P.E.R.C. NO. 79-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE BOARD OF EDUCATION OF THE
TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-77-281-111

THE CHERRY HILL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice Decision and Order the Commission determined that a board of education violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when it refused to pay its teachers for make-up days actually worked, the scheduling of which was necessitated by the loss of student instructional days, for which the teachers were not paid, due to a job action. Further, the Commission found that the Board also violated the Act by refusing to negotiate with the Association, proposed changes in other terms and conditions of employment occasioned by the making of the educational policy decision to alter the school calendar.

The Commission notes its agreement with the Commissioner of Education that the within dispute is not one arising under school law, but concerns a term and condition of employment, and as such rests within the exclusive jurisdiction of the Public Employment Relations Commission. Additionally, nothing contained in the Decision interferes with the duty of the Board of Education to provide 180 days per year of student instructional days and the Decision is carefully limited in order to prevent any suggestion that the employees in question are in any manner being rewarded or recompensed for the conduct of an illegal job action. In this regard, the Commission takes administrative notice of the fact that the Chancery Division of Superior Court issued an injunction against the illegal job action and took steps to punish violators of that injunction. Further, owing to the fact that the instant dispute arose in part because of the teachers' illegal job action, the Commission will not require the Board of Education to post the customary notice of violation.

Based upon the entire record herein the Commission orders that the Respondent Board of Education cease and desist from (a) interfering with, restraining or coercing employees in the exercise

of the rights guaranteed to them by this Act, by unilaterally reducing the annual compensations of the teachers by not paying them for days actually rescheduled when the compensations for the days originally lost had already been deducted. The Commission also orders the Board to take the following affirmative action to make the teachers whole for the loss of pay actually suffered through the rescheduling of days of school which were worked without compensation: (a) Compensate all teachers represented by the Cherry Hill Education Association who actually had days of work rescheduled in 1976-77 school year for the number of days rescheduled in each instance, as set forth in the decision. Such compensation to be paid based upon the same daily rate of pay used in docking the said teachers during the strike which occurred in October 1976. (b) Notify the Chairman, in writing, within twenty (20) days from the receipt of this Order what steps have been taken to comply herewith. It was further ordered that the allegations of the Complaint alleging that the Board of Education of the Township of Cherry Hill violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally rescheduled the school calendar, including Easter vacation in the 1976-77 school year to make up days lost due to the strike engaged in by the Cherry Hill Education Association be dismissed, as well as all allegations claiming that the said Board had violated N.J.S.A. 34:13A-5.4(a)(3) and (7).

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STATE OF NEW JERSEY
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In the Matter of

THE BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-77-281-111

THE CHERRY HILL EDUCATION ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Hyland, Davis & Reberkenny, Esqs.
(Mr. William C. Davis, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On March 29, 1977, the Cherry Hill Education Association (the "Association") filed an Unfair Practice Charge with the New Jersey Public Employment Relations Commission alleging that the Board of Education of the Township of Cherry Hill (the "Board") had engaged in 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"). More specifically, the Association alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3), (5), and (7), by altering the 1976-77 school calendar and refusing to negotiate, upon demand by the Association, either that alteration or the impact of that change upon the terms and conditions of

employment of Association members.[1/] It was also alleged that the Board failed to compensate the Association's members (i.e., teachers) for the additional working days added to the 1976-1977 school calendar.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, the Director of Unfair Practices issued a Complaint and Notice of Hearing on April 27, 1977. A hearing was held before Edmund G. Gerber, a Commission Hearing Examiner, on October 6, 1977 at which both parties were given an opportunity to present evidence, examine and cross-examine witnesses, and to argue orally. Both parties submitted briefs which were received by the Hearing Examiner by December 12, 1977.

