P.E.R.C. NO. 90-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SPARTA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-58

SPARTA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds, in agreement with a Hearing Examiner, that the Sparta Board of Education violated the New Jersey Employer-Employee Relations Act when it repudiated the collective negotiations agreement with the Sparta Education Association by paying some employees more than the contractual rate for bedside tutoring. The Commission orders the Board to negotiate in good faith with the Association over retroactive payments to negotiations unit members who received less than $25 per hour for bedside tutoring.

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Charging Party.

Appearances:

For the Respondent, Schwartz, Pisano, Simon, Edelstein & Ben-Asher, Esqs. (Nathanya G. Simon, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On August 23, 1988, the Sparta Education Association ("Association") filed an unfair practice charge against the Sparta Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when it repudiated the parties' collective negotiations agreement by paying some employees more than the contractual rate for bedside tutoring.

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; (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 and (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.

On October 25, 1988, a Complaint and Notice of Hearing issued. On November 15, the Board filed an Answer denying it violated the Act and asserting these affirmative defenses: the charge is untimely, the Association does not represent non-unit personnel, the Association did not exhaust the grievance procedure, and the requested relief is beyond our jurisdiction.

On December 19, 1988, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs and replies by March 6, 1989.

On April 3, 1989, the Hearing Examiner issued his report and recommendations. H.E. No. 89-29, 15 NJPER 210 (¶20089 1989). He found that the Board violated subsections 5.4(a)(1) and (5) by failing to negotiate with the majority representative before paying individual employees more than the $12 per hour contractual rate for bedside tutoring. He recommended that the Board be ordered to pay the contractual rate. He also recommended that the Board negotiate over any future changes and over retroactive payments to unit members who received less than the $25 per hour it paid some tutors during academic year 1987-88. He found no violation of subsection 5.4(a)(3).

On April 24, 1989, the Board filed exceptions. It incorporates its post-hearing brief. It asserts that the Board did not hide the fact that some teachers were getting paid more than $12 per hour, an "emergency" under the contract existed each time no teacher could be obtained at $12 per hour, and educational policy

took precedence over economic considerations. It argues that retroactive negotiations should not be ordered and states that a new rate has been negotiated. It supports the Hearing Examiner's recommendation, under South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 89-1, 14 NJPER 498 (¶19209 1988), that all tutors should not receive retroactive increases to $25 per hour.

On May 4, 1989, the Association filed a reply. It relies on the Hearing Examiner's recommendation and its post-hearing brief and reply. It excepts to the recommended remedy and seeks an order directing that all tutors receive $25 per hour retroactively. It relies on Hunterdon Cty., P.E.R.C. No. 87-35, 12 NJPER 768 (1968). It further claims that its remedy is appropriate since the parties have entered into a new collective agreement for the 1988-89 school year.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We incorporate them. We also adopt and incorporate his analysis and legal conclusions. He thoroughly addressed each of the Board's legal and contractual defenses.

We now address the remedy. The Association argues that Hunterdon controls. It also argues that it will be blamed if the teachers who received only $12 per hour are not paid $25 per hour. We disagree on both counts. Hunterdon did not address whether a benefit unilaterally granted some employees should be extended to additional employees. South Orange-Maplewood did and it said no.

As in South Orange-Maplewood, the Association here, upon learning of the unfair practice, filed a charge and sought the maximum legal remedy for the Board's violation. It cannot be blamed for the Board's wrongdoing.

We agree with the Hearing Examiner that a negotiations order, both prospective and retroactive, best effectuates the Act's remedial purposes. The Board apparently needed to pay more than $12 per hour to get the tutors it needed. It should have initiated negotiations with the majority representative for a higher rate. Instead it dealt directly with individual tutors and raised their rates. Ideally, we would issue an order putting the parties back in the positions they would have been in absent the unfair practice. But the Board has already paid certain tutors above the contractual rate and absent a union's request, we will not order rescission of a unilateral increase or recoupment of a benefit. The most appropriate remedy, therefore, is an order requiring the Board to negotiate both a prospective and retroactive rate.

We have been informed by both parties that a new rate for bedside tutors has been negotiated for 1988-89. Retroactive negotiations apparently have not taken place. In light of the successor negotiations, we limit our order to one requiring good faith negotiations over the rate for bedside tutors during the 1987-88 academic year, retroactive to the date the Board paid in excess of the contractual rate.

ORDER

The Sparta Board of Education is ordered to:

A. Cease and desist from

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the rate of pay for some bedside tutors.

2. Refusing to negotiate in good faith with the Association, particularly by unilaterally changing the rate of pay for some bedside tutors.

B. Take the following affirmative action:

1. Negotiate with the Association over retroactive payment to Association unit members who received less than $25 per hour for bedside tutoring during the 1987-88 academic year.

