P.E.R.C. No. 91-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BARNEGAT TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-102

BARNEGAT FEDERATION OF TEACHERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Barnegat Township Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally stopped the conversion of unused personal days into sick days for custodians and cafeteria employees represented by the Barnegat Federation of Teachers.

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BARNEGAT FEDERATION OF TEACHERS,

Charging Party.

Appearances:

For the Respondent, Cassetta, Taylor & Whalen
(Garry M. Whalen, consultant)

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

DECISION AND ORDER

On October 12, 1988, the Barnegat Federation of Teachers filed an unfair practice charge against the Barnegat Township Board of Education. Paragraphs 10 through 12 of the charge allege that the Board violated subsections 5.4(a)(1), (3), and (5)[1/] of the

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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 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...."

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it: (1) unilaterally ended a two-year practice of permitting cafeteria and custodial employees to convert unused personal days into accumulative sick days; (2) required cafeteria employees to do recycling tasks, and (3) failed to post opportunities for cafeteria employees to work extra hours. The charge made several other allegations, later settled.

On August 14, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing on these paragraphs.

On August 28, 1989, the Board filed an Answer. It admits the charge's allegations, but raises these defenses. With respect to converting unused personal days into sick days, it asserts that employees had received these benefits by error. With respect to the recycling assignments, it claims a prerogative to act unilaterally. With respect to posting, it asserts that no position had been created and that any violation was merely a breach of contract, not an unfair practice.

When it filed its Answer, the Board moved to dismiss the Complaint. On September 28, 1989, Hearing Examiner Joyce M. Klein granted that motion in part. She dismissed these allegations: (1) that the Board violated subsection 5.4(a)(3) by discriminatorily ending the practice of converting personal days into sick days, and (2) that the Board violated subsections 5.4(a)(1) and (5) when it imposed recycling tasks.

On November 21, 1989, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by January 23, 1990.

On March 27, 1990, the Hearing Examiner issued her report. H.E. No. 90-41, 16 NJPER 223 (¶21094 1990). She concluded that the employer violated subsections 5.4(a)(1) and (5) when it unilaterally stopped converting unused personal days to sick days. She recommended dismissal of the other allegations.

On April 25, 1990, the Board filed exceptions. It excepts to certain findings of fact; to the Hearing Examiner's conclusions that a binding past practice existed and that the payroll clerk had apparent authority to convert personal days into sick days; and to the Hearing Examiner's discussion of a contract defense the employer hadn't claimed. The Board incorporated its post-hearing brief.

The Federation filed a reply to the Board's exceptions, but no cross-exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-10) are generally accurate. We incorporate them with these modifications and additions.

We add to finding no. 5 this description of the annual sick leave form (J-6). The form is issued in the name of the Board and signed by the Board's Secretary. The form states that it is the "School Board's record of your absence for the school year 1986-1987 and the amount of accumulated sick leave to your credit as of June 30, 1987." The form sets forth the calculations for determining

accumulated sick leave, including a separate line for "converted unused personal days," and instructs the employee to report any errors promptly.

We correct finding no. 5 to the extent it states that personal days of clerical employees were first converted into sick days in 1985 and that the first agreement giving secretaries that benefit was not effective until July 1, 1986. The record does not indicate when clerks and secretaries first received that benefit. The payroll clerk did not recall how she learned of her mistake in converting unused personal days for cafeteria and custodial employees into sick days (T57).[2/]

The Hearing Examiner recommended that we dismiss the allegations concerning recycling assignments and posting of opportunities to work extra hours. Absent any exceptions, we accept these recommendations.

We now consider whether the employer violated subsections 5.4(a)(1) and (5) when, without prior negotiations, it stopped converting unused personal days into sick days for cafeteria and custodial employees. We conclude it did.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and

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2/ The Board also objects to the Hearing Examiner's use of the word "memorialize" on page 18. We will disregard that characterization, but we accept the Hearing Examiner's finding of fact (no. 4) with respect to the Federation's contract proposal.

conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. After good faith negotiations the employer may make a proposed change. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).