The Hearing Examiner issued his Recommended Report and Decision, H. E. No. 79-4, on July 17, 1978, a copy of which is attached hereto and made a part hereof. The Hearing Examiner concluded that in October 1976 members of the Association engaged in a job action and that for a period of eight days, they did not work although for two of these days the Board had elected to close the schools and did not dock the teachers for those two days. During the days of the strike the Board did open some of the schools for at least some of the remaining six days. The Board docked said

1/ These subsections specifically provide that employers, their representatives or agents are prohibited from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) violating any of the rules and regulations established by the commission."

teachers six days pay and after the job action, the Board scheduled up to eight additional school days in order to comply with the requirement that boards of education provide their students with 180 days of school. It is undisputed that the teachers worked these make-up days and that the Board did not pay its teachers for some of these additional work days. The result was that the teachers were only paid for the 176 days while all worked at least 177 and many worked more. The differences depended on what grades the teachers taught and on whether the Board had been able to keep those schools open.

Based upon the aforementioned recommended findings of fact, the Hearing Examiner recommended to the Commission a finding that the Board committed an unfair practice due to its failure to compensate its employees for certain of the make-up days worked and its failure to negotiate with the Association the effect on the employees' terms and conditions of employment of selecting the additional days to be worked. It was further recommended that the Commission order the Board to compensate its teachers for the days worked without pay as set forth in the report.

The Hearing Examiner, relying on the Commission's decision In the Matter of Edison Twp. Board of Education, P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070 1978), found that the Board did not violate the Act when it rescheduled the school calendar to permit the make-up days. He reasoned that the calendar change was necessitated by the emergency created by the strike, that the days had to be made up to meet the legal requirement of a 180 day school

year, and that the change was directed at the students' and not the teachers' calendar. He did recognize that this change did effect the vacation schedule, over Easter, of the teachers and therefore the effect on terms and conditions, i.e., altered vacation plans, etc., should have been negotiated. However, owing to the limited nature of the violation and the fact that it was the Association's job action which forced the Board to alter the school calendar, the Hearing Examiner recommended that the Commission not award a remedy to the Association for the Board's failure to negotiate the impact of this schedule change as it affected the days to be worked and the impact of selecting those days of work. N.J.S.A. 34:13A-5.4(c) delegates to the Commission the exclusive jurisdiction to prevent and remedy unfair practices and provides that if the Commission determines that an unfair practice is being or has been committed, it shall order the offending party to cease and desist such conduct and take such affirmative action as will effectuate the purposes of the Act. Therefore, in determining what is an appropriate remedy, it is necessary to consider what affirmative action, if any, is necessary to further the public policies of the Act. An affirmative remedy is not, in every case, consistent with these public policies or purposes of the Act.

On September 7, 1978, the Board filed timely exceptions to the Hearing Examiner's Recommended Report and Decision. These exceptions may be summarized as follows: 1) The Board objects to the Hearing Examiner's characterization of the Association's

members who were paid for only 176 days of work as "affected teachers" and urges a description of these employees as "striking teachers"; 2) The Hearing Examiner failed to correctly compute the number of days worked by 12th grade teachers and special education teachers; 3) The Board argues that the Hearing Examiner was incorrect in ruling that it had a duty to negotiate the effect of the revised school calendar on teachers; 4) Finally, the Board contends, in opposition to the Hearing Examiner's recommended conclusion, that it is without lawful authority to negotiate the payment of salary for make-up days where the revised calendar was dictated by an illegal strike.

Pursuant to an extension of time to file a response to the Board's exceptions, granted by the Commission in an effort to obtain a clear delineation of the positionsof both parties in this matter, the Associatin filed its response to the Board's exceptions on October 4, 1978. The Association's submission argues against the specifics of the Board's exceptions and in support of the conclusions recommended by the Hearing Examiner.

