P.E.R.C. NO. 78-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC TOWNSHIP BOARD OF EDUCATION,

Respondent,

Docket No. CO-77-130-86

-and-

PASSAIC TOWNSHIP ASSOCIATION OF
SCHOOL ADMINISTRATORS,

Charging Party.

SYNOPSIS

The Commission adopts the findings of fact and conclusions of law of the Hearing Examiner in an unfair practice proceeding and finds the exceptions filed by the Board to be without merit. The Commission, in agreement with the Hearing Examiner, concludes that the Board failed to negotiate in good faith by unilaterally increasing the administrators' work year and that such failure is a violation of N.J.S.A. 34:13A-5.4(a)(5).

The Commission orders the Board to cease and desist from refusing to negotiate in good faith with the majority representative of its school administrators concerning terms and conditions of employment of such administrators; and affirmatively orders that the Board restore the status quo, make the ten-month administrators whole for the effects of the unilateral change, post the appropriate notices supplied by the Commission, and notify the Chairman in writing of the steps taken to comply with the order.

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In the Matter of

PASSAIC TOWNSHIP BOARD OF EDUCATION,

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DOCKET NO. CO-77-130-86

PASSAIC TOWNSHIP ASSOCIATION OF
SCHOOL ADMINISTRATORS,

Charging Party.

Appearances:

For the Respondent:
Wiley, Malehorn & Sirota
(Donald M. Malehorn, of Counsel;
George H. Martini, On the Brief and oral argument)

For the Charging Party:
McCarter & English
(Steven B. Hoskins, of Counsel)

DECISION AND ORDER

The Passaic Township Association of School Administrators (the "Association"), employee representative of the Principals and the Supervisors of Curriculum employed by the Passaic Township Board of Education (the "Board"), filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on November 18, 1976, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1

et seq., (the "Act") [1] by lengthening the work year of certain administrators without negotiations and by refusing to negotiate this change.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 9, 1977, and a hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, on March 29, 1977. All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. The parties filed sequential post-hearing briefs, the first, as well as the third and final brief being submitted by the Respondent, with an intervening brief from the Charging Party. All briefs were filed by June 21, 1977. On September 16, 1977 the Hearing Examiner issued his Recommended Report and Decision [2] which included findings of fact, conclusions of law, and a recommended order. The original of this report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof.

The Hearing Examiner found that the Board failed to negotiate in good faith by unilaterally increasing the administrators' work year and that such failure is a violation of N.J.S.A. 34:13A-5.4(a)(5). The Hearing Examiner found that the Board, in attempting to justify a change in the work year, relied upon the contract language that did not clearly accomplish that purpose. He further determined that if the Board believed that the new contract

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

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

2/ H.E. No. 78-7, 3 NJPER ___ (1977).

between the parties altered the work year, it knew that the Association did not understand that to be the case and yet made no effort to explain or negotiate such desired change with the Association.

Pursuant to the Commission's Rules, exceptions to the Hearing Examiner's Recommended Report and Decision were filed by the Board. Additionally, the Board requested oral argument on this matter before the Commission; such request was granted and the parties presented oral argument before the Commission on December 20, 1977.

The Board takes exception to the Hearing Examiner's factual finding that the issue of the length of the work year was not the subject of good faith negotiations. It is the Board's position that the record reflects evidence of such negotiations.

The Commission finds that there is ample evidence in the record to support the finding of fact that the Board failed to negotiate in good faith the change in the length of the work year. The transcript of the testimony of Board member Robert Kurtz, the only witness for the Board, indicates that there were never any specific negotiations nor even discussions between the parties regarding the length of the work year. The record further reflects that the Board requested discussion of several areas of the contract which required mutual consent for reopening. 3/ Among these were, "the further definition of the calendar issue, and job and responsibility issue." 4/ The Association refused to reopen these areas before

3/ It is important to note that the negotiations at issue in this matter were of a reopener nature subject to the provisions of a prior existing agreement. Article XV of the agreement contained two provisions for the possible reopening of portions of the agreement for further negotiations. Article IX (Insurance Protection) and XI (Salaries) could be reopened during a certain time period at either party's option. Other amendments or modifications could be negotiated only by mutual consent of the Board and the Association.