For two years the practice was to allow custodial and cafeteria employees to convert unused personal days into accumulative sick days. The employer admits this practice and admits discontinuing it without negotiations. It thus violated subsections 5.4(a)(1) and (5) unless we accept one of its defenses.

The employer asserts that there was no "binding" past practice of converting personal days into sick days because the payroll clerk made an error and acted outside her authority. But the question is not whether the employer is "bound" by an existing condition. We are not grievance arbitrators and do not determine, absent a claim of bad faith repudiation, whether parties have breached contractual commitments or mutual understandings based on past practices. State of New Jersey, (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984); cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) (Commission concerned with abstract negotiability, not contractual

merits).[3/] To the contrary, we assume that the employer is not bound -- that it may make a proposed change after negotiations. We ask only whether an employment condition has been changed, thus triggering the duty to negotiate under section 5.3. Under the circumstances of this case, a condition existed and was changed without negotiations.

The employer also asserts that it had no duty to negotiate because it was simply correcting an unknown and unauthorized error by its payroll clerk. We rejected a similar contention in City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989), aff'd App. Div. Dkt. No. A-6485-88T2 (6/14/90). See also Denville Tp., P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981); cf. State of New Jersey (Dept. of Corrections), P.E.R.C. No. 89-111, 15 NJPER 275 (¶20120 1989), aff'd 240 N.J. Super. 26 (App. Div. 1990) (payroll officials treated certain days as vacation days, not overtime compensation). The point is not how a longstanding practice came to exist, but that it did exist. Further, more is involved than an isolated or informal error. Employees were sent official Board forms over the authorized signature of the Board Secretary. These forms were prepared by the payroll clerk, pursuant to her authority, and set forth the calculations for their accumulated sick days, expressly including the conversion of personal days into sick days.

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3/ In Somerville Bor.,P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984), unlike this case, we were called upon to assess a claim that a contract had been repudiated and a defense that an employer had acted consistently with past practice.

Employees were directed to report errors immediately. We believe the Board Secretary and the payroll clerk had the same obligation to correct these forms as employees did. While the clerk and Secretary might not have known, they should have known. The Board cannot now disown any duty to negotiate before correcting an error its agents created and should have detected.

We conclude that the Board violated subsections 5.4(a)(1) and (5) and enter this order.

ORDER

The Barnegat Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with custodians and cafeteria employees in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by unilaterally stopping the conversion of unused personal days into sick days for custodians and cafeteria employees.

2. Refusing to negotiate with the Barnegat Federation of Teachers before stopping the practice of converting unused personal days into sick days for custodians and cafeteria employees.

II. Take these actions:

A. Immediately convert personal days not used by custodians and cafeteria employees in the 1987-88 school year into accumulated sick days.

B. Notify each employee affected that their records have been adjusted.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Smith, Wenzler, Johnson and Bertolino voted in favor of this decision. Commissioner Ruggiero opposed. Commisioner Reid abstained from consideration.

DATED: Trenton, New Jersey
August 13, 1990
ISSUED: August 15, 1990

H.E. NO. 90-41

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

In the Matter of

BARNEGAT TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-102

BARNEGAT FEDERATION OF TEACHERS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Barnegat Township Board of Education violated subsection 5.4(a)(5) and derivately (a)(1) of the New Jersey Employer-Employee Relations Act when it unilaterally stopped the practice of permitting cafeteria and custodial employees to convert unused personal days to sick leave. Rejecting the Board's argument that it was not bound by the actions of the clerical employee who erroneously converted personal days, the Hearing Examiner found her to be an agent of the employer. The Hearing Examiner also rejected the Board's contract defense.