2. Post in 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 at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Smith, Johnson and Wenzler voted in favor of this decision. None opposed. Commissioners Reid and Bertolino abstained. Commissioner Ruggiero was not present.

DATED: Trenton, New Jersey
July 31, 1989
ISSUED: August 1, 1989

P.E.R.C. NO. 90-2

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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the rate of pay for some bedside tutors.

WE WILL cease and desist from refusing to negotiate in good faith with the Association, particularly by unilaterally changing the rate of pay for some bedside tutors.

WE WILL negotiate with the Association over retroactive payment to Association unit members who received less than $25 per hour for bedside tutoring during the 1987-88 academic year.

Docket No. CO-H-89-58

SPARTA 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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 89-29

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

In the Matter of

SPARTA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-58

SPARTA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Sparta Board of Education violated the New Jersey Employer-Employee Relations Act when it failed to negotiate wit the Sparta Education Association over the establishment and implementation of a new rate of pay for some bedside tutors represented by the Association. The Hearing Examiner recommended that the Board be ordered to pay the contractual rate and negotiate over any proposed change to that rate. The Hearing Examiner further recommended that the Board be ordered to negotiate with the Association, on demand, over whether any retroactive payments should be made.

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. 89-29

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

In the Matter of

SPARTA BOARD OF EDUCATION,

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Appearances:

For the Respondent, Schwartz, Pisano, Simon, Edelstein & Ben-Asher, Esqs. (Nathanya G. Simon, of counsel)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Arnold S. Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on August 23, 1988 by the Sparta Education Association (Association) alleging that the Sparta Board of Education (Board) violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Association alleged that

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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. (3) Discriminating in regard to hire or tenure of employment or any term or

Footnote Continued on Next Page

the Board repudiated its collective agreement with the Association by paying some employees more than the contractual rate for bedside tutoring. The Association also alleged that the Board unlawfully entered into individual contracts with unit members.

A Complaint and Notice of Hearing (C-1) was issued on October 25, 1988. The Board filed an Answer (C-2) on November 15, 1988 denying that it violated the Act. The Board raised several affirmative defenses, among them: statute of limitations; that the Association does not represent non-unit personnel; that the Association did not exhaust its grievance procedure; and that the requested relief was beyond the Commission's jurisdiction.[2/]

A hearing was conducted on December 19, 1988.[3/] Both parties filed post-hearing briefs by February 16 and reply briefs by March 6, 1989.

Based upon the entire record I make the following:

1/ Footnote Continued From Previous Page

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."

2/ The Association did not set forth the relief it was seeking in its Charge, but in its opening remarks at hearing it argued that it was seeking an order requiring the Board to pay the difference between the highest and lowest amounts it paid for bedside tutoring to every bedside tutor who received a lower amount (Transcript pp. 8-9).

3/ The transcript will be referred to as "T."

Findings of Fact

1. The Board and Association are parties to a collective agreement effective July 1, 1986 - June 30, 1988 (J-1). According to Article 1, Sec. A of J-1, the Recognition Clause, the Association represents all certificated employees including teachers employed by the Board. Among the specific exclusions from the unit are all temporary hourly personnel (twenty or less working days), and temporary per diem personnel (twenty or less working days). Section B of Article 1 defines teachers as all professionals represented by the Association in the unit defined in Sec. A.

Article 30 of J-1 is entitled "Salaries and Extra Pay," and contains Appendix A, the Teachers Salary Guide. Item 7 in Appendix A provides as follows:

> Teachers who serve as bedside tutors shall be compensated at the rate of $12.00 per hour.

Article 17, Sec. 1 of J-1 lists certain rights reserved for the Board including the right:

> ...to take whatever actions might be necessary to carry out the mission of the school district in situations of emergency.

2. John Greed, the Superintendent of Schools, was familiar with J-1 and knew that it required $12 per hour for bedside tutoring (T83, T90). He had always sought to comply with the $12 rate (T90).

During the 1987-88 academic year the Board had difficulty obtaining bedside tutors for certain students, and for certain courses at the $12 rate (T85-T86, T89). Several students had been

suspended for drug abuse, but under State law they were entitled to receive home-bound instruction (T83-T85).[4/] In seeking teachers to teach those students Greed first sought Sparta teachers, then teachers from outside the district, and first offered all teachers $12.00 per hour (T86). Greed found, however, that several teachers, both in and outside the district, would not teach certain students and certain subject matters at the contractual rate, and demanded $20.00 or $25.00 per hour (T85-T86, T91-T93). When confronted with the choice of not finding bedside tutors for certain students and certain courses at the contractual rate versus paying more money, Greed asked the Board for authority to pay the higher amounts. The Board subsequently gave Greed such authorization (T85, T94-T95).