4/ Exhibit J-7.

agreement was reached on Article IX (Insurance Protection) and Article XI (Salaries). This indicates an understanding that the negotiations pertaining to salaries were not deemed to include a definition of the calendar year. In fact, upon reaching agreement with the Association, the Board issued a press statement which made public the nature of the agreement and made no mention of an accomplished change in the work year. Finally, in oral argument before the Commission, counsel for the Board admitted that no discussions took place on this issue. The Board asserts that this issue was placed on the table by virtue of "presentations"; however, even the written documents pertaining to the two reopened Articles make no plain and direct mention of a changed work year.

The Board further takes exception to the conclusion of law that there was a failure to negotiate in good faith the change in the work year. This exception is based upon the claim that exact language accomplishing such a change was incorporated in the negotiated agreement. The Association argues that the changed language of the Article in issue had a purpose other than to change the work year, contending that it dealt with the difference of application of the per diem rate between ten month and twelve month administrators. The Association further asserts that this latter interpretation is the one it understood to be implemented through incorporation in the agreement. At oral argument before the Commission, counsel for the Board admitted that the clause was "somewhat ambiguous". Therefore the Board's exception to the Hearing Examiner's Report based upon the incorporation of exact language accomplishing the change is without merit. 5/

5/ Looking at standard contract law, if there is an ambiguity in the language of a contract and, prior to the signing of said contract, party A knows that party B has a different understanding of the meaning of the contract than party A, but party B is unaware of party A's understanding, then A is bound by B's meaning. Cresswell v. United States, 173 F. Supp. 805 (U.S.C.C. 1959). See also, Hurd v. Illinois Bell Tel. Co., 136 F. Supp. 125 (D.C.H.D. Ill. 1955) aff'd 234 F. 2d 942 (7th Cir. 1956) cert denied;

(Cont'd)

Finally, the Board takes exception to the failure of the Hearing Examiner to address the issue of the Association's failure to pursue the grievance procedure to the final stage of non-binding, advisory arbitration on this matter. The Board asserts that the issue at hand was purely one of contract interpretation and, therefore, would properly be resolved through the grievance procedure. At oral argument, counsel for the Board urged that, based on the above, this Commission lacks jurisdiction regarding this matter. This assertion is without merit.

While it is true that the Commission has adopted a policy of deferral to arbitration, the invocation of that policy is predicated upon the existence of several conditions. One of the prerequisites is that arbitration will be likely to lead to a resolution of the dispute. Such resolution cannot be expected when the arbitration award, as here, would be advisory only. 6/

After careful consideration of the entire record, the Commission, therefore, rejects the Board's exceptions and adopts the findings of fact and conclusions of law rendered by the Hearing Examiner.

The Commission finds that the record, including the testimony at hearing, the documentary evidence presented and the oral argument presented before the Commission, contains ample evidence to support the determination that the Board violated N.J.S.A. 34:13A-5.4(a)(5) as charged.

The Commission does not adopt that part of the Hearing Examiner's

5/ (Continued) and Seybold v. Western Electric, 352 U.S. 918 (1956); Restatement of Contracts, pages 74-75. Here the language was written by the Board. "Language is construed most strongly against him who uses it." Williston on Contracts, 3rd Ed., Vol. 4, page 105.

6/ For a fuller discussion of this policy, see In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975); In re City of Camden, E.D. No. 76-13, 1 NJPER 65 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER ___ (1977).

Recommended Order which directed the Board to reopen, upon Association demand, negotiations to discuss explicit definition of the work period for ten month administrators and a formula for per diem pay for all administrators. The appropriate remedy here is a return to the status quo and the direction to reopen upon demand is not necessary to re-establsih the status quo. 7/

ORDER

Accordingly, for the reasons set forth above, it is HEREBY ORDERED, that the Board shall:

1. Cease and desist from:

Refusing to negotiate in good faith with the majority representatibe of its school administrators concerning terms and conditions of employment of such administrators.

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

(a) Revert to the work period definition and the per diem pay formula which the parties agree exists in the 1975-77 agreement.

