

P.E.R.C. NO. 81-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY REGIONAL HIGH
SCHOOL DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-80-228-80

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission adopts the recommended decision and order of the Hearing Examiner that the Board of Education did not violate Subsections 5.4(a)(1), (5) or (6) of the Act when it unilaterally removed the Columbus Day holiday from the school calendar and refused to pay those employees who took that day off, and dismissed that portion of the complaint.

The Commission also adopts the recommended decision and order of the Hearing Examiner that the Board did violate the Act in unilaterally removing certain work previously performed by an employee in the negotiations unit and reassigning that work to another employee in a title outside the unit. The Board was ordered to negotiate the decision to shift work from unit employees to those employees outside of the unit and to restore to the negotiations unit that work which was unilaterally removed therefrom.

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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY REGIONAL HIGH
SCHOOL DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-80-228-89

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Leon A. Consales, Esquire

For the Charging Party, NJEA-NEA UniServ Regional
Office (William Flynn, Field Representative)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on February 1, 1980 by the Passaic Valley Office Workers Association (the "Association") alleging that the Passaic County Regional High School District #1 (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The charge alleged that the Board unilaterally removed a contractually guaranteed holiday, Columbus Day (October 8, 1979), from the holiday schedule, and docked Association members one day's pay when they did not work on that day. It was further contended that the Board "subcontracted" or removed from the unit certain work formerly performed by a unit member and assigned said work to a position outside the Association's negotiations unit. These actions are alleged to be violative

of N.J.S.A. 34:13A-5.4(a)(1), (5) and (6).^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 14, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 2, 1980 in Newark, New Jersey, before Hearing Examiner Charles A. Tadduni, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Post-hearing briefs were filed by both parties by July 28, 1980.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-26, 7 NJPER ____ (¶ ____ 1981), on February 10, 1981. He concluded that the Board's unilateral action in removing the Columbus Day holiday from the school calendar and failing to pay unit employees for taking that day off did not constitute a violation of N.J.S.A. 34:13A-5.4(a)(1), (5) or (6) and recommended that this portion of the Complaint be dismissed. He also concluded that the Board's unilateral removal of certain work previously performed by an employee in the Association's negotiations unit and reassigning that work to another employee in a title outside the Association's unit constituted a violation of

^{1/} These subsections prohibit public employers, their representatives or agents from: " (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

N.J.S.A. 34:13A-5.4(a)(1) and (5). He recommended that this Commission order the Board to restore to the Association's bargaining unit, that work which it had unilaterally removed.

Neither party has filed exceptions to the report of the Hearing Examiner. We have reviewed the entire record in this matter and hereby adopt the findings of fact and conclusions of law made in H.E. No. 81-26. We find that the Board's actions did not constitute a violation of the Act in removing Columbus Day as a holiday on the school calendar but did constitute a violation in unilaterally removing work performed by a member of the Association's bargaining unit and reassigning that work to another employee outside of the Association's unit. We adopt his recommendations and issue the following

ORDER

IT IS HEREBY ORDERED that:

A. The Respondent Board of Education shall cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate in good faith with the Association the decision to shift certain work from employees within the bargaining unit to employees outside the bargaining unit.

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

(a) Restore to the Association's bargaining unit that work which it has unilaterally removed therefrom, more specifically, restore to the Association's unit the functions

formerly performed by the Clerk of the computer center.

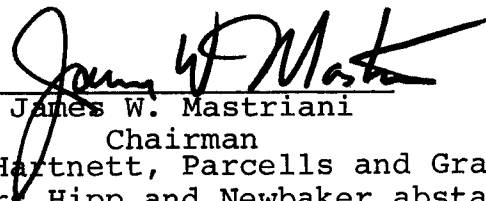
(b) Negotiate, upon demand, with the Association the decision, and the effects thereof, to shift certain work from employees within the Association's bargaining unit to employees outside the bargaining unit.

(c) Post at all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

IT IS FURTHER ORDERED that that portion of the Complaint which alleges a violation of the Act based upon Respondent's failure to pay unit employees for Columbus Day, October 8, 1979, and Respondent's refusal to negotiate the Columbus Day issue and that portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(6) be dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani and Commissioners Hartnett, Parcels and Graves voted for this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
March 10, 1981

ISSUED: March 11, 1981

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate in good faith with the Association the decision to shift certain work from employees within the bargaining unit to employees outside the bargaining unit.