Thereafter, when Greed, or a school principal or the guidance department, originally sought a bedside tutor from in or outside the district, the teacher was offered $12.00 per hour (T86, T92-T93). If the teacher demanded $20.00 or $25 per hour and no other teacher could be found to teach for $12.00 per hour, Greed authorized the payment at the higher amount (T86, T91-T95).

During that academic year at least three district teachers received $25.00 per hour and one district teacher received $20.00

4/ In its post-hearing brief the Board stated that it is legally required to provide five hours per week of home-bound instruction (bedside tutoring) to each student who is absent from school for a period in excess of ten school days. Although the Board did not cite a section of Title 18A or a provision in N.J.A.C. from which that "legal" requirement was derived, for purposes of this hearing I will assume the Board's statement of the law is correct.

per hour for bedside tutoring (J-2).[5/] Although Greed did nothing to hide the payment of the higher rates for bedside tutoring (T87), he never officially informed the teachers or the Association that higher rates were available, and neither he nor anyone else on behalf of the Board offered to discuss or negotiate with the Association over the payment of higher bedside tutoring rates prior to paying more than $12.00 per hour (T61, T65-T66, T90-T91, T97, T99).

3. Prior to June 9, 1988 the Association had no knowledge that the Board had paid more than $12.00 per hour for some bedside tutors (T30, T61). On June 8, 1988, teacher Alice Bartmer learned that some teachers received $20.00 per hour for bedside tutoring. That same day Bartmer informed teacher Ann Sullivan, who had received $12.00 per hour for tutoring, that some teachers received more than $12.00 per hour (T15). That night Sullivan prepared a letter to Greed (CP-2) requesting that she be reimbursed for tutoring at the $20.00 rate (the difference between $12 and $20 per hour).

5/ Exhibit J-2 is a list of teachers who performed bedside tutoring (home instruction) for the Board with their hours and rate of pay, from July 1, 1987 through July 1, 1988. The astericks appearing next to several names designated those teachers who were not regularly employed by the Board (T9). The list shows that three district teachers received $25 per hour and one district teacher received $20 per hour for bedside tutoring. Eleven district teachers received $12 per hour for bedside tutoring. Of the five out-of-district teachers who received more than $12 per hour for bedside tutoring, four worked no more than four hours, and one worked 25 hours. According to Article 25 of J-1, there are seven hours and 15 minutes to each working day.

On June 9, 1988, Bartmer told teacher Patsy Lockhart, an Association official, that she learned that some bedside tutors received $20.00 per hour (T17-T18). That same day Sullivan showed CP-1 to Lockhart. Lockhart informed Sullivan that some bedside tutors received $20.00 and others received $25.00 per hour (T25, T41). As a result of that conversation Sullivan did not send CP-2 to Greed. Rather, she revised the letter and calculated the money she believed was owed her based upon the difference between $12 and $25 per hour (T25-T26). On June 10, 1988 Sullivan sent a copy of the revised letter (CP-1) to Greed with a copy to Association President, teacher Sue Green (T26).[6/] Greed received the letter on June 10, but never directly responded to Sullivan (T27).

Prior to June 9, 1988, neither Lockhart nor Green were aware that the Board had paid anyone more than $12 for bedside tutoring (T30, T45, T61). After talking to Bartmer and Sullivan on June 9, Lockhart used CP-2 to take an informal poll of teachers in the Association's unit, and discovered that some teachers received $25 or $20 per hour for bedside tutoring (T32-T34, T45-T47). Lockhart listed names of teachers and the amounts they received for tutoring on the right side of CP-2 (T34). Lockhart also learned

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6/ Exhibit CP-1 says:

> An error has been made in the amount of money I received for tutoring. I have been paid $12.00 per hour. I discovered today that two teachers received $25.00 per hour. I will expect a check for $357.50 to cover the difference and payment to which I am entitled.

from the Guidance Department that the Board was reimbursed $20 per hour by the State for bedside tutoring (T34).

Later on June 9, after completing her poll, Lockhart informed Green that some teachers had received more than $12 for bedside tutoring (T41, T56-T58). In Lockhart's presence, Green had a telephone conversation with Greed regarding the matter, and Greed admitted that some teachers had been paid more than $12 an hour for tutoring (T42, T59-T60). Green and Greed agreed to meet on June 13 to further discuss the matter.

On June 13, 1988, Green and Association Vice President Nicholas Pisano, met with Greed. When their conversation began, Greed expressed surprise at having received--and at the tone of--Sullivan's letter, CP-1, which was the first indication he had that any teacher had a problem with the rate for bedside tutoring.[7/] Green expressed concern over the Board's failure to follow the contract, and Greed explained that if teachers were not willing to do the job for $12 per hour, he had to pay more (T64). The meeting ended with no resolution of the amount to be paid for bedside tutoring (T66).

