

P.E.R.C. NO. 90-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-178

PHILLIPSBURG EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Phillipsburg Education Association against the Phillipsburg Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act by unilaterally changing the regular teaching schedule for literature, writing and social studies teacher. The Association alleged that as a result of the change from a five-day to a six-day cycle, pupil contact time had been increased; teacher preparation time had been lost, and duty periods had been converted into teaching periods. The Commission finds that the Board has regularly assigned teachers up to six instructional periods per day, that the Association never sought to negotiate over any previous changes, and accordingly, that the Board's conduct conformed to the parties' prior conduct.

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Appearances:

For the Respondent, Boyd Harbourt, Esq.

For the Charging Party,
John W. Davis, NJEA UniServ Field Representative

DECISION AND ORDER

On December 23, 1988, the Phillipsburg Education Association ("Association") filed an unfair practice charge against the Phillipsburg Board of Education. 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/} by unilaterally changing the regular teaching schedule

^{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. (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."

for literature, writing and social studies teachers. The Association alleges that as a result of the change from a five-day to a six-day cycle, pupil contact time has been increased; teacher preparation time has been lost, and duty periods have been converted into teaching periods.

On March 17, 1989, a Complaint and Notice of Hearing issued. On March 22, the Board filed an Answer denying the allegations and claiming that there has been no workload change.

On May 9, 1989, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by July 25.

On August 21, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-7, 15 NJPER 528 (¶20218 1989). He found that any increase in instructional periods reflected the established practice.

On October 3, 1989, after an extension of time, the Association filed exceptions. It contends that: the Hearing Examiner had no evidentiary basis to determine other teaching staff members' schedules; teachers of literature, writing and social studies in the Middle School suffered increases in instructional time; the change to a six-day cycle caused a conversion of duty periods into instructional periods; the 16-20 teachers assigned six instructional periods were special subject teachers; and assuming a practice exists, the failure to exercise a legal right is not a surrender of the right to start exercising that legal right.

On October 23, 1989, the Board filed an untimely reply urging adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are accurate. We incorporate them here.

Teacher work hours and workload are mandatorily negotiable. See cases cited by Hearing Examiner, H.E. at 8-9. Any change in workload imposed without negotiations violates subsection 5.4(a) (5) unless the employer can prove that the majority representative waived its right to negotiate. A waiver can come in a number of forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). In South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87), we examined the waiver doctrine:

For example, if the contract explicitly allows the employer to make the changes, the employee representative has waived any right to negotiate the changes during the term of the contract. In addition, if the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes. Ibid.

We now consider the Board's affirmative defense. It asserts that it is not obliged to negotiate because a consistent past practice constitutes a clear and unmistakable waiver of the Association's right to negotiate over these changes. See New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978),

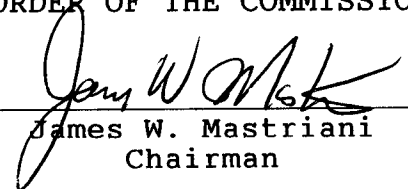
mot. for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. No. A-2450-77 (4/2/79); see also Rutgers Univ., P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982). We agree. The Board has regularly assigned teachers up to six instructional periods per day.^{2/} The change in the number of instructional periods for literature, writing and social studies teachers fell within those limits. The Association never sought to negotiate over any previous changes. Accordingly, we find that the Board's conduct conformed to the parties' prior conduct. Accordingly, we dismiss the subsection 5.4(a)(1) and (5) allegations.^{3/}

We also dismiss the subsection 5.4(a)(3) allegation. There was no evidence of anti-union animus motivating the change in the number of instructional periods.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

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

DATED: Trenton, New Jersey
 October 27, 1989
 ISSUED: October 30, 1989

^{2/} The change to a six-day cycle does not affect this calculation.

^{3/} We agree with the Association that the failure to exercise a right, here the right to negotiate workload, is not a surrender of the right to start exercising it. We simply hold that the Board cannot be found to have violated its negotiations obligation when it acted consistently with the parties' practice.