(b) Make ten month administrators whole according to the per diem pay schedule in the 1975-77 agreement, for whatever compensation they lost as a result of the Board's unilateral lengthening of their work year commencing September 1, 1976.

(c) Post at its central administrative building in Passaic Township, copies of the attached notice marked as Appendix "A". Copies of

7/ If the parties desire to negotiate this subject further they certainly may do so.

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

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

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

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

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

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the majority representative of our school administrators concerning terms and conditions of employment of such administrators.

WE WILL revert to the work period definition and the per diem pay formula which exists in the 1975-77 agreement.

WE WILL make ten month administrators whole according to the per diem pay schedule in the 1975-77 agreement, for whatever compensation they lost as a result of the Board's unilateral lengthening of their work year commencing September 1, 1976.

PASSAIC TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 78-7

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

In the Matter of

PASSAIC TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-130-86

PASSAIC TOWNSHIP ASSOCIATION OF
SCHOOL ADMINISTRATORS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find the Passaic Township Board of Education to have committed an unfair practice by unilaterally extending the work year of its school administrators in June, 1976.

The Board argued that the language of the contract was changed and therefore allowed them to extend the work year of the administrators.

The Hearing Examiner found that the contract language relied upon by the Board did not clearly alter the work year and concluded that there had been no negotiations between the parties relating to the work year of the administrators. The Hearing Examiner further determined that if the Board believed that the new contract between the parties altered the work year, it knew that the Association did not understand that to be the case and yet made no effort to explain the change to the Association.

The Hearing Examiner recommended that the Commission order the Board to cease and desist from refusing to negotiate in good faith with the Association; and affirmatively order the Board to revert to the work period definition and the per diem pay formula which the parties agree exists in the 1975-77 agreement; upon the request of the Association, to reopen negotiations to discuss an explicit definition of the work year for ten-month administrators and a formula or formulas for per diem pay for all administrators; and make the ten-month administrators whole for whatever compensation they lost as a result of the unilateral lengthening of their work year commencing September 1, 1976.

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. 78-7

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

In the Matter of

PASSAIC TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-130-86

PASSAIC TOWNSHIP ASSOCIATION OF
SCHOOL ADMINISTRATORS,

Charging Party.

Appearances:

For Passaic Township Board of Education,
Wiley, Malehorn and Sirota
(Donald M. Malehorn, of Counsel;
George H. Martini, On the Brief)

For Passaic Township Association of School Administrators,
McCarter & English
(Steven B. Hoskins)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Passaic Township Association of School Administrators (the "Association"), employee representative of the Principals and the Supervisors of Curriculum employed by the Passaic Township Board of Education (the "Board"), filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on November 18, 1976, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (the "Act") [1/] by lengthening the work year of certain administrators without negotiations and by refusing to negotiate the change.

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

"(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."

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 9, 1977, and a hearing was held before the undersigned on March 29, 1977. 2/

In February 1975, the Board and the Association entered into a two-year, collective negotiations agreement covering the period from July 1, 1975 through June 30, 1977. Article XV of the agreement 3/ contained two provisions for the possible reopening of portions of the agreement for further negotiations. Articles IX (Insurance Protection) and XI (Salaries) could be reopened during a certain time period at either party's option. Other amendments or modifications could be negotiated only by mutual consent of the Board and the Association.

On September 30, 1975, the Association made a timely submission to the Board of its proposals for changes in Articles IX and XI. 4/ The Board responded 5/ and negotiations ensued. On December 22, 1975, a new agreement was reached; 6/ it covered the period from July 1, 1976 through June 30, 1978.

In mid-June 1976, shortly before the 1975-77 agreement was to be superseded by the 1976-78 agreement, a question arose concerning the length of the work year for ten-month administrators. Anthony Gonnella, Superintendent of Schools, by memo of June 16, 1976, 7/ informed the ten-month adminis-

2/ All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. The parties filed sequential post-hearing briefs, the first, as well as the third and final brief being submitted by the Respondent, with an intervening brief from the Charging Party. All briefs were filed by June 21, 1977. Upon the entire record in this proceeding, I find that the Board is a public employer within the meaning of the Act and is subject to its provisions and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. An Unfair Practice Charge having been filed with the Commission that the Board has engaged or is engaging in an unfair practice within the meaning of the Act, as amended, a question concerning an alleged violation of the Act exists and this matter is appropriately before the Commission for determination.

