties included overseeing all supplies in the warehouse and he reported to the Board's purchasing agent. While employed as the maintenance/working foreman, Romano worked on many of the systems he also supervised -- plumbing, heating, HVAC, electrical, etc. He did not purchase supplies.

Only one week lapsed between Romano's termination as the maintenance/working foreman and his hiring as operations facilitator. His duties changed just as quickly, foregoing his "working" duties for liaising, supervising subcontracted employees, maintaining inventory and recommending equipment purchases. While "supervision" of employees threads the former unit title and the

operations facilitator title, the duties of this operations facilitator, prompted and defined by the warehouse construction, had not been performed by the TWU unit. Accordingly, I find that the Board did not unlawfully assign unit work to this non-unit employee.

Attorelli and Briscoe were custodians before July 1992. Both were assigned to separate schools and Attorelli generally supervised the night crew. Hired as an operations facilitator in July 1992, Attorelli evaluates repairs throughout the district, a job performed previously by the maintenance/working foreman. He also distributes learning materials, including books, to non-public schools and monitors an alternative lunch program, neither of which are former unit duties. Considering Attorelli's current duties and that he no longer cleans a building -- the primary duty of a custodian -- I cannot conclude that the Board created this new position in name only or that the TWU met its burden in showing that Board violated any duty to negotiate over the assignment of unit work to this non-unit title.

Briscoe was also hired as an operations facilitator in July 1992. He processes all the mail for the Board, spending most afternoons machine-stamping outgoing items. He also distributes the agenda to Board members before each meeting. His duties are not specified in the job description issued in July 1992. Only in November 1992 (long after the charge and petition were filed) did the Board issue an operations facilitator (1) description identifying Briscoe's duties.

Briscoe performs unit work. Jorge Quiles was a negotiations unit "delivery person" whose primary responsibility was to deliver mail and packages throughout the school district. He was terminated on July 6, 1992, along with all other unit employees. I am not persuaded that the Board's purchase of a new postage meter in September 1992 or Briscoe's distributing of assertedly "confidential" documents to Board members makes this title "new" or ineligible for inclusion in an appropriate unit. Of all the disputed positions, the operations facilitator (2) retains almost all duties traditionally performed by a TWU unit employee. The Board, however, does not have any duty to negotiate terms and conditions of employment for this one employee. Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd 174 N.J. Super. 25 (App. Div. 1980), pet. for certif. den. 85 N.J. 129 (1980); Cf. Ocean Cty. Bd. of Health, D.R. No. 85-2, 10 NJPER 490 (¶15221 1984). Accordingly, I recommend that charge and amended charge be dismissed except for the Board's refusal to negotiate with the TWU over compensation and other terms and conditions of employment for non-instructional assistant title in July 1992.

IV

The TWU's clarification of unit petition seeks to clarify its unit to include the operations facilitators and non-instructional assistants. In Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), the Director wrote that the purpose of the clarification of unit proceeding is "...designed to resolve

questions concerning the exact composition of an existing unit of employees for which the exclusive representative has already been selected." The Director stated that a petition was proper when "a new title may have been created by the employer entailing job functions similar to functions already covered by the unit...." Id. at 249.

On July 6, 1992, the Board terminated all 180 unit employees, eliminating the negotiations unit. I have recommended that the subcontracting was lawful, and except for one operations facilitator, did not involve an unlawful assignment of unit work to non-unit employees. Accordingly, I do not believe a unit exists which may be clarified to include the disputed titles.

Even assuming that a TWU negotiations unit exists, I am not persuaded that it is necessarily the most appropriate unit for the non-instructional assistants. State v. Prof. Ass'n of N.J. Dept. of Ed., 64 N.J. 231 (1974). These employees may share a community of interest with support staff currently included in the broad-based unit represented by the Lakewood Education Association.

Again assuming that a TWU unit exists, I might recommend that it is the most appropriate unit for the operations facilitators, notwithstanding that two of three do not perform predominantly unit work. But considering that the "unit" (however defined) is a fraction of its former size and scope in the wake of subcontracting, I recommend that a petition for certification of employee representative is the best method to determine the representational desires of these employees. N.J.A.C. 19:11-1.2.

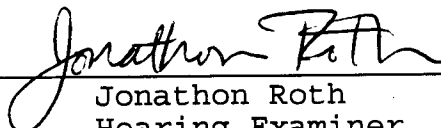
Accordingly, I recommend that this clarification of unit petition be dismissed.

RECOMMENDATIONS

The Lakewood Board of Education violated subsections 5.4(a)(5) and (a)(1) of the Act by failing to negotiate in good faith with the TWU over terms and conditions of employment for non-instructional assistants between July 6, 1992 and the first school day in September 1992.

The Lakewood Board of Education did not violate the Act by refusing to negotiate a successor agreement and when it subcontracted unit work in July 1992. Except for the negotiations obligation regarding the non-instructional assistants, the Board did not violate the Act by abrogating the expired agreement. The Lakewood Board did not violate subsections 5.4(a)(2) and (7) of the Act.

I also recommend that the clarification of unit petition be dismissed.



Jonathon Roth
Hearing Examiner

DATED: July 2, 1993
Trenton, New Jersey