The Hearing Examiner recommends that the Commission dismiss allegations that the Board violated subsection 5.4(a)(3) of the Act when it required cafeteria workers to crush cans for recycling and failed to post increased hours given to a newly employed cafteria worker.

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. 90-41

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

In the Matter of

BARNEGAT TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-102

BARNEGAT FEDERATION OF TEACHERS,

Charging Party.

Appearances:

For the Respondent, Cassetta, Taylor & Whalen, Consultants
(Garry M. Whalen, Consultant)

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

HEARING EXAMINER'S RECOMMENDED
DECISION AND ORDER

On October 12, 1988, the Barnegat Federation of Teachers, NJSFT, AFT/AFL-CIO ("Federation") filed an unfair practice charge alleging that the Barnegat Board of Education ("Board") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act[1/] when it unilaterally changed

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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 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.

several terms and conditions of employment.

The parties resolved most of the issues raised by the Charge. On August 14, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing on paragraphs 10, 11 and 12 of the Charge. These paragraphs alleged that the Board violated the Act when it: (1) unilaterally changed the practice of permitting cafeteria and custodial workers to convert personal days to sick leave which may be accumulated; (2) required cafeteria workers to separate garbage and crush aluminum cans for recycling and (3) failed to post increased hours given to a newly employed cafeteria worker.

On August 28, 1989 the Board filed an Answer admitting the above allegations, but asserting that the changes were at most, breaches of contract or exercises of managerial prerogatives. The Board argues that the parties' agreement permitted it to stop converting unused personal days to sick leave. It also asserts that a clerical employee acting without authority converted custodians' and cafeteria employees' unused personal days to sick leave. On the same date, the Board also filed a Motion to Dismiss the Complaint. On September 1, 1989, the Federation filed a response opposing the Motion.

On September 28, 1989, I granted the Board's motion to dismiss the allegation that it violated subsection 5.4 (a)(3) when it unilaterally eliminated the policy of permitting custodians and cafeteria workers to convert personal days to sick leave which may

accumulate. Barnegat Township Bd. of Ed., H.E. No. 90-11, 15 NJPER 582 (¶20238 1989). I also granted the Board's motion to dismiss the allegations that it violated subsections 5.4(a)(5) and derivatively (a)(1) when it failed to post the availability of increased hours for a cafeteria worker and when it required cafeteria workers to separate garbage and crush aluminum cans for recycling. I denied the motion on the remaining allegations and ordered a plenary hearing.

On November 21, 1989 I conducted a hearing in this matter. The parties examined witnesses, introduced exhibits and argued orally. Briefs were filed by January 23, 1990 and the record was closed.

Upon the record, I make the following:

## FINDINGS OF FACT

1. The Federation represents a collective negotiations unit of teachers, secretaries, custodians, cafeteria employees, instructional aides, library employees and bus drivers (T31-32).[2/] Custodial, maintenance and cafeteria employees were represented by the Service Employees International Union, Local 389 ("SEIU") in separate units until 1987. In 1987, the custodial and cafeteria units voted for representation by the Federation. Teachers and secretaries were represented by the Federation in separate units until March 1988. Separate units of teachers,

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2/ T refers to the transcript of the November 21, 1989 hearing. J refers to joint exhibits.

secretaries, custodians and cafeteria employees were merged in a March 1988 election (T31). Instructional aides, library employees and bus drivers were added to the merged unit effective July 1, 1989 (T32). The Board opposed the merger (T33).

2. Agreements between SEIU custodial and cafeteria units and the Board, effective from July 1, 1984 through June 30, 1987, include the following personal leave clauses:

> Employees shall be allowed up to three (3) days, without loss of pay, for personal business during the school year. These days may not be accumulated....
>
> * * * * *
>
> If the clause regarding personal leave is taken out of the teacher's contract, it also will apply and be taken out of all our units within the school district. (J-1, J-2)

Both provisions also define personal business and list requirements for use of personal days. Neither agreement contains a provision permitting the conversion of unused personal days to sick leave (J-1, J-2). Both agreements permit employees to accumulate sick leave.