3/ Exhibit J-1, p. 27.

4/ Exhibit J-3.

5/ Exhibit J-4.

6/ Exhibit J-2.

7/ See Exhibit J-11.

trators that he had concluded that, under the 1976-78 agreement, their work year would begin September 1 and end June 30. However, he said, since they were still working under the 1975-77 agreement, their last regular work day that year would be June 18.

The administrators took exception to the Superintendent's view; in September 1976, the Association filed a grievance [8/] alleging a unilateral lengthening of the work year and demanding a return to the status quo. The grievance was first denied by the Superintendent and then, on October 12, 1976, denied by a formal resolution adopted by the Board. [9/] The Association subsequently filed the instant Unfair Practice Charge. [10/]

The issue before the undersigned is whether there were, in fact, good faith negotiations between the parties over the length of the ten-month administrator's work year; no one disputes there was a change in 1976-77 and in order to determine the issue of good faith, it will be necessary to examine the language upon which the Board relies to defend its position, and to view it along with the conduct of the parties in the relevant period before, during and after the close of the negotiations process.

Vincent Moretta, President of the Association and one of the three ten-month administrators (the fourth Association member is the only twelve-month administrator), was the Association's sole witness at the hearing. Robert Kurtz, a member of the Board of Education, was the Board's only witness. Both men had taken part in the negotiation of the 1976-78 agreement.

The 1975-76 school year was the first year any of the administrators worked on a ten-month basis with July and August excluded from their work year. Prior to that year, all administrators worked on a twelve-month basis. Article XI of the 1975-77 contract [11/] contains a five-step salary guide for ten-month employees and another for twelve-month employees. There are two asterisks after the heading "10 Month Employees" and lower on the page is the corresponding note: "Administrators who work days in addition to the regular year as

8/ See Exhibit J-11.

9/ Resolution attached to Respondent's Answer, Exhibit C-2.

10/ Incorporated in Complaint, Exhibit C-1.

11/ Exhibit J-1, p. 19.

defined elsewhere in Articles V and X shall be reimbursed on a per diem basis. The per diem rate shall be defined as the 10-month administrator's salary divided by 200 days." 12/

Articles V and X of the 1975-77 agreement cover holidays and vacations, respectively. Both parties agree that under this contract the ten-month administrators' work year consisted of the duration of the academic calendar, plus three weeks during the year when the students were on short vacations.

Mr. Kurtz testified for the Board that a problem arose in September 1975 at one school when the principal, one of the ten-month administrators, didn't appear for work until the first day of school. Apparently the Board had expected him to report a few days earlier on September 1 in order to get things in order for the new school year. But upon reviewing the 1975-77 agreement, the Board conceded the principal had been correct about his first required work day. Kurtz also testified that the Board agreed with the Association that the ten-month administrators' work year officially ended with the last day of school in June 1976. 13/

The problem, then, was the length of the work year under the 1976-78 agreement, and it first arose in June 1976. Mr. Moretta, on cross-examination, refuted the suggestion of the Board's counsel that he had first raised the question of the length of the work year: "I didn't raise that question. The actual work year, the Superintendent raised the question and we asked for clarification." 14/ Later, Kurtz testified that although he was not privy to the original conversation, he understood that Moretta had first raised the question at an Administrative Council session. 15/ The undersigned finds it unnecessary to resolve by whom the issue was first raised in order to determine the validity of the Charging Party's allegations in this case.

The Board defends its position by reference to the following paragraph in Article XI (Salaries) of the 1976-78 agreement: "Administrators who work days in addition to their regular period as defined in their individual contract

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12/ Supra, note 11.

13/ Transcript, pp. 64-67.

14/ Transcript, p. 45.

