

P.E.R.C. NO. 92-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY REGIONAL HIGH
SCHOOL DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-H-91-3

UNION COUNTY REGIONAL H.S.
FEDERATION OF TEACHERS,
LOCAL 3417, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Union County Regional High School Federation of Teachers against the Union County Regional High School District No. 1. The charge alleged that the District violated the New Jersey Employer-Employee Relations Act by unilaterally changing the teacher preparation and recording period of the Federation's president because of her protected activity. The Chairman finds that the charging party failed to prove that the charge was in retaliation for her protected activity. He further finds that her assignment was changed to meet operational requirements.

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Charging Party.

Appearances:

For the Respondent, Weinberg and Kaplow, attorneys
(Irwin Weinberg, of counsel)

For the Charging Party, Dwyer & Canellis, attorneys
(Thomas D. Forrester, of counsel)

DECISION AND ORDER

On July 3, 1990, the Union County Regional High School Federation of Teachers, Local 3417, AFT, AFL-CIO filed an unfair practice charge against the Union County Regional High School District No. 1. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (5),^{1/} by unilaterally changing the teacher

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the

preparation and recording period ("TPR") of the Federation's president, Evelyn McGill, because of her exercise of protected activity. The assignment of a yearbook class during the last period of the day when McGill had been assigned a TPR allegedly interfered with her ability to conduct union business.

On September 18, 1990 a Complaint and Notice of Hearing issued. On October 9, 1990, the District filed an Answer claiming that it had a right to make classroom assignments and that the parties' collective negotiations agreement gave the president three personal days off to devote to union business.

On January 14, 1991, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. At the conclusion of the charging party's case-in-chief, the Hearing Examiner dismissed the subsection 5.4(a)(2) and (4) allegations. The charging party filed a post-hearing brief on March 8, 1991.

On May 30, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-41, 17 NJPER ____ (¶____ 1991). He found that the District did not violate the Act by

Footnote Continued From Previous Page

exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

changing McGill's TPR and assigning her a yearbook class. He concluded that the schedule change was for legitimate educational reasons. He further found that teaching assignments are a managerial prerogative and that the District was not contractually required to provide the president with more time off than the three negotiated days.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due June 12, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-13) are undisputed and accurate. I incorporate them with this minor modification. The legislative ban on smoking was restricted to school buildings. See N.J.S.A. 26:3D-17.

The charging party failed to prove that the change in McGill's TPR was in retaliation for her protected activity. Accordingly, acting pursuant to authority granted to me by the full Commission in the absence of exceptions, I dismiss the subsection 5.4(a)(3) allegation.

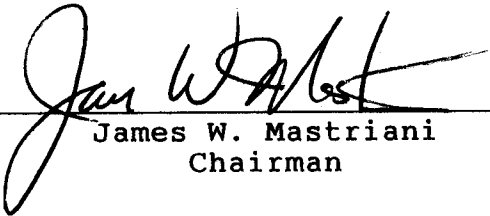
Transfers and assignments of union officers have been found to be mandatorily negotiable if the employer can otherwise meet its operational requirements. Local 195, IFPTE v. State, 88 N.J. 393, 418-419 (1982). But the Hearing Examiner found that McGill was the only English teacher available to perform the yearbook assignment at that time. Accordingly, I dismiss the subsection 5.4(a)(1) and (5)

allegations. Because there were no facts presented to substantiate the subsection 5.4(a)(2) and (4) allegations, I dismiss them as well.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: July 8, 1991
Trenton, New Jersey

H.E. NO. 91-41

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

In the Matter of

UNION COUNTY REGIONAL HIGH SCHOOL
DISTRICT NO. 1,

Respondent,

-and-

Docket No. CO-H-91-3

UNION COUNTY REGIONAL H.S.
FEDERATION OF TEACHERS,
Local #3417, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Union County Regional High School District No. 1 did not violate the New Jersey Employer-Employee Relations Act by changing the teaching assignment of the Federation president. The Hearing Examiner found that the assignment was not made in retaliation for the president's exercise of protected activity, rather, it was based upon legitimate educational and business considerations. The Hearing Examiner also found that the District was under no obligation to negotiate with the Federation over making the assignment nor did the District violate any past practice or collective agreement in making the assignment.