WE WILL restore to the Association's bargaining unit that work which it unilaterally removed therefrom, more specifically, restore to the Association's unit the functions formerly performed by the Clerk of the computer center.

WE WILL negotiate, upon demand, with the Association the decision, and the effects thereof, to shift certain work from employees within the Association's bargaining unit to employees outside the bargaining unit.

PASSAIC VALLEY REGIONAL HIGH SCHOOL DISTRICT NO. 1
(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 the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

PASSAIC COUNTY REGIONAL HIGH
SCHOOL DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-80-228-89

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(5) when it unilaterally removed certain work from the Association's bargaining unit and reassigned that work outside the bargaining unit.

The Hearing Examiner further recommends that the Commission find that the Board did not violate § 5.4(a)(1) and (a)(5) when it removed the Columbus Day holiday from the school calendar. The Association contended that the Board violated the Act when it unilaterally removed Columbus Day as a holiday during negotiations for a successor agreement, when it refused to negotiate concerning the Columbus Day removal, and docked employees one day's pay for not working on Columbus Day. The Hearing Examiner determined that the parties' contract provided that the holiday schedule followed the school calendar; that the school calendar did not provide a Columbus Day holiday; that school calendar was not a mandatorily negotiable subject, that the Board's calendar change resulted in a net gain of paid holidays to employees, and that employees did not work on Columbus Day, which was a regular school/workday in the district. Accordingly, the Hearing Examiner determined that there was no unilateral change of a term and condition of employment and no refusal to negotiate concerning a mandatory subject of negotiations. The Hearing Examiner further determines that there was no violation of § (a)(6) shown in the record.

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.

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

In the Matter of

PASSAIC COUNTY REGIONAL HIGH
SCHOOL DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-80-228-89

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Leon A. Consales, Esq.

For the Charging Party
William Flynn, Field Representative, NJEA

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge (Docket No. CO-80-228-89, the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on February 1, 1980, by the Passaic Valley Office Workers Association (the "Association") alleging that the Passaic County Regional High School District #1 (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). It is alleged in the Charge that Association members were docked one day's pay for having taken off on Columbus Day (October 8, 1979), a contractually guaranteed holiday. The

Association contends that the Board unilaterally removed the holiday and would not negotiate concerning same despite Association demands to do so. It is further contended that the Board "sub-contracted" or removed from the unit certain work formerly assigned to a position in the unit and assigned it to a position outside the Association's negotiations unit. ^{1/}

It appearing to the Director of Unfair Practices that the allegations of the Charge, if true, may constitute unfair practices within the meaning of the Act, on April 14, 1980, a Complaint and Notice of Hearing was issued in the above-captioned matter. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 2, 1980, at which time all parties were given the opportunity to examine witnesses, to present evidence and to argue orally. Subsequent to the close of hearing, briefs were submitted by both parties to the instant proceeding by July 28, 1980. Upon the entire record in this proceeding, the Hearing Examiner finds:

(1) The Passaic County Regional High School District #1 is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of the employees involved in this proceeding.

^{1/} More specifically, the Association alleges that by its conduct, the Board has violated N.J.S.A. 34:13A-5.4(a)(1), (5) and (6). These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) refusing to reduce a negotiated agreement to writing and to sign such agreement."

(2) The Passaic Valley Office Workers Association is an employee representative within the meaning of the Act and is subject to its provisions.

Part I

As filed by the Association, the Charge is in two parts. In Part I of the Charge, the Association alleges that the Board committed a violation of the Act when it unilaterally removed Columbus Day as a holiday during the negotiations for a successor agreement with the Association. The Association alleges a further violation by the Board when, in the face of Association demands to negotiate concerning the removal of Columbus Day from the calendar, the Board did not respond to said demands.

The Association contends that in past years, holidays -- including Columbus day -- had been negotiated by the Board and in fact were always enumerated in the contracts between the Association and the Board. The Association claims that inasmuch as no new contract had been concluded by the parties on October 8, 1979, the expired contract (covering 78-79) then prevailed; under the 78-79 contract, Columbus Day was designated as a holiday and a day off for Association unit employees.

In response to Part I of the Charge, the Board asserts that the school calendar is a managerial prerogative and is a non-negotiable subject. The Board contends that calendar has never been negotiated by the Board and that the inclusion of the school

calendar in prior contracts with this and various other employee groups of the Board has been done ostensibly to avoid misunderstandings with the employees regarding the holiday schedule. Finally, the Board states that as a result of the changed calendar which it adopted for the 79-80 school year, Association unit employees received more days off than they had during the previous school year.