15/ Transcript, p. 73.

and in this contract shall be reimbursed on a per diem basis. The per diem rate shall be calculated by dividing their base salary by the number of days of their regular period." 16/

The Board relies on this paragraph as it contrasts with a similar note in the 1975-77 agreement, 17/ to sustain its view that ten-month administrators must now work from September 1 through June 30. Its interpretation increases the 1976-77 work year about 11 days over the 1975-76 year; it adds the period from September 1 to the first day of the students' year and the period from the last student day in June through June 30. The 1977-78 work year would be similarly increased.

Both parties agree that the noted paragraph in the 1976-78 agreement differs from its counterpart in the 1975-77 agreement, and that the wording of the paragraph in the new agreement is exactly what they agreed to when they concluded their negotiations on December 22, 1975. They disagree, however, over the import of that wording, and over why and how it came into being.

At the outset of the hearing, the parties jointly moved into evidence copies of both the 1975-77 agreement and the revised pages which formed the 1976-78 agreement, as well as copies of the written proposals, responses and counter-proposals, etc., which were exchanged during negotiations for the 1976-78 agreement. 18/ In order to arrive at an understanding of the key paragraph, it will be helpful to briefly trace what transpired over the sequence of negotiations.

On September 30, 1975, the Association opened the first negotiating session with a written proposal for changes in Articles XI (Salaries) and IX (Insurance Protection). 19/ Under Article XI, it proposed compacting the salary guide from five steps to three, and it proposed new dollar amounts for those steps. The proposed new guide included salaries for ten and twelve-month principals as did the existing guide, but it also included a blank salary column for ten-month vice principals. A note below indicated that New Jersey

16/ Exhibit J-2, p. 19.

17/ Supra, notes 11 and 12.

18/ Exhibits J-1 through J-9.

19/ Exhibit J-3.

law suggests the use of assistants to principals in schools which meet certain criteria. The Association believed that Central School met the criteria and that the hiring of a vice principal there was warranted. There was another note regarding per diem pay for administrators who worked extra days. Additionally, the Association proposed a change in the definition of a service premium, and the elimination of a section on the withholding of increments. The Association suggested that Article IX be completely rewritten so that there would be no cost to the employee for medical insurance, and to add dental care and prescription drug coverage.

The Board responded at the next meeting on October 9 with a written counter-proposal which recognized the negotiability of Articles IX and XI. 20/ It claimed, however, that the request for a vice principal could only be considered by mutual consent of the parties, and it refused to consider such request. Also, it claimed that since dental and prescription coverage were not included in the existing contract, they were not open for negotiation. The Board proposed to hold any discussion of the insurance provisions in abeyance until it had concluded negotiations with its teachers. It proposed, in light of a review of Consumer Price Index ("CPI") figures, to retain the existing salary guide for 1976-77 and keep all administrators on the first step of the guide. The Board agreed to reevaluate the provision on the withholding of increments, but refused to renegotiate the service premium provision. It then proposed, under the reopener provision which required mutual consent, renegotiation of certain provisions of Articles XIII (Board of Education Rights), V (Holidays) and XV (Duration of Agreement).

The Association's written response to the Board's October 9 counter-proposal was dated October 14. 21/ It first recognized the Board's right not to consider the request for inclusion of a vice principal category in the salary guide. That was the end, apparently, of any discussion of vice principals. The Association then noted the Board's request to reopen items in Articles V, XIII and XV, and reaffirmed its right not to reopen them. But it stated that it would consider the Board's reopener request after the parties had agreed on Articles XI and XI. The Association then rejected the Board's

20/ Exhibit J-4.

21/ Exhibit J-6.

position on the negotiability of dental and prescription coverage, but agreed to hold discussion of Article IX in abeyance until after the teachers' package had been worked out. It rejected the validity of the Board's reliance on the CPI for determining salary levels, and stated that it believed a Board decision to keep administrators on the first step of the existing salary guide would be illegal. The Association argued with the Board's reasoning on service premiums and, finally, offered to reduce their initial salary increase request from 16.7% to a total increase of 12%.