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. 91-41

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

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Appearances:

For the Respondent, Weinberg and Kaplow, Attorneys
(Irwin Weinberg, of counsel)

For the Charging Party, Dwyer & Canellis, Attorneys
(Thomas D. Forrester, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public
Employment Relations Commission (Commission) on July 3, 1990, by the
Union County Regional High School Federation of Teachers, Local
3417, AFT, AFL-CIO (Federation) alleging that the Union County
Regional High School District No. 1 (District or Board) violated
subsections 5.4(a)(1), (2), (3), (4) and (5) of the New Jersey
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

(Act).^{1/} The Federation alleged the District unilaterally changed the class assignment of its President, Evelyn McGill, because of her exercise of protected activity. The Federation argued that McGill previously had the last period of the day available to do union-related work, but for the 1990-91 school year the District assigned her a yearbook class during that period. This assignment allegedly prevented McGill from adequately performing her duties as President. The Federation seeks a decision voiding the new assignment; directing the District to assign the yearbook class to another employee; and requiring the District to reinstate McGill's free time during the last period.

A Complaint and Notice of Hearing (C-1) was issued on September 18, 1990. The District filed an Answer (C-2) on October 9, 1990, denying it violated the Act. The District argued that it had the right to make classroom assignments, and that the parties'

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

collective agreement gave the Federation President three personal days off to devote to union business. A hearing was held in this matter on January 14, 1991, in Newark, New Jersey. After the Federation rested I granted a Motion to Dismiss the 5.4(a)(2) and (4) allegations. The Federation filed a post-hearing brief by March 8, 1991.

Based upon the entire record, I make the following:

Findings of Fact

1. Evelyn McGill has been employed by the District as an English teacher for 32 years, most of which was at the Jonathan Dayton Regional High School. She has been President of the Federation for 12 years, and Vice-President of the State Federation of Teachers for ten years. The Federation has been the majority representative of the professional staff since 1981. McGill has been the leader of the Federation's negotiating committee and been active in all of the negotiations with the District (T14, T16, T30, and T59).^{2/}

In 1987 McGill represented an employee (Mr. Whelan) in reaching a large monetary settlement with the Board (T31-T33, T109-T110). During the 1986-87 school year McGill notified the Summit Board of Health and PEOSHA about an environmental problem existing at the District's Governor Livingston Regional High School. It was necessary for the District to expend funds to clean

^{2/} "T" refers to transcript of the hearing taken in this matter.

up the environmental problem (T33-T34). McGill did not disclose to Superintendent Merachnik that she had been the one who had notified authorities regarding the environmental problem, and her supervisor in 1990, Julia Latzer, was not aware of McGill's involvement in that matter (T93, T116 and T133).^{3/}

During the 1988-89 school year, the District imposed a smoking ban in school facilities. The Federation challenged the District's right to impose the ban and filed an unfair practice charge (Exhibit CP-2) with the Commission alleging that the District violated the Act. During that time period Merachnik was trying to persuade the New Jersey State Legislature to pass smoking ban legislation for all public schools, and he spoke to McGill regarding the smoking ban issue, but no agreements were reached. Subsequently, the Legislature passed legislation banning smoking in public buildings. That resulted in the withdrawal of CP-2 (T38-T39, T152-T153).^{4/}

^{3/} McGill testified on cross-examination that she thought Merachnik had to be aware that she was the one who had informed authorities regarding the environmental problem. However, she also testified that she did not disclose it, and Merachnik testified that he was not aware of that until the time of the hearing. I credit Merachnik's testimony regarding the environmental problem and note that McGill admitted she did not disclose her involvement to Merachnik (T93, T133).

^{4/} An examination of Commission files reveals that CP-2 was originally filed as Docket No. CO-89-160 on December 14, 1988 and amended on January 6, 1989. The charge was officially withdrawn on July 11, 1989.

In the spring of 1989, the Board apparently announced its intent to RIF approximately 31 teachers. McGill was responsible for organizing a community action group of teachers, students and parents to attend a Board meeting to speak in opposition to the RIFs. Many people appeared at that meeting resulting in the withdrawal of RIFs for tenured teachers, but approximately seven to nine non-tenured teachers were RIFed that year (T35-T36, T62).