Findings of Fact

Several contracts between the parties herein have contained a provision listing holidays-days off, including the contracts covering school years 1979-82, 1976-79 and 1974-76. On the Board's school calendar, Columbus Day has been designated as a holiday for each school year from 1969-70 through 1978-79, inclusive.

During the 1978-79 school year, the parties commenced negotiations for a new contract. The parties were then operating under a contract covering the period 1976-79, which expired on June 30, 1979 (Exhibit J5). The 78-79 contract listed the holidays provided to secretarial employees, among which was listed Columbus Day.

In May 1979, the Board adopted a calendar for the 79-80 school year. The 79-80 calendar did not designate Columbus Day as a holiday. The Association was furnished with a copy of this calendar. Under the 79-80 calendar, the total number of holiday-days off was greater (by one or two days) than the total number of holiday-days off under the 78-79 calendar.

On July 2, 1979, the designated negotiations representative of the parties executed a Memorandum of Agreement. The Memorandum was made specifically contingent upon approval by the Board and the Association; the negotiators agreed to recommend ratification of the Memorandum to their respective principals. The Memorandum addressed the following subjects: duration of the agreement, salaries, vacation, personal leave, summer hours, bereavement leave, longevity pay and a prescription-drug plan. Subsequent to the execution of the Memorandum, the negotiators met again some time prior to July 26, 1979, in an effort to "flesh out" the terms of a full collective negotiations agreement for the period from 1979-82. However, some language problems arose concerning several provisions and the Association alleged that several new items were included in the complete draft which had not been discussed prior thereto. A complete initial draft was first readied in August, 1979.

During the period subsequent to the execution of the Memorandum, the Board maintained that "hours and other contractual issues" were still governed by the recently expired contract (for 1978-79). On September 26, 1979, the Association sent the Board a letter (P3) stating that because of the Board's position -- that the terms of the expired contract would prevail until a new contract had been executed -- Association members had worked through the summer without receiving the benefit of the summer schedule tentatively agreed upon in the Memorandum of Agreement. The letter (P3) went on to state that in accordance with that Board position, inasmuch as Columbus Day was a "contractually agreed upon holiday" under

the 1978-79 contract, and inasmuch as the new contract had not yet been signed and therefore the terms and conditions of the old contract still prevailed, Association members were not obligated to work on Columbus Day.

The Board responded that the school calendar was controlling of this matter and that Association members were expected to work in accordance with the current school calendar. Further, the Superintendent testified that both he and the Board encouraged the Association to have its membership work on Columbus Day and thereafter to grieve the issue rather than to have employees not report for work on that day.

On October 8, 1979 (Columbus Day), the members of the Association did not report to work. October 8, 1979 was a regular school day in the Passaic County Regional High School District -- students were in attendance and classes were taught. Thereafter, the Board docked one day's pay from the paycheck of each Association member. On October 10, 1979, the Association ratified the full draft agreement without any changes to the document as it had stood immediately prior to October 8, 1979.

The Association contends that the Board violated the Act when it (a) unilaterally changed a term and condition of employment during negotiations of a successor contract -- the Board's removal of the Columbus Day holiday -- and (b) refused to negotiate regarding the removal. The Board contends that this is a calendar issue, that it has never negotiated calendar and will not do so now. Further, the Board notes that its calendar change has given

Association members a net of two additional holidays. Finally, the Board argues that acceptance of the Association's position under the circumstances herein would mean that the employees would receive Columbus Day off as well as the increased number of holidays which the Board created by its calendar change. ^{2/}

Analysis and Conclusions of Law

In several contracts between the parties prior to 1979-80 there were provisions dealing with work year. Article V ("Work Day and Work Year"), Paragraph B of the parties' Agreement covering 1974-76, states:

Holidays with full pay shall be provided for members of the Secretarial/Bookkeeping and Clerical staff. Holiday schedules follow the school calendar for 1974-75 as follows:

New Year's Eve Day and New Year's Day
*Lincoln-Washington Recess, Feb. 12th
13th & 14th, 1975
Good Friday
Memorial Day
July 4th
Labor Day
Columbus Day
Veteran's Day
Teacher Convention Days
Thanksgiving Day and the day after
Christmas Eve Day and Christmas Day
Easter Recess and Christmas Recess as
heretofore mentioned in Article V,
paragraph A-1

* "The 1975-76 comparable holidays to be based upon the school year calendar adopted by the Board for that school year." (emphasis added).