On October 28, 1975, the Board gave the Association a written summary of the status of the negotiations: 22/ Both parties agreed to postpone discussion of an insurance package. The Board then offered the Association its choice of one of two salary packages. Each would cover the next three years, i.e., through June 1979. The two salary formulas were different, as were the merit pay proposals. As a final note, the Board indicated it would pursue the other issues which required mutual consent for renegotiation.

On November 4, 1975, the Association responded. 23/ It reiterated its agreement to hold off insurance discussions until after the Board had worked out agreements with other personnel. It agreed with the concept of parity (ratio of difference between teachers' and principals' salaries) which had been suggested in the Board's October 28 memorandum, and it offered what it thought an appropriate ratio. The Association also agreed to existing service premiums and a three-year agreement for Articles IX and XI, subject to certain conditions, which were salary and merit pay data listed later in the memorandum. Finally, it stated its willingness to discuss job description, calendar language and responsibility when Articles IX and XI had been mutually resolved.

The Board issued its final official contract proposal on December 4, 1975, with a covering note from Mr. Kurtz attached to it. 24/ Kurtz first indicated that most of the proposal was a confirmation of the Association's recent discussion with Mr. Hanley (another Board member), then took care to point out what he termed "pertinent departures": revision of the twelve-month

22/ Exhibit J-7.

23/ Exhibit J-8.

24/ Exhibit J-9.

increment, and elimination of merit pay except at the Board's discretion. Kurtz closed his note with the hope that it would meet with Association approval and that the Board would be notified of its acceptance shortly.

On December 22, 1975, the Board issued a press release indicating that agreement had been reached on the 1976-78 contract. [25/] The announcement detailed the salary increase, the extra insurance coverage and the reversion to Board discretion in the awarding of merit pay.

Vincent Moretta, the Association President, who, according to his uncontroverted testimony, attended every negotiating session, [26/] stated that nobody proposed changing the length of the ten-month administrators' work year. [27/] When asked if, as a result of the negotiations, he had agreed to work a longer year, his negative reply was allowed to stand over Board counsel's objection that what he believed he had agreed to was irrelevant. [28/]

Moretta testified that the language change in the key paragraph was made so that there would be an equitable formula for computing per diem pay for twelve-month administrators who worked extra days, as distinguished from the formula for computing ten-month administrators' per diem pay. [29/] The language in the 1975-77 contract had only provided for such pay for ten-month administrators, and the Board admitted as much. [30/]

Robert Kurtz, a Board member, who, according to Moretta's uncontroverted testimony, missed two or three of the eight or nine negotiating sessions, [31/] testified that at a work session of the Board after the Association gave notice that it wished to exercise the reopener provision, a discussion was held concerning what changes the Board would like to see in the agreement. According to Kurtz, the Board specifically requested that its negotiating team attempt to negotiate a longer work year. Kurtz went on to say that he (or some of the Board negotiators, at least; it's not clear exactly who) explained

25/ Exhibit J-10.
26/ Transcript, pp. 42 and 62.
27/ Transcript, p. 33.
28/ Transcript, pp. 38-39.
29/ Transcript, pp. 37 and 54.
30/ Transcript, p. 86.
31/ Transcript, pp. 42 and 62.

to the superintendent and the rest of the Board that such a change would be difficult to achieve, since only Articles IX and XI were to be reopened, and he believed Article V governed the length of the work year. But then someone noticed that a change in the language of the key paragraph of Article XI might do the trick just as well. 32/

The Board claimed, through Kurtz, through its counsel at the hearing and in its brief, that it set out from the beginning of the negotiations to lengthen the work year. It claimed that the subject was referred to several times throughout the negotiations by both parties. The key paragraph finally offered by the Board was, according to Kurtz, intended to define the ten-month administrators' work year by the period stated in their individual contracts, and to get away from any tying it to the school calendar. 33/ The Board points out that the paragraph was accepted by the Association without question, and claims, therefore, that the change was negotiated in good faith.