A retirement dinner honoring professional and other staff retirees of the District was scheduled for May 24, 1989. As Federation President McGill usually attended retirement dinners and presented AFT awards (T52). Because of the 1989 RIFs, McGill, and other staff members, chose not to attend the retirement dinner, and no AFT awards were presented (T50-T52). McGill made no arrangements for anyone to present AFT awards. McGill did not inform Natalie Waldt, Board of Education President, that she would not attend nor make presentations at the retirement dinner. Prior to the actual dinner Waldt learned that teachers had been asked to boycott the dinner (T151, T158). When McGill did not appear at the dinner Waldt commented to the assembled group that McGill had been responsible for boycotting, or arranging a boycott of, the dinner (T158, T161). On June 2, 1989, McGill wrote a letter to Waldt (CP-4) regarding the remarks that she made about McGill at the dinner. In strong language McGill criticized Waldt for making those remarks. A copy of that letter was sent to Board members and the Superintendent. On June 7, 1989, the Board, reacting to CP-4, sent a memorandum to all

staff members(CP-5) saying the Board fully supported Waldt's comments at the retirement dinner.

Later in June 1989, the Federation issued its newsletter The New Frontier (CP-1) which contained articles and editorials, some of which were written by McGill. On page 1 of CP-1 an article appeared entitled "Bizarre Action!?! " concerning the retirement dinner episode and the related boycott issue and exchange of letters CP-4 and CP-5. The article was critical of the Board's handling of the matter. On pages 3 and 4 of CP-1 McGill wrote an article entitled "Morale Problem" which included a cartoon. The article and cartoon were critical of the Board and/or the Superintendent and questioned their competence in handling District matters. On page 2 of CP-1 an article appeared regarding the smoking ban status which was critical of the Board's handling of that matter (T37-T38).

In December 1990, the parties began negotiations for a new collective agreement. McGill lead the Federation's negotiations team (T30). She preferred to negotiate during the day time, but has scheduled negotiations in the evenings, but felt it a hardship to schedule meetings at any time (T96-T97). McGill's yearbook assignment during seventh period made it difficult for her to meet with union members and to properly represent the Federation (T31).

On February 5, 1990, McGill filed a grievance on behalf of employee Angelo Corbo (CP-3) challenging a supervisor's remarks in a report about the employee. McGill represented or assisted in representing Corbo in this matter (T41-T42). Over the last three

years McGill only filed three grievances, one of which was the Corbo grievance which was the only one processed to conclusion (T92, T139).

2. Since the Federation became majority representative in 1981, McGill, as its President, has been assigned to TPR, teacher preparation and recording, during the last period of the day. Former Dayton Principal, Ann Romano, had arranged to have McGill assigned to TPR during the last period of the day as a courtesy to allow her to meet with teachers or to conduct meetings in the nature of union business (T17-T18, T97).

McGill is certificated in both English and social studies but has never taught social studies (T58). Throughout the 1970's and 1980's McGill did not have an extra teaching or extracurricular assignment (T95).

In the spring of 1990 the Board rified 31 teachers, nine of those teachers were from the Dayton Regional High School. Among those nine was an English teacher, John Cafone, who had taught the yearbook class for six to seven years prior to being RIFed (T123-T124). The RIF affected the 1990-91 academic year (T62-T63).

Judith Wickline became Principal of Jonathon Dayton Regional High School in March 1990. Prior to that time Wickline had been a vice principal in a different school district and had no knowledge of McGill's union or protected activity (T65-T66). Shortly after Wickline came to the District, the District engaged in the RIFs affecting the 1990-91 school year. Since Cafone was RIFed,

his yearbook class had to be assigned to another teacher. According to the parties' 1988-91 collective agreement (J-1), Schedule E provided a \$2,000 stipend for the yearbook class teacher for the 1990-91 school year. Through a computer program the District determined that the yearbook class should be scheduled for the seventh period of the day because that was the time when most students would be available to take that particular course (T124-T125).

Neither Superintendent Merachnik, nor Board President Waldt were involved in the assignment of teachers to yearbook and other stipended positions (T130, T146, T160). The Principal of each building had the primary responsibility to assign teachers to teaching functions, and Merachnik did not interfere unless no certificated teacher was available for a particular function (T130-T131, T146). Wickline, as principal at Jonathan Dayton, delegated the responsibility of assigning a teacher for the yearbook class to English Department Supervisor, Julia Latzer, because yearbook was related to journalism which was included in the English Department (T113, T123).