Greed was willing to have additional discussions with Green over the tutoring rate after June 13, but the Association made no

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7/ Greed wrote the following comment to Green on CP-1 and gave it to her at the start of the meeting on June 13 (T62-T63):

> Surprised at this tone! Calculus and physics tutoring pays $25 because in fields with fewer teachers - that is what happens (61-T63, T87).

demand for further meetings on that issue. Instead, the Association filed the Charge on August 23, 1988 (T70, T89).

ANALYSIS

The Board violated subsections 5.4(a)(1) and (5) of the Act by failing to negotiate with the Association prior to paying more than the $12 per hour contractual rate for bedside tutoring. While the Board had a legitimate need to find teachers for bedside tutoring even if it meant paying more than $12 per hour, they would not have been prevented from carrying out their mandated educational function by negotiating with the Association over a new or different rate prior to paying more than the contractual rate.

The rate of pay for bedside tutoring is salary, and salary is clearly a negotiable term and condition of employment. Galloway Tp. Bd.Ed. v. Galloway Tp. Ed.Assn., 78 N.J. 25, 49, 4 NJPER 334 (¶4163 1978); Woodstown-Pilesgrove Reg. Ed.Assn., 88 N.J. 582 (1980). Normally, when a public employer needs to change an establish term and condition of employment such as the amount paid for tutoring, it has the burden to initiate negotiations with the majority representative over any proposed change in the amount paid prior to implementing any change. New Brunswick Bd.Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978)(New Brunswick). Failure to engage in such negotiations violates the Act.

1. The Board's basic argument was that because it had the educational responsibility to provide bedside tutoring and could not find teachers to tutor for $12 an hour in every case, it had the

right to offer more money to obtain the necessary tutors. In its post-hearing brief the Board raised several specific arguments in support of its position that the Complaint be dismissed.

First, the Board argued that the Charge was filed untimely. Pursuant to subsection 5.4(c) of the Act, complaints should not issue based upon an unfair practice occurring more than six months prior to the filing of a charge unless the charging party was prevented from filing the charge within the six months, and then the time is computed from the day the charging party was no longer prevented. Establishing knowledge by the charging party of the employer's action that constitutes the unfair practice, therefore, is a key element in deciding whether a charge is timely filed. Where a charging party had no knowledge of or notice of an employer's change in an established term and condition of employment, the charging party could not have been expected to file an unfair practice charge.[8/]

Here the Board did not prove that the Association or any of its officers knew before June 9, 1988, that some employees had received more than $12 per hour for bedside tutoring. I credited Lockhart and Green that the Association had no knowledge of the change in the bedside tutoring salary until June 9, 1988. There was no contradictory evidence. In fact, the Board did not establish the

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8/ I made the same argument in State of N.J. (DOC), H.E. No. 89-16, 15 NJPER 3 (¶20001 1988) which is pending before the Commission.

actual date it first paid more than $12 per hour for bedside tutoring. Since the Association had no knowledge during the 1987-88 academic year that the Board had paid some teachers more than $12 per hour for bedside tutoring, the Association was prevented from filing the charge within the six months of whenever the Board first paid more than $12 per hour. Once the Association became aware of the change on June 9, it filed the Charge on August 23, 1988, well within the six-month period which began on June 9, 1988. Thus, the Charge was timely filed.

The Board relied upon Hunterdon Central H.S. Bd.Ed., P.E.R.C. No. 87-138, 13 NJPER 481 (¶18176 1987), affirming H.E. No. 87-55, 13 NJPER 305 (¶18128 1987)(Hunterdon) to support its argument that the Charge was untimely filed. But Hunterdon does not support that argument. In Hunterdon the Hearing Examiner found, and the Commission affirmed, that the statute of limitations begins to toll when the alleged violation occurs, "or when the charging party initially learns of the alleged violation." 13 NJPER at 307. In that case the union knew about a particular change in October 1983, but did not file a charge until May 1984, which was beyond the six-month period. Thus, that charge was dismissed. That is not the case here. The Association initially learned of the change on June 9 and filed the Charge on August 23rd, well within the six-month period. Thus, this Charge was timely filed.

Second, the Board argued that pursuant to items (b), (d) and (e) of Article 17, Section 1 of J-1, it had a contractual right

to offer some teachers more than $12 per hour for bedside tutoring.