H.E. NO. 90-7

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

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

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-and-

Docket No. CO-H-89-178

PHILLIPSBURG EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Phillipsburg Board of Education did not violate the New Jersey Employer-Employee Relations Act when it increased the number of instructional periods assigned to certain literature, writing and social studies teachers in academic year 1988-89. The Hearing Examiner found that the increase in the number of instructional periods assigned to the teachers reflected the established past practice and, therefore, the Phillipsburg Education Association waived its right to negotiate over such change.

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.

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Appearances:

For the Respondent, Boyd Harbour, Esq.

For the Charging Party, John W. Davis, NJEA UniServ Field Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 23, 1988, the Phillipsburg Education Association ("Association") filed an Unfair Practice Charge against the Phillipsburg 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. ("Act"), specifically subsections 5.4(a)(1), (3), and (5),^{1/} by unilaterally modifying the regular

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.

five (5) day schedule for teachers teaching literature, writing, or social studies to a weekly work schedule comprised of six (6) days. The Association alleges that the result of the institution of a six-day work schedule is that pupil contact time has been increased, teacher preparation time has been lost, and duty periods have been converted into teaching periods.

On March 17, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 22, 1989, the Board filed an Answer generally denying having committed any violation. A hearing was conducted on May 9, 1989, at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs, the last of which was received on July 25, 1989.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Board is a public employer within the meaning of the Act and that the Association is a

1/ Footnote Continued From Previous Page

(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."

public employee representative within the meaning of the Act (T7).^{2/}

2. Prior to academic year 1988-89, the teaching schedule operated on a five-day rotation, seven periods per day. A five-day rotation operates so that a week of classes would begin on Monday and end on Friday. Five-day rotations consist of 36 weeks per academic year (T47; T137). Each school day contains seven periods (R-1b; R-4b^{3/}). There are a total of 1260 teaching periods in the academic year using a five-day rotation.

3. In academic year 1988-89, a six-day weekly rotation was initiated. Under a six-day weekly rotation, an academic week would begin on Monday and end on the following Monday. The second academic week would begin on Tuesday and end the following Tuesday, and so forth. A six-day weekly rotation consists of 30 weeks per academic year. Each day continues to have seven periods (R-1a; R-4a). There are a total of 1260 teaching periods in the academic year using a six-day weekly rotation.

4. Douglas Morris teaches social studies and math at the Phillipsburg Middle School. During academic year 1987-88, Morris was assigned 25 instructional periods, 4.5 duty periods and 5.5 preparation periods per week for an annual total of 900

^{2/} Transcript citation T7 refers to the transcript produced on May 9, 1989 at p. 7.

^{3/} Exhibits designated "R" refer to items offered by the Association and admitted into evidence.

instructional periods, 162 duty periods and 198 preparation periods (R-1b). In academic year 1988-89, Morris' weekly assignment included 33.5 instructional periods, 1 duty period, and 7.5 preparation periods. This translates to an annual total of 1,005^{4/} instructional, 30 duty periods, and 225 preparation periods (R-1a). At those times when the "student leader"^{5/} took charge of Morris' social studies classes, Morris would be scheduled for either a duty or a preparation period (T52).

5. In academic year 1985-86, Morris worked more than 1,008 instructional periods under a five-day weekly rotation (T62).^{6/} Although Morris expressed his displeasure to then Assistant Principal Hovell concerning the number of instructional periods he was assigned in academic year 1985-86, neither Morris nor the Association took formal action to challenge the number of instructional periods assigned (T66). Morris' more typical schedule was reflected in his 1987-88 schedule (R-1b; T66).

4/ During the second marking period of academic year 1988-89, students in Morris' social studies classes met in their student leadership program on a weekly rather than biweekly basis. Morris was afforded a free period during the times when the students met with their student leader. Consequently, Morris taught less than 1,005 instructional periods during calendar year 1988-89 (T72-T73).

5/ The Student Leadership Program is described more fully in paragraph 6, below.

6/ The record is unclear regarding how many more instructional periods Morris worked, but it establishes that he worked more than 1,008.