^{2/} Noting in particular the timing of the Association's signing of the Agreement covering the 79-80 school year, the Association's reasoning would permit Columbus Day (October 8, 1979) as a holiday under the old contract (which prevailed on that date) and would permit the enlarged Washington-Lincoln holiday period, which was created by the Board's calendar change, as a holiday under the new contract (which prevailed on the date of the Washington-Lincoln holiday).

There is an identical provision (Art. V, Para. B) in the 1976-79 contract between the parties; only the dates are changed, i.e. 76-77, 77-78 and 78-79. A similar provision appears in the parties' 1979-82 contract.

Initially, the Hearing Examiner notes the clear and unambiguous language regarding holidays set forth in each of the contracts in evidence: "Holiday schedules follow the school calendar for ...(year) as follows:"; in each contract, such language is followed by the enumerated holidays, which consistently match those set forth in the school calendar. For the statutory, 180 day, September-June school year, the holidays set forth in the school calendar for a given school year match those enumerated in the parties' contract. In that portion of the contract year not covered by the school calendar, two additional holidays are provided in the contract: July 4 and Labor Day. This fact, however, does not diminish the Hearing Examiner's earlier observation that contracts and calendars match concerning holidays during the regular school year.

Further examination of the "Work Year" provision in each of the contracts in evidence indicates an additional correlation between contract and calendar as concerns holidays. In the 78-79 contract, with reference to the "Lincoln-Washington Recess" the contract states:

"1976-77, 1977-78, 1978-79 comparable holidays to be based upon the school year calendar adopted by the Board for the school year." (emphasis added).

The 76-79 contract was executed in December, 1976. Thus, for school years 77-78 and 78-79, such language indicates a contractual intent to follow the future designation by the school calendar of the Lincoln-Washington holidays.

The plain meaning of the language of Article V, Para. B from the parties' 78-79 Agreement is that holidays for employees shall be as designated in the calendar adopted by the Board for that school year. And if the contract language is not totally convincing, the experience of the parties appears dispositive: contract holidays have followed the calendar through the years.

On July 2, 1979, the parties' negotiators executed a Memorandum of Agreement. The memo specifically called for ratification by each of the parties. Accordingly, the memo was not technically binding on the parties. ^{3/} However, we may view the memo as one indicator of the parties' intent.

It is settled law in this state that during the pendency of negotiations for a successor agreement, if the parties' contract expires, the terms of the expired contract shall prevail until a new contract is executed. ^{4/} What does this mean? Does it mean that everything remains precisely the same -- salary, vacation, etc.? Not necessarily, and in fact, not usually. Several things often "change" even as the parties follow the terms and

^{3/} In re Black Horse Pike Reg. School Dist. Bd/Ed., P.E.R.C. No. 78-83
4 NJPER 249 (¶4126, 1978); see also, In re Bergenfield Bd/Ed.,
P.E.R.C. No. 90 (1975), In re East Brunswick Bd/Ed., P.E.R.C. No.
77-6, 2 NJPER 279 (1976).

^{4/} Galloway Twp. Bd/Ed. v. Galloway Twp. Assn/Educational Secretaries,
P.E.R.C. No. 76-31, 2 NJPER 182 (1976), affmd in part,
revd in part 149 N.J. Super. 346 (App. Div. 1977), affmd in
part, revd in part, 78 N.J. 1 (1948). See also, In re Piscataway Bd/Ed.,
P.E.R.C. No. 91 (1975).

conditions set forth in their old contract. For example, in a contract covering teachers where there is a salary guide with automatic progression, teachers progress along that salary guide -- they are paid at the next succeeding step of the guide, not at last year's step. Also, where holidays are designed by date (Thanksgiving, November 27, 1980), in the new school year, even as the parties follow their old contract, they substitute appropriate dates in the new year (Thanksgiving, November 26, 1981).

In the instant matter, the Hearing Examiner would expect the parties to do the same. The contract language stating that "holidays follow the school calendar" remains in effect. Plain logic dictates that the calendar which holidays follow will be the then-current calendar, not last year's calendar. Thus, into Article V, Paragraph B of the 78-79 contract is substituted the 79-80 school calendar (in place of the 78-79 calendar). What further serves to underscore this point is the language of the memorandum of agreement:

The parties hereby agree that the collective agreement between the parties shall remain in full force and effect except as modified herein:

The duration of the agreement shall be from July 1, 1979 through June 30, 1982 and the contract shall reflect appropriate date changes. (emphasis added).