The Commission has carefully considered the exceptions filed by the Board and finds them to be without merit. The crux of the Board's contentions rest in its joint assertion that it is not obligated to negotiate the impact of the revised school calendar on the affected employers' terms and conditions of employment and its contention that it is unlawful to compensate these employees for make-up days occasioned by the Association's job action. In support of these arguments, the Board cites several

decisions of the Commissioner of Education which pre-date the effective date of the 1974 amendments to the Act, commonly known as Chapter 123. It should be recognized that these decisions did not consider the implications of the Act on the Board's actions, particularly the effect of the amendments to the Act. The latest decision of the Commissioner in this arena, also cited by the Board, acknowledges that, owing to the passage of Chapter 123, the payment of teachers for make-up days occasioned by a job action, is not a dispute arising under school law, but concerns a term and condition of employment, a dispute which falls within the exclusive jurisdiction of the Public Employment Relations Commission.[2/] At this juncture we note our agreement with the position of the Commissioner therein, and with the analysis of the Hearing Examiner that compensation for days of work and proposed changes in other terms and conditions of employment occasioned by the making of educational policy decisions are mandatorily negotiable and must be negotiated with the recognized or certified majority representative prior to implementation.[3/] The effect of this conclusion does not deprive or interfere with the duty of a board of education to provide 180 days per year of student instructional days.[4/]

2/ Parents Union Burlington Cty. v. Bd. of Ed. Twp. of Willingboro Burlington Cty, and Willingboro Ed. Assn.; ___S.L.D.___ (Decided June 22, 1978).

3/ The validity of our conclusions has recently been reaffirmed by the N. J. Supreme Court in Galloway Twp. Bd. of Ed. v. Galloway Ed. Assn., ___ N.J. ___ (Decided August 1, 1978), slip opinion at pg. 30 and note #9.

4/ See In re Edison Twp. Bd. of Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (Para 4070 1978) and In re Belvidere Bd. of Ed., P.E.R.C. No. 78-62, 4 NJPER 165 (Para 4080 1978).

The remedy of compensation for the make-up days requires only that the teachers be paid for days actually worked. Any pay lost for days docked which would have been worked but for the strike is not included within the order. The Board's action in determining not to pay teachers for days actually worked constituted a unilateral reduction in salary without negotiations in that these teachers received zero compensation for work performed. Admittedly, this rescheduling was necessitated by an illegal job action, and the Commission has held the Board was within its rights to schedule the make-up days without negotiating with the teachers. However, the Board was not within its rights to determine that it would not pay its employees for work performed.

The Superior Court of this State retains jurisdiction to enjoin illegal job actions and possess powers far in excess of either boards of education or this Commission to insure that its orders are enforced and to punish employees who violate the injunction by continuing the strike. See In re Hoboken Teachers Ass'n., 147 N.J. Super 240 (App. Div. 1977); In re Twp. of Teaneck and Local #42 FMBA, 158 N.J. Super. 131 (App. Div. 1978); In re Parsippany-Troy Hills Education Ass'n., 140 N.J. Super. 354 (App. Div. 1975); Bd. of Ed. of Newark v. Newark Teachers Union, 114 N.J. Super. 306 (App. Div. 1971). The penalties in such case have included substantial fines and even significant jail terms. These remedies for the strike were available to the Board and were in

fact utilized.[5/] The unilateral determination not to compensate people for the work they subsequently performed pursuant to the Board's directives constituted a violation of this Act and is not justified by the fact that the rescheduling occurred as a result of the job action.

There remains the Board's exception concerning the computation of the discrepancy between the days worked and the compensation paid to the twelfth-grade teachers (if any exist) and special education teachers. We have examined the Board's arguments, the cited exhibit, the stenographic transcript and the Hearing Examiner's Report and find that the weight of the evidence supports the conclusion reached by the trier of fact, the Hearing Examiner.

However, in view of the following modifications to be made in the recommended remedy, we find it unnecessary to discuss this alleged discrepancy. The Hearing Examiner recommended the use of 1/200th of the teachers' annual salary as the daily rate on which to compensate the teachers for days worked. However, the record does not indicate if this was the daily rate utilized to dock the teachers. Our purpose in ordering the affirmative remedy of compensation is to make the teachers whole for the Board's unilateral determination not to pay them for work performed.

5/ The Commission takes administrative notice of the fact that the Board herein sought and was granted an injunction in this case and that proceedings have been held to punish the Association and its leaders for violation of that Court order.