Article 17, Section 1 provides in full as follows:

> Rights of the Parties
>
> The Board of Education, subject only to the language of this Agreement, reserves to itself full jurisdiction and authority over matters of policy and retains the right, in accordance with applicable laws and regulations (a) to direct employees of the school district, (b) to hire, promote, transfer, assign and retain employees in positions within the school district and to suspend, demote, discharge, or take disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the school district operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted, and to take whatever actions might be necessary to carry out the mission of the school district in situations of emergency.

The Board's argument suggests that the Association contractually waived the right to negotiate over changes in the tutoring rate. This argument lacks merit. No actual "emergency" existed to justify the Board's reliance on the language in Article 17, Section 1(e) and Article 17 did not otherwise constitute a waiver of the Association's right to negotiate over salary changes.

The Commission has defined emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Tp. of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338, 340 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87), certif. den. 108 N.J. 198 (1987)(Hamilton).[9/] While a

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9/ Webster's Ninth New Collegiate Dictionary (1985).

public employer does not normally have the right to unilaterally change a term and condition of employment, where immediate action is required under particular circumstances, the employer may have the right to make a change at least on a temporary basis. Hamilton; Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981)(Pitman). In Pitman, for example, an emergency existed requiring the employer to take immediate action to maintain the minimum staffing level of its police force. But where, as here, the employer had knowledge of an impending problem, but one which did not necessitate immediate action, it still has the responsibility to at least offer to negotiate with the majority representative before making a change. In fact, even if it was necessary for the employer to take immediate action on a given day to deal with an emergency, that does not excuse the employer from its obligation to negotiate over the terms and conditions of employment as soon as possible thereafter, and does not excuse it from negotiating over the terms and conditions of employment that would be in effect in dealing with a similar problem in the future.

Whether immediate action was necessary can best be determined by how much notice the employer had prior to the time it finally took action. Here, even if the Board had to take immediate action to pay more than $12 per hour the first time it had a problem obtaining a tutor, it was not entitled to assume that it could thereafter unilaterally pay more than $12 per hour each time it had a problem obtaining a tutor. At the very least, after the first

incident it had an obligation to notify the Association and offer to negotiate a new hourly rate.

The Board, itself, established that it was not required to assign tutors until students were absent in excess of ten school days. Several of the students who were absent more than ten days were students who had been suspended for drug abuse. The Board knew well in advance of their tenth absence that it had to obtain tutors for those students, and once it became apparent that teachers demanded more money to teach those students, the Board had the opportunity, certainly after the first incident (whenever that was), to offer to negotiate with the Association over a new rate of pay. Similarly, when the Board discovered that it had a problem obtaining tutors for particular subjects, it had the opportunity to negotiate with the Association over a different rate of pay. Since the Board never established even on a particular day that it was unaware of a problem obtaining a tutor until the ninth or tenth day of a student's absence, I find that no emergency existed, and there was no need to take immediate action to pay tutors more money without first negotiating with the Association.

The Board's reliance on Article 17, Section 1(e) as a waiver of the Association's right to negotiate over the tutors' pay rate is also without merit. The Commission and the courts have repeatedly held that it will not find a contractual waiver of a majority representative's right to negotiate over a term and condition of employment unless the parties' agreement clearly and

unequivocally authorizes the employer to make the particular change(s). Red Bank Reg. Ed.Assn. v. Red Bank Reg. Bd.Ed., 78 N.J. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd.Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82)(Deptford). There is nothing in Article 17 that authorizes the Board to unilaterally establish a new rate of pay for tutors or any other term and condition of employment, except perhaps in a particular incident where an emergency existed. But I have already concluded here, that the Board did not establish any emergent conditions.

Third, the Board argued that since the Recognition Clause in Article 1 of J-1 excludes temporary and hourly personnel, and since the nature of bedside tutoring is temporary and hourly, that the Charge be dismissed. That argument suggests that by the wording of Article 1 the Association waived the right to negotiate over the rate for bedside tutoring. But the Board then clarified its position by arguing that the Charge be dismissed at least with respect to tutors who were not part of the Association's negotiations unit.

Although the Board may be correct that those tutors who were not regular Board teachers might not be in the Association's unit with respect to the bedside tutoring rate, neither that argument nor the wording of the Recognition Clause justifies a dismissal of this Charge.

The wording in the Recognition Clause does not waive the Association's right to negotiate an hourly rate for bedside tutoring particularly for regularly employed Board teachers. Deptford. That clause merely defines the scope of the unit and excludes temporary personnel who have worked less than 20 working days. In fact, the parties have previously negotiated an hourly rate for bedside tutoring (Article 30, Appendix A) which is an acknowledgement by the Board that it had an obligation to negotiate over that issue.