6. The Student Leadership Program began in the Middle School approximately sixteen years ago (T124). The program teaches students value clarification, develops self-esteem and socialization skills, and, later, focuses on high school course selection and career goals (T124). Eight to ten years ago, Morris' schedule included six instructional and one preparation period per day. Under that schedule, Morris taught a total of 1080 instructional periods per school year (T78-T79). Prior to academic year 1988-89, the Student Leadership Program was conducted during the social studies period once per week in the eighth grade and biweekly in the seventh grade (T47-T48; T51). In academic year 1988-89, the Student Leadership Program was reduced to one meeting every two weeks (T47-T48; T72). I find the reduction in the weekly student leadership meetings to have contributed to the increase in instructional periods reflected in Morris' 1988-89 schedule. The reduction of the weekly student leadership meetings would have caused an increase in the instructional periods which Morris would have been assigned regardless of whether the elimination occurred on a five-day or six-day weekly rotation (T75).

7. In academic year 1987-88 Morris, taught 900 instructional periods and was assigned 162 duty periods and 198 preparation periods for a total of 1260 periods (R-1b). In academic year 1988-89, Morris taught 1005 instructional periods and was assigned 30 duty periods and 225 preparation periods for a total of 1260 (R-1a). The additional 105 instructional periods and 27

preparation periods found in Morris' 1988-89 schedule as compared with his 1987-88 schedule came from a reduction of 132 duty periods (R-1a; R-1b). The increase in the number of instructional periods was not related to the change from a five-day to a six-day weekly rotation.

8. Stephanie Wydner teaches eighth grade language arts, literature and writing at the Middle School. She has taught at the Middle School for four years (T80-T81). In academic years 1985-86 and 1986-87, Wydner was assigned hall duty two or three times per week (T100-T101). In academic year 1987-88, Wydner and the other writing teachers embarked on an informal arrangement with the Middle School's administration whereby the teachers were given what amounted to a preparation period in lieu of a duty period for the purpose of correcting students' essay assignments. The writing teachers would be "on call" to cover duty assignments in the event the administration determined that they were needed. (T127-T128).^{7/}

^{7/} The record is unclear with respect to whether the "on call" duty assignment arrangement was implemented for writing teachers in academic year 1986-87 or 1987-88. Wydner testified that the on-call arrangement arose in academic year 1986-87 and that she simply had no duty assignments made in academic year 1987-88 (T97-T101). Hovell's testimony indicated that the administration agreed to relieve the writing teachers from having to perform their duty assignments so that they could devote that time to correcting the students' essays. However, Hovell testified that from the outset of the arrangement it was understood that the writing teachers would be "on call" to perform a duty assignment in the event such assignment became necessary during the school

9. For the last 16 years, Paul Hovell has served in various administrative and teaching capacities at the Middle School. Currently he is principal (T113). During his 16 years at the Middle School, Hovell has been solely responsible for preparing teachers' schedules (T113). Fifteen years ago, Hovell changed the teachers' schedules from eight periods to seven periods per day (T117). At that time, teachers were assigned to as many as seven instructional periods per seven-period day (T117-T118). As the student population decreased, Hovell revised the teachers' schedules to include at least one preparation period within a seven-period day (T118). Over the years, it has become clearly enunciated policy that Middle School teachers will be assigned at least one preparation period each seven-period day (T114; T119; T125; T135; T156). During faculty meetings, Hovell announced the policy that teachers will be scheduled at least one preparation period during each seven-period day (T119; T156), and that teachers would be assigned either instructional or duty periods for the remaining six periods (T126; T135-T136). Teachers might be assigned one or two duty periods per week (T136). The number of duty periods assigned any particular teacher changes each year in keeping with the annual

7/ Footnote Continued From Previous Page

year (T127-T128). I credit Hovell's testimony. It is clear from both Wydner's and Hovell's testimonies that the "on call" duty period arrangement existed. However, I find that Wydner was more tentative in her testimony with respect to the timing of events, whereas, Hovell appeared to have a firmer grasp of the factual details.

changes made in a teacher's schedule (T138). For at least the last four years, teachers' schedules have changed to reflect increases in the number of instructional periods assigned with concomitant decreases in duty periods or increases in the number of duty periods offset by decreases in the number of assigned instructional periods (T139; T146).