Therefore, the purposes of the Act will be effectuated if the Board makes the teachers whole by paying them for rescheduled days at the same daily rate of pay utilized in docking them. Consistent with the Hearing Examiner's recommended findings of fact we find the grammar school teachers only had to make up one day and therefore they should be compensated the amount they were docked for one day. Junior high school teachers made up three days without compensation and so must be paid the amount they were docked for three days. High school teachers, and special education teachers who had to make up six days of school, will be compensated for the full six days pay they were docked. But no teachers, including special education teachers, shall be compensated for days not actually rescheduled.

The Hearing Examiner in his recommended order stated that the Board should not be required to post a notice of the employees indicating the action being taken to remedy the violation of the Act. Such a notice is normally made part of the Commission's orders, as it is deemed essential to the purpose of the Act that all affected employees be informed of their rights as a result of the employer's wrongdoing. The Hearing Examiner reasoned that since the events which were the subject of this proceeding were precipitated by the unlawful job action of the employees and their Association, a notice in this case in which the Board acknowledged its subsequent violation of the Act with regard to the non-payment for make-up days might be interpreted or publicized by sanctioning

the conduct engaged in by the employees. It must be reiterated that our decision in this case cannot be read as in any way condoning the strike or as in any way passing upon the merits of the negotiations impasse which preceded it. The Board in this case took certain actions, subsequent to the resolution of the job action to schedule the necessary make-up days, which action we have found to be appropriate. However, its decision not to pay employees for the work performed, apparently based on its opinion of the law, has in this decision been found to have been incorrect, and the order in this case is intended to remedy that limited aspect of the entire controversy. Given these facts we agree with the Hearing Examiner that a notice is not appropriate in this case.

Based upon our careful review of the entire record, including the exceptions filed by the Board herein, the Commission hereby adopts the Hearing Examiner's recommended findings of facts and conclusions of law with the modifications discussed above.

ORDER

Accordingly, for the reasons set forth above, the Public Employment Relations Commission hereby determines that the Respondent Board of Education of the Township of Cherry Hill has violated N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act by refusing to negotiate the impact of the rescheduling of the school calendar on the teachers terms and conditions of employment and by unilaterally reducing the compensation of teachers represented by the Cherry Hill

Education Association when it unilaterally determined not to pay teachers for days of work actually rescheduled after it had already not paid these same teachers for the days of work lost due to a strike, and

IT IS HEREBY ORDERED that the Respondent Board of Education of the Township of Cherry Hill

1. Cease and desist from:

(a) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, by refusing to negotiate in good faith by unilaterally reducing the annual compensations of the teachers by not paying them for days actually rescheduled when the compensations for the days originally lost had already been deducted.

2. Take the folllowing affirmative action to make the teachers whole for the loss of pay actually suffered through the rescheduling of days of school which were worked without compensation.

(a) Compensate all teachers represented by the Cherry Hill Education Association who actually had days of work rescheduled in 1976-77 school year for the number of days rescheduled in each instance, as set forth in the decision. Such compensation to be paid based upon the same daily rate of pay used in docking the said teachers during the strike which occurred in October 1976.

(b) Notify the Chairman, in writing, within twenty (20) days from the receipt of this Order what steps have been

taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the Complaint alleging that the Board of Education of the Township of Cherry Hill violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally rescheduled the school calendar, including Easter vacation in the 1976-77 school year to make up days lost due to the strike engaged in by the Cherry Hill Education Association be dismissed, as well as all allegations claiming that the said Board had violated N.J.S.A. 34:13A-5.4(a)(3) and (7).

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett and Parcells voted for this decision. None opposed. Commissioners Hipp and Schwartz abstained.

DATED: Trenton, New Jersey
October 23, 1978
ISSUED: October 25, 1978

H.E. No. 79-4

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

In the Matter of

THE BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-77-281-111

THE CHERRY HILL EDUCATION ASSOCIATION,

Charging Party.