Even if all of the non-Board teachers who tutored, only five of whom received more than $12 per hour, were excluded from the Association's unit by operation of the Recognition Clause, at least four regular Board teachers received more than $12 for bedside tutoring. Thus, the Board's action in unilaterally paying more than the contractual rate for bedside tutoring clearly applied to at least some teachers in the Association's unit, and the Association had the right to pursue a charge to protect its unit members.10/

Fourth, the Board argued that it paid more than $12 for bedside tutoring based upon "an educational policy consideration," which, it argued, was the legal requirement to provide tutors after the tenth day of a student's absence. The Board further argued that it did not "intend" to modify or repudiate the parties' agreement.

10/ It is not necessary for me to decide in this case whether any of the non-Board teachers employed as bedside tutors met the Article 1 standards for inclusion in the Association's unit for tutoring. That is not the issue in this case. That issue can be more appropriately decided by an arbitrator.

But that is exactly what it did. Subsection 5.4(a)(5) of the Act does not require intent. The Board's unilateral change in--and subsequent failure to negotiate over--the bedside tutoring rate was a repudiation of the collective agreement and a violation of the Act.

The Board's argument that its legal obligation to provide tutors became an "educational policy consideration," lacks merit. The Board did not change any established educational policy regarding tutors, nor create any new educational policy. It merely unilaterally changed the rate of pay for bedside tutoring which was an established term and condition of employment.

Although the Board may have been motivated by a legal directive to provide tutors, that does not excuse it from complying with the legal directives of the Act. The Board failed to balance its two legal obligations. Even assuming that the Board had a legitimate basis to pay a higher rate in the first instance, its failure to subsequently offer to negotiate over the rate violated the Act.

The Board relied upon State of N.J. (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985)(Ramapo) to support its argument that because its actions were based upon what it believed was an educational policy consideration, the Charge should be dismissed. Though Ramapo might stand for the proposition that if an employer's actions were based upon an educational policy decision it would have the right to make certain unilateral changes, the facts and holding in that case support the finding of a violation in

this case. In Ramapo the College unilaterally reduced an employee's work year. The Commission held that the College violated the Act because it had neither a managerial prerogative nor a contractual right to reduce the work year. The Commission in Ramapo specifically found that the College's actions were not based upon an educational policy determination. Similarly here, the Board's decision to change the rate of pay for bedside tutoring was not based upon any change in the Board's educational policy regarding the tutoring program. Rather, it was a change in salary which was a term and condition of employment. By unilaterally changing the tutoring salary the Board violated the Act.

Fifth, the Board argued that because it hired some tutors from outside the district it was subcontracting that work; that the outside the district tutors were "outside contractors"; and that since subcontracting is not negotiable, the Charge should be dismissed. That argument lacks merit. The Board did not contract out, or "subcontract," the bedside tutoring work.

A public employer subcontracts work when it contracts with another employer whose employees provide services for the public employer formerly performed by employees of the public employer. That is not what happened here. The tutors from outside the district were not independent contractors, but were operating as temporary or casual employees of the Board. They were not operating under a subcontracting arrangement with another employer.

But even if the out of district tutors were operating under a subcontracting arrangement, since the Board's own employees were performing bedside tutoring, and since the Board unilaterally paid more than $12 an hour for tutoring to some of its own employees, a subcontracting agreement for part of the work would not result in a dismissal of this Charge. The Board was still obligated to negotiate with the Association regarding the pay rate for tutors who were clearly in its negotiations unit.

Sixth, the Board stated that it was not required to concede to any specific rate of pay, presumably for bedside tutoring; that the duty to negotiate is not inconsistent with a firm position on a given subject; and an adamant position is lawful as long as there continues to be ongoing discussions. The Board did not explain its rationale for those statements. But whether it was arguing that it had reserved the right to pay a different bedside tutoring rate and, therefore, was not bound by the language in Article 30, Appendix A(7), or that because it was willing to negotiate over the tutoring rate after June 9, 1988, it did not violate the Act, are without merit.

Although the Board's statements regarding negotiations rights are accurate, the Board's reliance on them as a defense here is misplaced. It is true that during negotiations either party may take a firm position on a given subject, and that neither party is required to concede on a given item. But once parties have agreed to specific items and embodied them in a written agreement, they are

bound by the terms of that agreement. Thus, by agreeing to J-1, the Board was required to pay unit members $12 per hour for bedside tutoring, and was not entitled to change that rate without first negotiating the change with the Association.

Seventh, the Board alleged that because it had to pay more than the contractual rate to attract some bedside tutors, a disparate salary guide existed, and argued that the establishment of disparate salary guides based upon different classifications of employees was not a violation of the Act. On that basis the Board sought dismissal of the charge. The Board's argument lacks merit. Although it is not illegal for an employer and a union to agree to create different salary guides for different classifications of employees (assuming there is no unlawful intent)(Camden Cty. Voc. Bd.Ed., P.E.R.C. No. 84-67, 10 NJPER 24 (¶15014 1983)(Camden), it is illegal for a public employer to unilaterally create another, or disparate, salary guide for a particular employee function. Here, the parties had created only one salary guide ($12 per hour) for bedside tutoring. A disparate salary for bedside tutoring came into existence only because the Board unilaterally established another rate. The Association never agreed to a different rate, nor was given the opportunity to negotiate over a different rate.