Latzer has been English supervisor for at least six years (T113). In May 1990 she assigned McGill to teach the yearbook class for the 1990-91 academic year. Latzer had no conversations with Merachnik or Romano about making the assignment (T116-T117, T129). She chose McGill for that assignment because, due to the RIF, there was a lack of other English teachers to teach the yearbook class,

and because McGill was the only English teacher who had no other assignment (T114, T117). Latzer had nothing to do with scheduling yearbook for seventh period (T118); she was not aware that during the preceding ten years McGill had TPR during the seventh period (T118); and she was not aware of any understanding McGill had with Romano about seventh period (T119). Latzer was unaware of McGill's involvement in the Whelan matter, and the environmental problem, but knew McGill had objected to RIF's and a smoking ban, but none of McGill's protected activity influenced Latzer's decision to assign her to the yearbook duties (T115-T116).^{5/} In conjunction with the assignment Latzer prepared McGill's schedule for 1990-91 (R-1), which showed that McGill had yearbook during second and seventh periods (T22), and had TPR during fifth period, the longest period of the day, when she would have time to travel to other schools (T132). There were no negotiations between the parties regarding the removal of TPR from McGill's seventh period and assignment to teach yearbook class (T26, T143).

McGill was notified of her yearbook assignment and R-1 by Latzer in May 1990 (T63). McGill spoke to Latzer about the assignment, explained how the assignment would interfere with her union activity, but Latzer indicated there would be no change

^{5/} Latzer testified that McGill's involvement in the RIF and smoking ban played no part in her decision to assign yearbook to McGill (T115-T116). She testified the assignment was based upon the lack of teachers (T117). The Federation offered no contradictory evidence, thus I credit Latzer's testimony.

(T24-T25, T63). McGill did not say that Latzer made the assignment because of her (McGill's) involvement in environmental problems; the Corbo grievance; or the smoking ban issue (T64).

After talking to Latzer, McGill spoke to Wickline. McGill did not suggest to Wickline that the assignment was made to punish her (McGill), nor because of her involvement in the Corbo grievance, the smoking ban, nor comments in CP-1 (T25, T65-T66). But McGill explained to Wickline that the assignment would interfere with her union activities, and that her priority was the representation of teachers. Wickline responded that her (McGill's) priority should be the students (T67-T68, T126-T127).

McGill also told Wickline (and Latzer) that other teachers, specifically English teacher Art David, and art teacher David Brodman, were available to teach the yearbook class, and that she would "volunteer" to take the creative writing (or literary) magazine assignment (T27-T29). Wickline rejected those suggestions and upheld Latzer's selection of McGill for the yearbook assignment (T25). Neither Art David nor David Brodman ever told Wickline that they were interested in the yearbook assignment (T125, T129), and Art David was already assigned to - and doing an excellent job with - the creative writing magazine, a fact McGill admitted (T29, T125). Brodman was going to be a traveling teacher and the practice was to avoid extra assignments to traveling teachers (T126). Merachnik never told Wickline to make a change in McGill's assignment, nor did any Board member discuss the assignment with Wickline (T128).

After talking with Wickline, McGill spoke to Merachnik about the assignment. She told him that the assignment would change her TPR and she should be assigned the yearbook class, and she asked him to intercede on her behalf (T131, T146). She did not tell him that the assignment was being made to punish her or that it was because of the smoking ban matter or the Corbo grievance (T66-T67).

Merachnik responded that it was the building principal's responsibility, not his, to make staff assignments and he did not like to interfere with that procedure. But he agreed to speak to Wickline about the assignment. Wickline told him that McGill was the only teacher that could take that assignment in Dayton, and at that point he agreed with the assignment (T25, T67, T130-T131, T146-T147).

McGill's employment was never threatened because of her union activity; the assignment to teach the yearbook class resulted in a salary increase; and she was not reprimanded for speaking at a public meeting or distributing CP-1 (T91).