ERRATA SHEET

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Edmund G. Gerber
Hearing Examiner

DATED: July 27, 1978
Trenton, New Jersey

H.E. No. 79-4

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

In the Matter of

THE BOARD OF EDUCATION OF THE
TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-77-281-111

THE CHERRY HILL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission("Commission") that they find the Cherry Hill Board of Education ("Board") committed an unfair practice when it refused to compensate its teachers who worked additional school days at the end of the 1976-77 school year.

In October 1976 members of the Cherry Hill Education Association ("Association") engaged in a job action and they did not work for a period of eight days. For six of those eight days the Cherry Hill schools remained open. Accordingly, the Board docked said teachers six days' pay. After the job action the Board scheduled up to eight additional school days in order to comply with the Commissioner of Education's requirement that they provide their students with 180 days of school. The Board did not pay its teachers for some of these additional work days.

The Association filed unfair practice charges with the Commission claiming that it was unfair for the Board to schedule the additional days without negotiating (1) compensation, (2) the particular days they were to work and (3) the impact of selecting those days worked. The Hearing Examiner recommended to the Commission that they find that the Board committed an unfair practice as to both the failure to compensate its employees and failure to negotiate the impact of selecting the days worked. The Hearing Examiner recommends that the Commission order the Board to compensate its teachers for the additional work days. Nevertheless, he recommends that the Commission award no remedy to the Association for the Board's failure to negotiate the impact of this schedule change as it affects items 2 and 3 since it was the Association's job action which forced the Board to make such changes.

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. 79-4

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

In the Matter of

THE BOARD OF EDUCATION OF THE
TOWNSHIP OF CHERRY HILL,

Respondent,

-and-

Docket No. CO-77-281-111

THE CHERRY HILL EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Board of Education of the Township of Cherry Hill
Hyland, Davis and Reberkenny, Esqs.
(William C. Davis, of Counsel)

For the Cherry Hill Education Association
Rothbard, Harris and Oxfeld, Esqs.
(Sanford R. Oxfeld, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Cherry Hill Education Association (the "Association") filed an unfair practice charge with the Public Employment Relations Commission (the "Commission") on March 29, 1977, alleging that the Board of Education of the Township of Cherry Hill (the "Board") had engaged in 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"), specifically § 5.4(a)(1), (3), (5) and (7). 1/

1/ These sections specifically provide that employers, their representatives or agents are prohibited from: "(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) violating any of the rules and regulations established by the commission.

The Association claimed that the Board unilaterally altered the 1976-77 school calendar and that the Board has refused to negotiate either the change or its impact upon the terms and conditions of employment of the Association members resulting from the changing of the school calendar. It is also alleged that the Board has failed to compensate the teachers for the additional days that were added to the calendar.

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 April 27, 1977, and a hearing was held before the undersigned on October 6, 1977. 2/

* * * * * * *

It is undisputed that on October 18, 1976, the Association began what it characterizes as a job action, 3/ that is, a strike. This strike continued for eight school days, up to and including October 27, 1976. The general membership of the Association voted to end the job action on October 27, 1976, and the teachers returned to work on the following day. All schools closed on October 19 and 20 as "teacher holidays" and all teachers were paid for these two days. However, as the job action continued the schools reopened. Thereafter those teachers who participated in the strike for the six days school was open were docked six days' pay.

Because of the days lost to the strike and the teacher holidays of October 19th and 20th the students in the district would not have completed 180 days of classes under the existing schedule as required by the State Commissioner of Education. Accordingly, the Board unilaterally scheduled four make-up days during Easter vacation and up to four extra days at the end of the school year in June. 4/ The exact number of make-up days necessary depended upon the grade level. For the grammar schools only the four days during the Easter vacation were added to the schedule. For the seventh and eighth grades, as well as the twelfth grade

four days

2/ Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Both parties submitted briefs which were received by December 12, 1977.

3/ This stipulation was made by the Association for the purpose of this instant action only.

4/ There was also a snow day in January that had to be made up.

the four days over the Easter vacation and one day in June were added to the calendar and for special education students and the ninth, tenth and eleventh grades, four days in June were added in addition to the four days over Easter.