The Board's reliance on Camden is misplaced. That case held that it was not illegal (barring evidence of some unlawful motive) for parties to a collective agreement to agree to disparate salary guides. But Camden did not authorize an employer to act

unilaterally. Since there was no agreement here to create another salary for some bedside tutors, the Board's unilateral action violated the Act.

Eighth, the Board argued that the Charge should be dismissed because the Association had the burden to demand negotiations and to continue discussions after raising the issue in June 1988. That argument is the very antithesis of the law. The Board, not the Association, had the burden to offer to negotiate, but once the Board unilaterally altered an established term and condition of employment, the Association was entitled to file an unfair practice charge rather than negotiate after the fact.

When a collective agreement sets a particular term and condition of employment a public employer has the burden to initiate negotiations with the majority representative over any proposed change to that term and condition of employment prior to implementing any change. New Brunswick. Once a public employer unilaterally alters a particular term and condition of employment, a majority representative that files an unfair practice charge is relieved of any burden to demand negotiations on that particular subject for as long as the employer fails to reinstate the status quo. Hudson Cty., P.E.R.C. No. 78-48, 4 NJPER 87, 90 (¶4041 1978).

The Board's reliance on Town of Secaucus, P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987)(Secaucus); Hunterdon; and Trenton Bd.Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987)(Trenton) to support its argument is misplaced. Secaucus and Trenton did not

involve the unilateral change of a term and condition of employment. Rather, they involved the implementation of a managerial prerogative and a union's subsequent burden to demand negotiations over negotiable issues arising as a result of the implementation of the managerial prerogative. Hunterdon involved an alleged unilateral change, but was dismissed for being untimely filed. Here there was no implementation of a managerial prerogative. Although the Board had the right to obtain tutors even if it had to pay more than the contractual rate, it was the Board's obligation to offer to negotiate over the establishment of that rate.

In sum, the Board violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act by unilaterally changing the rate of pay for bedside tutoring.

The 5.4(a)(3) alleged violation of the Act should be dismissed. The Association did not show that the Board implemented the higher rate for bedside tutoring in a discriminatory manner, or refused to pay some tutors the higher amount because they exercised their rights under the Act.

Remedy

In addition to seeking an order to negotiate, the Association seeks an order prospectively barring the payment of salaries outside the contractual rate, and directing the Board to pay the difference between $12 and $25 (or between $20 and $25, whichever applies) to all bedside tutors who received only $12 (or $20) per hour during the 1987-88 academic year. The Association did

not seek to retroactively rescind the higher rate. The Board argued that if it violated the Act, a monetary remedy would be inappropriate, and that, at most, the Board should only be ordered to restore the status quo and negotiate prospectively over the tutors' salary guide.

The Association relied upon Borough of Metuchen, P.E.R.C. No, 84-91, 10 NJPER 127 (¶15065 1984)(Metuchen) and Hunterdon County, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986)(Hunterdon County)[11/] and cases cited therein to support its position. In Metuchen the Commission found that the employer violated the Act by unilaterally changing certain provisions of its health insurance plan. Those changes affected all unit members. Some changes resulted in a loss compared to the former plan, but some changes resulted in an increase in benefits. In fashioning a remedy the Commission, consistent with the policy established by the National Labor Relations Board,[12/] held that while ordering a return to the status quo, it would not penalize the employees (or union) by revoking favorable changes that resulted from the employer's initial unlawful conduct. Thus, the Commission ordered the employer to reimburse the employees for what they would have received under the

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11/ The Commission remanded Hunterdon County and subsequently issued a decision on the remand, P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987)(Hunterdon County II) aff'd App. Div. Dkt. No. A-5558-86T8 (3/21/88), app'd to S. Ct. Dkt. No, 28,806, affirming a hearing examiner's decision.

12/ See NLRB v. Keystone Consolidated Industries, 653 F.2d 304, 107 LRRM 3143, 3146 (7th Cir. 1981).

old plan but did not receive under the new plan, but allowed them to keep the difference of any increased benefits.