10. In determining a teacher's schedule, Hovell focused on two primary factors: (a) student population and (b) the teacher's subject certification (T114). Over the 16 years that Hovell has been responsible for establishing the teachers' schedules, the student population has declined steadily. Sixteen years ago, there were 800 students in the Middle School, currently there are 520 (T114).

11. In academic years 1987-88 and 1988-89, 16 to 20 teachers in the Middle School, out of a total of 56, were assigned schedules which included six instructional periods during each seven-period day (T136-T137). This work schedule existed irrespective of whether a five-day or six-day weekly rotation was in effect (T138).

ANALYSIS

It is firmly established law in this state that teacher work hours and work load are mandatorily negotiable and, normally, a unilateral increase in pupil contact time or the number of teaching periods violates the Act. See Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Ed. Assn., 168 N.J.

Super. 45 (App. Div. 1979), pet. for cert. den. 81 N.J. 292 (1979); Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. The Warrington, 138 N.J. Super. 564 (App. Div. 1976); Kingwood Tp. Bd. of Ed. v. Kingwood Tp. Ed. Assn., App. Div. Dkt. No. A-1414-84T7 (11/25/85); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. A-3380-80T2 (3/16/82); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/20/80); City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Dkt. No. A-954-79 (1980), pet. for cert. den. 87 N.J. 310 (1981). However, a majority representative may waive its right to negotiate changes in student contact time or work load. A waiver can come in different forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). Where an employee organization declines the opportunity to negotiate after being notified of proposed changes or if it has routinely permitted the employer to make similar changes, it may have waived its right to negotiate over what would otherwise be mandatorily negotiable subjects. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87); Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

By definition, an established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No.

80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part 180 N.J. Super. 440 (1981). In this case, an established practice exists allowing the Board to make annual adjustments in teachers' schedules. The current practice allows the Board to increase or decrease the number of instructional periods assigned to teachers. These adjustments are made on the basis of the effect that student population changes have on particular subject areas. Changes in the number of instructional periods assigned to teachers have been made unilaterally by the Board for at least the last four years. Prior to academic year 1988-89, the Association has never objected to changes in assigned instructional periods made by the Board.

Not only has the Board regularly taken unilateral action to change the number of instructional periods assigned to teachers, but the Board has also specifically advised teachers of its policy to change the number of instructional periods assigned. Hovell has announced during faculty meetings that within a seven-period day, teachers may be assigned up to six instructional periods and one preparation period. In academic years 1987-88 and 1988-89, some 16 to 20 teachers were assigned six instructional periods per seven-period day in accordance with the Board's enunciated policy. Consequently, in light of the established past practice, I find that the Board has not and does not unilaterally change a condition of employment when it increases the number of instructional periods, up to six, within the current seven-period day, and the Association has waived its right to negotiate regarding this subject.

The Association alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(3). In order to establish that the Board violated subsection (a)(3) of the Act by increasing the number of instructional periods assigned to teachers, the Association has the burden of proving animus (anti-union motive) as the basis for the change, Boro of Haddonfield Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); Cape May City Bd. of Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (111022 1980), and that protected activity was a motivating factor in the Board's action. Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). The Association did not offer any evidence of animus, or any evidence that the Board's action was taken as the result of the conduct of any protected activity. Consequently, the §5.4(a)(3) allegation must be dismissed.

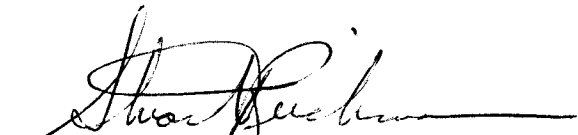
Accordingly, based upon the entire record and the above analysis, I make the following:

CONCLUSIONS OF LAW

The Phillipsburg Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) by increasing the number of instructional periods assigned to certain literature, writing or social studies teachers in academic year 1988-89.

RECOMMENDATIONS

I recommend that the Commission ORDER that the Complaint be dismissed.



Stuart Reichman
Hearing Examiner

Dated: August 21, 1989
Trenton, New Jersey