Based chiefly on a careful reading of the negotiating documents submitted jointly by the parties and on the testimony of the Board's witness, Robert Kurtz, the undersigned concludes that the Association did prove its case by a preponderance of the evidence. I find the Board did fail to negotiate in good faith the change in the administrators' work year, and that failure is a violation of N.J.S.A. 34:13A-5.4(a)(5). An analysis follows:

Kurtz testified that there were never any specific discussions during the negotiations regarding the length of the work year. He said he assumed the Association negotiators could read English and would ask questions if they had any. 34/

The Board's claim that there were several references to the issue in the early negotiating documents is overstated. I found four oblique references. First the Board proposed to reopen, by mutual agreement, Articles other than IX and XI. It wanted, inter alia, to change Article V to read "consistent with Teacher's Employment Contract" instead of school calendar. 35/ The Association replied, in effect, that it didn't have to agree to negotiate that but it might so agree after Articles IX and XI had

32/ Transcript, pp. 67-68.

33/ Transcript, p. 72.

34/ Transcript, pp. 80-81.

35/ Exhibit J-4.

been resolved. 36/ At the end of the Board's next communique, the following note appeared: "Other: The Board will pursue the further definition of the calendar issue, and job and responsibilities issue." 37/ The Association then replied, in effect: "OK. We agree to discuss those after we resolve Articles IX and XI." 38/ It is evident to me that the Association had notified the Board that it considered the issue outside the scope of Articles IX and XI. If the Board wished to effect such a change by altering Article XI rather than Article V, it should have notified the Association of its intention.

The Board consistently maintained that they key paragraph was intended to define the work period by reference to the administrator's individual contracts, but the words of the paragraph plainly say more than that: "Administrators who work days in addition to their regular period as defined in their individual contract and in this contract shall be reimbursed on a per diem basis..."(emphasis supplied). 39/ It should be noted that while Vincent Moretta's individual contract for the 1976-77 school year described a period from September 1 through June 30, so did his 1975-76 contract, although everyone agreed he was to work a shorter year in 1975-76. 40/ The individual teacher contract for 1976-77 also referred to a period from September 1 through June 30, but no one disputed that the teachers worked a shorter year. 41/

Moreover, all of these individual contracts stated that they were subject to their respective collective negotiations agreements. The 1976-78 agreement between the Association and the Board had two articles which pertained to holidays and vacations for ten-month administrators: Articles V and X. These did not change in the course of the negotiations, but appeared in the 1976-78 agreement exactly as they had in the 1975-77 agreement.

Kurtz testified regarding a telephone conversation he had with Moretta during the summer of 1975, before the grievance and the instant charge were filed. Moretta, he said, complained of the Superintendent's interpretation of the work period for 1976-77 as beginning September 1. Kurtz claims

36/ Exhibit J-6.
37/ Exhibit J-7.
38/ Exhibit J-8.
39/ Exhibit J-2, p. 19.
40/ Exhibit A-1-A and A-1-B.
41/ Exhibit A-2.

he replied that the Superintendent was correct and then he and Moretta both referred to copies of the contract. Moretta, according to Kurtz, referred to Article V and Kurtz to Article XI. Moretta paused, and then said: "Well it looks like we've been had." 42/ The Association made no attempt to refute this version of the conversation. Kurtz' own testimony of Moretta's surprise on learning the basis of the Board's position lends credence to the Association's claim that the change was not negotiated in good faith.

On direct examination, Kurtz testified that prior to the issuance of the Board's final package proposal on December 4, no conclusion had been reached whether negotiations should be expanded beyond discussion of the salary and insurance articles. But, Kurtz claimed, in its last proposal, the Board "...made some fairly drastic changes in what we were offering and also then at that point in time we decided as long as we were willing to make these drastic changes in our offer, we would make some equally drastic changes in the items that we were looking for." 43/ A covering note from Kurtz was attached to the Board's final proposal and it purported to highlight pertinent changes. 44/ If the work year change was so important to the Board, as it claims, and was a drastic departure from a previous offer, as Kurtz indicates, why was it not referred to in the covering note?

Indeed, if the issue was so important to the Board, why was it never discussed in plain English with the Association, either orally or in writing? Perhaps a further sample from Kurtz' testimony sheds some light on the question. When asked on cross-examination why the proposal didn't simply state that a ten-month administrator would work from September 1 through June 30, he answered: "Because we have always avoided trying to lay out a provision of a work period. What we have stated in effect is that the work period is covered by the other segments and we did not wish to add another segment to the contract." 45/ The undersigned cannot help but wonder what good reason the Board could possibly have had for not wishing to settle explicitly such a basic issue as what period of time during the year its employees would work. No good reason was offered.