Accordingly, under the terms of the Association's own argument that the 78-79 contract provision concerning holidays still prevailed, by the language of the 78-79 contract, the experience of

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the parties and the language of the 79-82 Memorandum of Agreement, the Hearing Examiner determines that Columbus Day was not a contractual holiday for 1979-80.

The undersigned further notes that with respect to disputes concerning the obligation to perform certain work activity, the generally accepted approach in labor relations is to "work and grieve" concerning such an issue. ^{5/} In the instant matter, the Association chose not to work on a day when work was scheduled by virtue of the school calendar. The Board's reaction then was to not pay the secretarial employees for the day not worked. It would seem that the Association had thus acted at its peril, for if its contention concerning the employees' work obligation turned out to be incorrect -- as it did herein -- then in not working on the disputed day, the Association thereby risked having its members not paid (docked) for the day not worked.

Finally, the undersigned notes that the Board's calendar change did not result in a lengthening of the work year -- nor did it result in a net loss of days off to these employees for the year. Rather, the change resulted in actually increasing the amount of paid time off for these employees.

In summary, the undersigned determines that in May 1978, the Board adopted its 1979-80 calendar; the parties' expired 78-79 contract was in effect during the period at issue herein (October 1979); that contract (78-79) provided that holidays followed the

^{5/} While the record reflects the Association's lack of confidence in the contractual grievance procedure, the Association nevertheless had other avenues of procedure available to it other than not working the disputed day.

school calendar; that the 79-80 school calendar did not provide a Columbus Day holiday; that the Board's calendar change resulted in a net gain of paid holidays to employees; that employees did not work on October 8, 1979 (Columbus Day); that October 8, 1979 was a regular school day and regular work day in the Passaic Valley Regional High School District; and finally, that the Board did not pay secretarial employees for October 8, 1979. Based upon the foregoing, the undersigned determines that there was no contractual entitlement to Columbus Day and therefore no unilateral change based upon the Board's "removal" of the Columbus Day holiday.

With regard to the Association's contention that the Board refused to negotiate concerning the Columbus Day issue, the undersigned notes that the courts and the Commission have held that the establishment of a school calendar -- including the scheduling and length of intermediate vacations during the school year -- is not a required subject for collective negotiations. ^{6/} In In re Edison Township Board of Education, P.E.R.C. No. 78-53, at 5, 4 NJPER 151 (¶4070, 1978), the Commission stated:

Thus, it is clear that the Commission has recognized the coexistence of two concepts: (1) the establishment of the academic or school calendar which is not mandatorily negotiable and (2) the determination of employees' work year which is a term and condition of employment and is mandatorily negotiable. However, it has been recognized that negotiations on the work year for teachers will, as a practical matter, recognize the parameters of the school calendar.

^{6/} Burlington Cty. College Faculty Association v. Board of Trustees of Burlington Cty. College, 64 N.J. 10 (1973); Bd/Ed. of Woodstown-Pilesgrove School Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980); In re Green Brook Twp. Bd/Ed., P.E.R.C. No. 77-11, 2 NJPER 288 (1977); and In re Edison Twp. Bd/Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070, 1978).

Other than the September 26 letter from the Association to the Board (Exh. P-3), there is no indication in the record of the Association having submitted any written proposal to the Board regarding the Columbus Day issue. Between the signing of the Memorandum of Agreement and Columbus Day, other exchanges regarding the Columbus Day issue were verbal and apparently phrased in terms of wanting to negotiate "Columbus Day." ^{7/}

In the instant matter, it is clear that the Association sought to negotiate concerning a matter which was inextricably bound to and controlled by the school calendar, i.e., a day off from work with pay on Columbus Day (October 8, 1979) -- a day which, some six months prior, the Board had designated in its school calendar as a regular school day; that issue was non-negotiable. To the extent that the Association may have sought to negotiate concerning various related matters not entirely controlled by calendar, the record is not clear.

Based upon the foregoing, the Hearing Examiner concludes that the Association has failed to demonstrate by a preponderance of the evidence that the Board refused to negotiate concerning a mandatory subject of negotiations.