However, all of the striking teachers were paid for only 176 days, although grammar school teachers worked 177 days, seventh and eighth grade teachers worked 179 days and high school teachers worked 182 days. The discrepancy between the number of days worked by the striking teachers and 180 days of classes is attributable to the fact that the schools were open for several days while the strike was in progress and the high school teachers attended a two-day orientation period at the beginning of the school year. Further, although the scheduling of twelfth grade students was different from the rest of the high school grades during the strike, no evidence was adduced at the hearing to demonstrate that there are any teachers who exclusively teach twelfth grade classes. 5/

The Board claims that it had no obligation to negotiate either the revision of the school calendar or the impact of such revision. In the Matter of Edison Township Board of Education, P.E.R.C. No. 78-53, 4 NJPER ___ (1978), the Edison Township Board of Education was faced with a situation where because of the large number of snow days during the winter, additional days had to be made up by the students to comply with the 180 school day requirement. The school board adopted a resolution directing that the deficiency in school days be remedied by requiring students and teachers to attend school over Easter recess. This action was taken by the Board unilaterally despite the objection of the Association and without any negotiation.

The Commission in deciding this matter recognized the coexistence of two concepts: 1) the establishment of the academic or school calendar is not mandatorily negotiable, but 2) the determination of employees' work year is a term and condition of employment and is mandatorily negotiable. They held that negotiations on the work year for teachers will, as a practical matter, recognize the parameters of the school calendar. Thus, the areas of mandatory negotiability of the teacher work

5/ There were some eleven teachers who chose not to strike who did not work through to the end of school in June. Article 15 of the contract between the parties provides that no teachers shall work more than 184 school days. These teachers did work 184 days and accordingly were excused from teaching. There is no dispute about these teachers.

year must be limited to those days, both as to numbers and scheduling, in excess of the days of attendance of students scheduled by the Board to meet their required educational responsibilities. Those days of the academic calendar which are scheduled by the Board to meet the 180-day requirement of student instruction are not within the scope of mandatory negotiations even though they obviously define the bulk of the work year of the teachers. So too in the instant case. The Board had to change the schedule to ensure the 180 school days' requirement and their action was not negotiable. It is noted, however, that the charging party alleged that the make-up days were scheduled on Passover. In addition the charging party submitted a number of affidavits stating that people lost deposits for scheduled trips and missed opportunities for employment because of the change in scheduling. As stated in Edison these effects do constitute an impact on employees which require the Board to negotiate with the Association prior to the implementation of the school calendar. Accordingly, the Board's failure to negotiate constitutes a refusal to negotiate terms and conditions of employment. It should be emphasized that such negotiations need not have involved a change in the revised schedule but rather should have only concerned ways to ameliorate the effects of these changes on the employees. The undersigned is also mindful of the fact that it was the Association itself, by engaging in a work stoppage, that forced the Board to take the action it did. Accordingly, the undersigned will recommend to the Commission that they only find a technical violation of the Act and decline to award a remedy for the Board's refusal to bargain over the impact of the scheduling change.

The other aspect of this case concerns the refusal to pay its employees for the make-up days over Eastern Jaheon[6/] and the Board[6/] in their brief maintained that if they were to pay for the make up days the teachers would be profiting by their own wrongdoing[7/] receiving money for when they went on strike.[7/]

The undersigned is not impressed by this argument for the strikers were already docked for the days they did not work. The Association is only claiming they should be paid for the days they did work.[8/] The Board also argues that

6/ The Association does not challenge the Board's action in docking striking teachers in October.

7/ It is undisputed that it is unlawful under common law for public employees to strike. Bd. of Educ. of Union Beach v. N.J.E.A., 53 N.J. 29 (1958).