42/ Transcript, pp. 74-75.
43/ Transcript, p. 78.
44/ Exhibit J-9.
45/ Transcript, p. 82.

Counsel for the Association points out that while the Board negotiating team claimed it explained the details of the work year change when it presented the proposal to the Board, 46/ it did not claim in its press release announcing the agreement to the public, to have gained any such concession. 47/ Counsel for the Association also points out that all four administrators received approximately a 3.8% raise. The work year of the twelve-month administrator remained unchanged, but the work year of the ten-month administrators was lengthened by over 5%. It is difficult for the undersigned to believe that if the Association had any idea that the key paragraph would achieve such a result, it would have accepted it without any fuss or discussion of the apparently unequal treatment that would be afforded its members.

One needn't be an educator to understand why a Board of Education might find it desirable to have its school principals working a few days before and after students are in attendance. But it makes equally good sense to the undersigned that this Board might reasonably have agreed that the principals' salaried work year would be defined by the school calendar and that they would be paid on a per diem basis, as necessary, for extra days spent preparing for the arrival of students and closing down the school after their departure. I believe this was the agreement in the 1975-77 contract, and if the Board believed the 1976-78 contract altered that agreement, it knew the Association did not understand that, and it made no effort to explain the change. 48/

46/ Transcript, pp. 79-80.

47/ Exhibit J-10.

48/ Looking at standard contract law, if there is an ambiguity in the language of a contract and, prior to the signing of said contract, party A knows that party B has a different understanding of the meaning of the contract than party A, but party B is unaware of party A's understanding, then A is bound by B's meaning. Cresswell v. United States, 173 F.Supp. 805 (C.T.C.L. 1959). See also, Hurd v. Illinois Bell Tel. Co., D.C. 136 F.Supp. 5; aff'd 7 Cir., 234 F.2d 942, cert denied; and Seybold v. Western Electric, 352 U.S. 918; Restatement of Contracts, pages 74-75. Here the language was written by the Board. "Language is construed most strongly against him who uses it." Williston on Contracts, 3rd Ed., Vol. 4, page 105.

As the Board points out in its first brief, relying on East Brunswick Board of Education, H.E. No. 76-13, 2 NJPER 204 (1976), "Where a refusal to negotiate in good faith is charged, the overall conduct and/or attitude of the party charged must be subjectively analyzed to determine whether such a violation has occurred." 49/ I have made such a subjective analysis, and have determined that the Board violated N.J.S.A. 34:13A-5.4(a)(5), as charged.

RECOMMENDED ORDER

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

1. Cease and desist from:

Refusing to negotiate in good faith with the majority representative of its school administrators concerning terms and conditions of employment of such administrators.

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

(a) Revert to the work period definition and the per diem pay formula which the parties agree exists in the 1975-77 agreement.

(b) Upon request of the Association, reopen negotiations to discuss an explicit definition of the work period for ten-month administrators and a formula or formulas for per diem pay for all administrators.

(c) Make ten-month administrators whole according to the per diem pay schedule in the 1975-77 agreement, for whatever compensation they lost as a result of the Board's unilateral lengthening of their work year commencing September 1, 1976.

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

Edmund G. Gerber
Hearing Examiner

DATED: September 16, 1977
Trenton, New Jersey

49/ Board brief filed 4/25/77, p. 5.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with the majority representative of our school administrators concerning terms and conditions of employment of such administrators.

WE WILL revert to the work period definition and the per diem pay formula which exists in the 1975-77 agreement.

WE WILL, upon request of the Association, reopen negotiations to discuss an explicit definition of the work period for ten-month administrators and a formula or formulas for per diem pay for all administrators.

WE WILL make ten-month administrators whole according to the per diem pay schedule in the 1975-77 agreement, for whatever compensation they lost as a result of the Board's unilateral lengthening of their work year commencing September 1, 1976.

PASSAIC TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780