^{7/} See Tr., pp. 39, 40 and 41. When the parties met after Columbus Day to try to finalize their negotiated agreement, there was some indication that the Association then raised additional monetary compensation and/or alternative days off in exchange for the Columbus Day removal. However, there was but one negotiations session which occurred after Columbus Day on October 9, 1979, and that was inconclusive; on October 10, 1979, the Association signed the Agreement without changing the document as it appeared on October 8, 1979.

Part II

In Part II of the Charge, the Association alleges that the Board "subcontracted" unit work to an employee outside the Association's negotiations unit. The Association contends that the Board merely changed the title of an employment position which was in the unit, to one not in the unit. The Board then hired a new employee to fill the re-titled position and assigned to that employee functions which had previously been performed by an employee in an employment position covered by the Association's negotiations unit.

The Board asserts that it exercised its managerial right to establish and abolish positions in an effort to promote the efficient operation of the district. The Board further contends that the issue is moot because no harm resulted to the Association from its (the Board's) actions because the unit position it abolished was vacant.

Findings of Fact

Exhibit J8 is the job description of the position designated as Clerk in Computer Center, the clerical position abolished by the Board in 1979. Exhibit J7 is the job description of the position designated as Aide in Computer Center, the clerical position created by the Board in 1979 to replace the Clerk position referred to above. A comparison of these documents is instructive. The qualifications required for the Clerk are: familiarity with keypunch and terminal operation, ability to type and run reproduction machinery. The qualifications required for the Aide position are: ability to type and run reproduction machinery and a willingness (?) to learn keypunch and terminal operation. The

Clerk job description requires the Clerk to compile and check attendance reports, maintain files, operate the keypunch and computer terminal, type and assist the computer operator with tasks assigned. The Aide job description is short and quite general: assist the computer operator with tasks assigned.

The chief difference which clearly appears on the face of the job descriptions is that the Clerk was a 12-month, 35-hour per week position compensated in accordance with the Association salary guide. The Aide is a ten-month, 30-hour per week position compensated in accordance with the Aide salary guide. Aides are an unorganized group.

The employee who formerly occupied the Clerk position left the district voluntarily. Thereafter, in July 1979, the Board posted notices concerning the vacancy in the computer center. No applications were received in response to this posting.

The Superintendent then developed and had posted a notice for an Aide position in the computer center -- due, in part, to the lack of response to the Clerk posting, to a desire to cut compensation costs and to the belief that the Clerk's job did not warrant a full-time employee. Eventually, by a word-of-mouth search, a candidate was located and hired into the Aide position.

Testimony from the Association president, who is a secretary in the Board office, indicates that the functions currently performed by the Aide in the computer center are substantially the same as those functions formerly performed by the Clerk. The Superintendent stated in his testimony that the two positions were

in fact "not the same," and that the Aide did fewer tasks than the Clerk had previously performed (because she "doesn't have the time to do it"). ^{8/} The Superintendent's testimony does not refute the assertion that the Aide is performing at least some of the tasks previously performed by the Clerk.

Analysis and Conclusions of Law

From the foregoing, the undersigned concludes (at least) that the Aide position's functions are encompassed within the Clerk position's functions. While the Clerk may have performed more tasks than the Aide now does, those tasks which the Aide does perform apparently were previously done by the Clerk. More simply, if the Clerk performed duties identified as a, b, c, d, e, and f, the Aide now performs duties a, b, c, d and e. The status of duty f is not clear in the record.

From the foregoing, the undersigned is convinced that the essential difference between the old Clerk position and the new Aide position is that the Clerk works fewer hours, performing substantially (if not precisely) the same tasks as the Clerk did for less compensation. Further, the Hearing Examiner believes that the basic reason behind the Board's changing the Clerk position to an Aide position was economic. Hence, what has occurred here is that the Board took functions performed by a unit position and transferred them to a non-unit position, and reduced the hours and compensation of the non-unit position -- all without negotiations.

In In re Jersey City Board of Education, P.E.R.C. No. 81-24, NJPER (¶ 1980), the Commission stated:

^{8/} There is nothing in the record which indicates that the Superintendent had more accurate knowledge or more direct knowledge than the Association President of the tasks which had actually been performed on a day-to-day basis by the Clerk and those now being performed by the Aide.