3. The District and Federation have been parties to at least two collective agreements, R-3 the September 1, 1986 - August 31, 1988 agreement, and J-1 the September 1, 1988 - August 31, 1991 agreement. In negotiations leading to R-3 the Federation submitted proposals (R-2) which contained the following proposal seeking duty-free time for the Federation president.

Article 7

Add: New "H": The Federation President shall be relieved of homeroom assignments and shall also

have a duty free period in addition to his/her TPR. The designated Building Representatives shall have a normal teaching load but shall be relieved of any other duty assignments.

But when negotiations were completed "H" was not added to the agreement (T69). But Article 7, Section (G) of R-3 did provide three additional work days for the Federation President to conduct union business.

Article 7, Section (G). The President of the Federation, in addition to the personal days granted to all teachers pursuant to the terms of this agreement, shall be permitted upon proper notice to the Superintendent and/or his designee to have three (3) personal days off without loss of pay during the school year to be devoted to local Union business.

In negotiations leading to J-1 the Federation again proposed (in R-4) adding a section "H" to Article 7 providing:

The Federation President shall not be given any duties beyond regular teaching assignments.

But when negotiations for J-1 were completed Section "H" was not added to J-1 and the language in Article 7, Section (G) of J-1 remained the same as in R-3.

Another relevant clause, Article 11 (Teaching Assignments), Section (D) of both R-3 and J-1, provides, in identical language, that if a change is made in a teaching assignment after June 1 the affected teacher may seek a review of that assignment from the administration up to and including the superintendent. The superintendent's decision, however, is final and not subject to arbitration.

The change in McGill's assignment occurred prior to June 1, thus she was not entitled to a review. Nevertheless, her assignment was reviewed by the superintendent who, after learning the facts, did not interfere with it (T87-T88).^{6/}

ANALYSIS

The District did not violate the Act by changing McGill's TPR and assigning her the yearbook class during the seventh period. The change in McGill's schedule occurred due to legitimate educational/business considerations.

The Federation alleged two legal issues. First, that McGill's schedule was changed because of the exercise of her protected activities. Second, that the District had the obligation to negotiate over the removal of TPR from McGill's seventh period. Neither the facts nor law, however, support the finding of a violation on either theory.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984)(Bridgewater) the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party in a

^{6/} The District introduced two documents, R-5 the faculty sign-out, sign-in, sheet covering January 1989 - May 1990, and R-6, a memorandum from Romano to McGill dated June 8, 1989. R-5 shows the numerous times that McGill signed out and in from Dayton during the seventh period often in conducting union business (T73-T82). R-6 was a memo from Romano to McGill regarding her (McGill's) absence from the building during the afternoon of June 7, 1989. R-6 was not probative to the issue of why McGill was assigned the yearbook class in May 1990. Although R-5 demonstrated McGill's participation in protected activity during the statute of limitations period, it did not demonstrate animus or hostility.

5.4(a)(3) case has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

The Federation obviously demonstrated that McGill engaged in protected activity and that the District knew of the activity. However, the Federation did not demonstrate that the District was hostile towards McGill because of the exercise of that activity. While testifying, McGill suggested that the Superintendent, in particular, and Wickline and Latzer, acted in bad faith in assigning her to teach yearbook during the seventh period. But the facts show that neither Merachnik nor Wickline were directly responsible for that assignment. Latzer, who was not very familiar with the history of McGill's protected activity, made the assignment based upon the availability of English teachers in her department. Neither

Merachnik nor Waldt were responsible for, nor interfered with, the making of that assignment. Similarly, Wickline, was unaware of the history of McGill's protected activity and she too was not responsible for, nor did she interfere with, Latzer's selection of McGill to teach yearbook during the seventh period.

Although McGill was not entitled to a review of this teaching assignment pursuant to Article 11, Section D of J-1, both Wickline and Merachnik took the time to review the assignment, and Merachnik investigated the basis of the assignment, and determined that it was legitimately based and they did not interfere with it. The allegation by the Federation in its post-hearing brief that Merachnik did not give the assignment sufficient consideration is without merit. McGill was not entitled to be treated differently than any other employee who might have been selected for that assignment, particularly since Article 7, Section G of J-1 provided that the Federation president was entitled to three extra days for union business.