8/ The Board cites a commissioner of education case, Thomas Hightor v. Bd. of Educ. of the City of Union, 1974 S.L.D. 193. This case is not apposite here for there the teachers did not work without pay.

the Commissioner of Education has upheld the action of school boards that did not compensate striking teachers for make-up days. In Sommer v. Board of Education of the City of Long Branch, 1974 S.L.D. 276, 286, the Commissioner of Education held, in a situation factually similar to the instant matter, that there was no obligation to negotiate since, according to the commissioner, "an illegal absence in the form of a strike is neither a term and condition of employment nor a grievable issue." However, subsequent to Long Branch, supra, the courts have held that only the Public Employment Relations Commission and the appellate courts can determine what is or is not a term or condition of employment. Plainfield Board of Education v. Plainfield Education Association, 144 N.J. Super. 521 (App. Div. 1976). 9/ Nothing could be more elemental than compensation for hours worked is a term or condition of employment and, therefore, mandatorily negotiable. Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973).

The Board's uncontested refusal to negotiate over the salary for make-up days is violative of § (a)(5) of the Act. Admittedly the Board was forced into their actions by the conduct of the Association, and had the Board taken their action as a disciplinary measure, they perhaps would have been justified, 10/ but the Board never introduced evidence that they were so motivated. 11/ The only testimony on the matter came on cross-examination of the Association witness, Hrair Zakarian. He testified that school Superintendent Shine told Zakarian that "the law proscribes him from paying for the additional days." 12/ The law makes no such proscription. Absent any other proof of motivation, there was a clear duty on the part of the Board of Education to negotiate the compensation. The undersigned believes an appropriate remedy would be a make-whole remedy;

9/ See also Hoboken Teachers Assocation v. Hoboken Board of Education, Docket No. C-3828-76 wherein Judge Kentz of the Chancery Division upheld an arbitrator's decision in a case factually similar to the instant matter. The arbitrator upheld the right of the board to dock employees for the day they' struck but ordered the board to reimburse its employees for the rescheduled make-up days.

10/ Unquestionably the Board had the right to seek court action against the the strikers.

11/ This anomolous situation could be explained by the representation made in the Association's brief that a no-reprisal clause was entered into between the parties. Such a representation, however, is not proof and was not relied upon by the undersigned in reaching his decision.

12/ T. p. 63, line 2.

the employees have in essence worked without compensation. 13/ In determining the rate of compensation the testiomony is of little help for the Association witness was unable to state his actual salary for the year. 14/ The 1975-1976 contract provides under Article IX for compensation of 1/200th of their annual salary for each day's work over and above the normal work year under certain circumstances for certain employees. Accordingly, the undersigned recommends the use of these same figures in computing damages. 15/

Accordingly, it is hereby recommended that the Commission find that the Board violated §§5.4(a)(1) and (5) of the Act in refusing to negotiate the impact of their rescheduling of the school calendar and their refusal to negotiate the salaries for the rescheduled additional days.

It is further recommended to the Commission that they order the Board to pay the affected teachers at the following rate: grammar school teachers affected (who lost one day's pay) - 1/200th of their annual salary for 1976-1977; junior high school teachers affected (who lost 5 days' pay) - 5/200th of their annual salary for 1976-1977; and special education and high school teachers affected (who lost 6 days' pay) - 6/200th of their annual salary.

It is further recommended that the Commission not order the Board to post a notice of violations of the Act for reasons set forth in the above report.

It is also recommended that the allegations that the Board violated §§5.4(a)(3) and (7) of the Act be dismissed for no evidence was introduced at the hearing by the Association concerning such alleged violations.

Edmund G. Gerber
Hearing Examiner

DATED: July 17, 1978
Trenton, New Jersey

13/ Therefore this situation is readily distinguishable from Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Assn., 149 N.J. Super. 346 (App. Div. 1977), appeal pending, where the court stated the Commission is without statutory authority to order back pay for services not rendered.

14/ The contractual dispute was apparently settled by an arbitrator and retroactive pay was awarded.

15/ Galloway Twp. Bd. of Education and Galloway Twp. Education Association, 157 N.J. Super. 74 (App. Div. 1978), the court disallowed the Commission use of the 1/200th figure. In that case, however, the court stated the remedy itself was inappropriate for the teachers suffered no loss of income.