It is well settled that assignment of unit work to non-unit employees for economic or other non-governmental or educational policy reasons is mandatorily negotiable, and therefore arbitrable. In re County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (¶19111 1979), aff'd in relevant part, County of Middlesex v. PBA Local 152, Docket No. A-3564-78 (June 19, 1980); In re Rutgers, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), aff'd Rutgers v. Local 1761 AFSCME, Docket Nos. A-3651-78 and A-3903-78 (July 1, 1980).

In affirming the Commission's determination that the shifting of work from employees within a unit to other employees outside the unit was a mandatory subject collective negotiations, the Appellate Division stated:

We agree with the Commission that the subject matter of the grievance in this case "directly affects the work and financial welfare of the employees and does not interfere with any inherent managerial prerogative pertaining to the determination of governmental policy"; that "shifting work from employees within a bargaining unit to other employees outside the unit is a mandatory subject of negotiations"; 9/

9/ Rutgers, The State University v. Local 1761, AFSCME, Council No. 52, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), motion for recon., P.E.R.C. No. 79-92, 5 NJPER 239 (¶10127 1979), affmd App. Div. Docket No. A-3651-78 (7/1/80).

See also, In re Deptford Bd/Ed., P.E.R.C. No. 81-78, NJPER (¶ 1980). In Deptford, the Commission determined that the Board committed a violation when it effectuated a "semantic change" concerning a certain employment position and subsequently reduced unilaterally the compensation provided to that position. The "new" position (part-time itinerant teacher) performed substantially the same duties as had the "old" position (full-time itinerant teacher). Because the position changed only in title, there was no justification for the Board's altering the terms and conditions of employment thereof. That this occurred vis-a-vis a new employee makes it no less a violation. See, Galloway Twp. Bd/Ed. v. Galloway Twp. Assn. of Educ. Secys, 78 N.J. 1, pp. 17-20 (1978).

Accordingly, the undersigned concludes that the Board unilaterally removed certain work previously performed by an employee in a title included in the Association's negotiations unit and reassigned that work to another employee in a title outside the Association's unit. Such conduct by the Board was violative of § (a)(1) and (a)(5) of the Act. That this conduct occurred at a time when the unit position was vacant is irrelevant -- the knub of the issue is the taking of unit work from the unit and the moving it outside the unit, without negotiations.

Recommended Order

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that Respondent, Passaic Valley Regional High School District No. 1, shall:

(A) Cease and desist from interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate in good faith with the Passaic Valley Office Workers Association the decision to shift certain work from employees within the bargaining unit to employees outside the bargaining unit.

(B) Take the following affirmative action necessary to effectuate the policies of the Act:

1) Restore to the Association's bargaining unit that work which it has unilaterally removed therefrom; more specif-

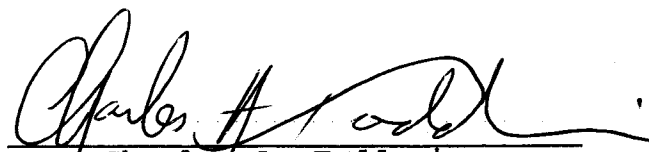
ically, restore to the Association's unit the functions formerly performed by the Clerk in the computer center.

2) Negotiate, upon demand, with the Passaic Valley Office Workers Association the decision, and the effects thereof, to shift certain work from employees within the Association's bargaining unit to employees outside the bargaining unit.

3) Post at all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

IT IS HEREBY FURTHER ORDERED that that portion of the Complaint which alleges a violation of the Act based upon Respondent's failure to pay unit employees for Columbus Day, October 8, 1979, and Respondent's refusal to negotiate the Columbus Day issue and that portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(6), be dismissed.


Charles A. Tadduni
Hearing Examiner

DATED: February 10, 1981
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate in good faith with the Passaic Valley Office Workers Association the decision to shift certain work from employees within the bargaining unit to employees outside the bargaining unit.

WE WILL restore to the Association's bargaining unit that work which we have unilaterally removed therefrom; more specifically, restore to the Association's unit the functions formerly performed by the Clerk in the computer center.

WE WILL negotiate, upon demand, with the Passaic Valley Office Workers Association the decision, and the effects thereof, to shift certain work from employees within the Association's bargaining unit to employees outside the bargaining unit.

PASSAIC VALLEY REGIONAL HIGH SCHOOL DIST. #1
(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 James W. Mastriani, Chairman, Public Employment Relations Commission, 429 E. State St., Trenton, N.J. 08608 - Telephone (609) 292-9830.