McGill suggested to Latzer and Merachnik the names of other employees who would, or could, be available to perform the yearbook assignment, but the facts show that neither of those employees expressed any interest to Wickline in performing that assignment. Art David was already performing the literary magazine assignment in an exemplary manner and Wickline had a legitimate basis not to disturb that assignment. Similarly, David Brodman was performing a different assignment which Latzer was not obligated to change.

Although McGill had suggested these other employees were available to perform the yearbook assignment, McGill's testimony does not contradict either Wickline's or Merachnik's testimony that McGill was the only English teacher at Jonathan Dayton that had not received an extra teaching assignment, nor that she was the only English teacher available to perform the yearbook assignment at that time.

In its post-hearing brief the Federation also argued that the timing of the Board's action in assigning McGill to the yearbook function violated the Act. The Federation argued that since McGill was involved in negotiating a new contract in the spring of 1990 the yearbook assignment at that time was done to punish her because of the exercise of her protected activity, particularly, the Whelan incident, the environmental problem, the 1989 RIF incident, the retirement dinner incident, the news articles in June of 1989, and the Corbo grievance. That argument lacks merit. The Whelan and environmental incidents were simply too far removed to have formed a basis for animus in 1990. The smoking ban issue was hardly significant especially since it was resolved through State legislation. The 1989 RIF and retirement dinner problems also occurred nearly a year prior to Latzer's assignment of McGill to teach the yearbook function, and neither Latzer nor Wickline were involved in those matters. Similarly, Wickline was not aware of the New Frontier articles, Latzer was not affected by them, and neither was involved in the Corbo grievance. Thus, I conclude that the

history of McGill's protected activity did not form the basis upon which Latzer selected McGill to teach yearbook during the seventh period nor Wickline's approval of that selection. Thus, I recommend dismissal of the 5.4(a)(3) allegation.

In arguing that the Board violated the Act by unilaterally changing McGill's TPR from seventh period and assigning her the yearbook duties the Federation alleged that the District had an obligation to negotiate over those changes in McGill's work, or class assignment. The Federation also argued that a past practice had been established granting McGill her TPR during the seventh period, and that that past practice could not be unilaterally changed.

A past practice (or established practice) is a term and condition of employment not appearing in the parties' collective agreement, but arising as implied from their mutual conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J. Super. 440 (App. Div. 1981). A past practice establishing a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or the parties' collective agreement. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982)(Sussex); Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). Normally, where a collective agreement is silent or ambiguous on an issue, past practice controls. Sussex. But mere silence on an issue does not give a past practice binding effect

where the particular past practice is contrary to - or gives an effect different from - the express provisions of a collective agreement. N.J. Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710, 711 (¶18264 1987); Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). Where the mutual intent of the parties can be determined from a simple reading of the parties' agreement, a contrary past practice cannot be relied upon. New Brunswick Bd. of Ed., 4 NJPER 84 (¶4040 1978), mo. for recon. den., 4 NJPER 156 (¶4073 1978).

Here, Romano's decision to schedule McGill's TPR during the seventh period did not become a binding past practice on the Board. First, teaching assignments are managerial prerogatives and the District was under no obligation to negotiate with the Federation over McGill's yearbook classroom assignment. Ridgefield Park, 78 N.J. 144, 156 (1978); IFPTE Local 195 v. State, 88 N.J. 393, 413-419 (1982). See also Ramapo-Indian Hills Ed. Assoc. v. Ramapo Indian Hills Reg. H.S. Dist. Bd. of Ed., 176 N.J. Super 35, 45-47 (1980).


Second, J-1 specifically provides in Article 7, Section G that the Federation president is entitled to three days for union business. The District is not required to provide the Federation president any more time for union business than what it had already negotiated. The Federation cannot rely on a contrary unwritten practice to supersede the clear written agreement. Thus, the District was not obligated to negotiate with the Federation over the change in McGill's TPR and yearbook assignment.

Finally, since the Federation did not allege or show that the District repudiated its collective agreement regarding the three business days off for the Federation president, there was no basis for finding that the District violated the Act by changing McGill's seventh period assignment. On that basis, the 5.4(a)(5) and derivative (a)(1) allegations should be dismissed.

Accordingly, based upon the above facts and analysis I issue the following:

RECOMMENDATION

I recommend the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: May 30, 1991
Trenton, New Jersey