In Hunterdon County, the County unilaterally implemented a safety incentive program paying cash awards to qualifying unit members. The union filed a charge, and at the exploratory conference conducted by a Commission staff agent, the union demanded the right to negotiate over the program, but requested that the program continue in the interim. Nevertheless, following the conference the County unilaterally discontinued the program. The Commission held that the County violated the Act by unilaterally implementing the program, and as affirmed in Hunterdon County II, also held that the County violated the Act by unilaterally discontinuing the program. The Commission concluded that the County discontinued the program in retaliation for the union's filing the charge. Thus, the Commission ordered that qualified employees receive their cash awards and further ordered that the program be continued while the parties negotiated a new program.

The Board relied upon Tp. of East Brunswick, P.E.R.C. No. 86-41, 12 NJPER 785 (¶17299 1985)(East Brunswick) and South Orange-Maplewood Bd.Ed., P.E.R.C. No. 89-1, 14 NJPER 498 (¶19209 1988)(South Orange) to support its position.

In East Brunswick, the employer unilaterally implemented merit salary increases to certain employees, and the Commission found that the employer violated the Act. As a remedy, the union asked that the increase be rescinded prospectively, but did not ask

that it be rescinded retroactively. The Commission granted the union's proposed remedy.

In South Orange the Commission found that the employer violated the Act by unilaterally upgrading the salary grades of certain secretarial positions thereby unilaterally increasing the salaries of employees holding those positions. As a remedy the union sought the upgrade of the salary grades for all other secretarial positions. The Commission specifically rejected the union's proposed remedy and held that such a remedy would impermissibly rewrite the parties' contract. 14 NJPER at 499.[13/] The Commission, instead, ordered that the employer prospectively return the affected positions to their former salary grade levels.

With respect to the Association's request here that all bedside tutors receive the difference between what they received and $25 per hour, So. Orange applies. The Association's proposed remedy is inappropriate. It would require the payment of additional money to employees who were not subject to the bedside tutoring rate policy that the Board unilaterally implemented, and were not otherwise entitled to more than the contractual rate. The Association is entitled to a remedy requiring the Board to prospectively comply with the bedside tutoring rate in J-1 or the

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13/ The Commission cited H.K. Porter & Co. v. NLRB, 397 U.S. 99 (1970.

parties' new collective agreement (whichever applies),[14/] and to negotiate with the Association over a new or different rate in circumstances where it must pay more money to attract qualified tutors. But because of the adverse effect of the Board's unlawful act on the Association's ability to fairly represent all bedside tutors in its unit, the Association is also entitled to an order requiring the Board to negotiate retroactively with the Association over what additional salary, if any, should be paid to bedside tutors who received less than $25 per hour for the 1987-88 academic year.

The Association's reliance on Metuchen and Hunterdon County is misplaced. They are distinguishable from this case. The Association's argument that the Commission incorrectly fashioned the remedy in So. Orange, lacks merit.

In Metuchen the unlawful change affected all unit members equally, thus there was no need for the Commission to consider a remedy, as it did in So. Orange, to address unit members who were not subject to the benefits of the employer's unlawful act. In Hunterdon County, the unlawfully implemented program affected only "qualifying" unit members, and the remedy only reinstated that program while the parties negotiated. The Commission did not order the County to pay anything to unit members who were not subject to that program.

14/ In its post-hearing brief the Association indicated that the parties had entered into a new collective agreement for at least the 1988-89 academic year. From that I infer that the parties negotiated over the bedside tutoring rate for 1988-89.

Accordingly, based upon the above findings and analysis I make the following:

Recommended Order

I recommend that the Commission ORDER:

A. That the Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the establishment and implementation of a different rate of pay for some bedside tutors.

2. Paying more than the contractual rate for bedside tutoring unless having first negotiated a new rate with the Association.

B. That the Board take the following affirmative action:

1. Pay prospectively the contractual rate for bedside tutoring as found in J-1 or any successor agreement, whichever applies.

2. Offer to negotiate with the Association over any proposed change of the bedside tutoring rate prior to implementing any rate change.

3. Upon demand, negotiate with the Association over the retroactive payment of additional salary, if any, to Association unit members who received less than $25 per hour for bedside tutoring during the 1987-88 academic year.

4. Post in 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 at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the 5.4(a)(3) allegation be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: April 3, 1989
Trenton, New Jersey

Recommended Posting
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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to negotiate with the Association over the establishment and implementation of a different rate of pay for some bedside tutors.

WE WILL cease and desist from paying more than the contractual rate for bedside tutoring unless we first negotiate a new rate with the Association.

WE WILL prospectively pay the contractual rate for bedside tutoring as found in the parties' collective agreement.

WE WILL offer to negotiate with the Association over any proposed change of the bedside tutoring rate prior to implementing any rate change.

WE WILL, upon demand, negotiate with the Association over the retroactive payment of additional salary, if any, to Association unit members who received less than $25 per hour for bedside tutoring during the 1987-88 academic year.

Docket No. CO-H-89-58 SPARTA 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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.