Both agreements also include the following "Past Better Conditions" clause:

> 1. No provision of the Agreement shall be construed to lower the weekly, daily or hourly wage of any employee covered by this Agreement.
>
> 2. No part of this agreement shall be construed to preclude the Employer from giving any further benefits to its employees.
>
> 3. Any written policy affecting any or all employees covered by this Agreement will not be

> changed without prior notification and negotiation other than those required by law, rule or regulations promulgated or enacted by higher governmental authority.

3. The 1985-88 agreement between the Federation and the Board covering certificated employees provided the following personal leave provision:

> 1. All teachers shall be allowed up to three (3) days without loss of pay, for personal business during the school year. These days may not be accumulated. One of these days may be taken without reasons or verification being given. As of September 1, 1987, two of these days may be taken without reasons or verification being given. The other two (2) days during 1985-86 and 1986-87, and the other one (1) day in 1987-88 are subject to the limitations described in subparagraph A.2. below.
>
> * * * * *
>
> 6. Unused personal days shall accumulate as sick days for use under Article X of this Agreement. (J-8)

Article III, of the agreement between the Federation's secretarial unit and the Board for July 1, 1986 through June 30, 1988 provides:

> A. All secretaries shall be allowed up to three (3) days without loss of pay for personal business during the school year upon notification to the Building Principal, without verification. These days are not accumulative; However any unused days shall be converted to accumulated sick leave. (J-9)

4. In July 1988, the Board and the Federation completed negotiations for an agreement covering the previous two school years for the cafeteria and custodial employees (T41-T42). The 1984-1987 agreements between the custodial and cafeteria employees and the

Board were extended for the 1987-88 and 1988-89 school years (J-4). The parties' July 27, 1988 memorandum of agreement provides:

> The parties agree that all terms of the 1984-85 to 1986-87 contracts covering cafeteria and custodial employees shall continue in effect for the 1987-88 school year, and shall continue in effect for the 1988-89 school year until a successor agreement is negotiated. (J-4)

That memorandum of agreement and an earlier memorandum of agreement signed on July 21, 1988 change only the cafeteria and custodial employees' salary and the 'just cause' clauses in their agreements. A Federation contract proposal for the cafeteria and custodial employees from July 1, 1987 through June 30, 1988 provided that, "unused personal days shall accumulate as sick days" (J-3).

After the parties resolved the custodians' and cafeteria employees' agreements, they began negotiations for a master agreement (T42). The parties' new agreement, effective July 1, 1988 through June 30, 1991 provides that, "Unused personal day shall accumulate as sick leave." (J-5, Article XV).

The Board converted unused personal leave to sick leave in the 1985-1986 and 1986-1987 school years for the custodial and cafeteria employees (T11, T12, T25, J-6). The Board stopped converting unused personal days to sick leave in the Fall of 1988 for those employees (T25, J-7). The annual sick leave records for Jennie Grippaldi, a cafeteria worker and Ralph DeStefano, a custodian reflect the change. On July 1, 1987, Grippaldi was credited for two unused personal days during the 1986-87 school year (J-6). Those days were converted to sick leave. DeStefano's July

1, 1988 statement for the 1987-88 school year shows that no days were converted (J-7). On the original document, the space for converted unused personal days is blank--it has been covered with white correction fluid (J-7). The correction fluid covers the number "2" (T27, J-7).[3/] DeStefano's total accumulated sick leave has also been covered with white correction fluid and the number "46" written in blue ink in its place.[4/]

When the teachers and clerical employees began receiving unused personal days as sick days in 1985, Nancy Sweeny began converting unused personal days to sick leave for the cafeteria and custodial workers as well (T56).[5/] No one instructed Sweeny to convert personal days for custodial and cafeteria employees (T56-57). When Sweeny discovered that the conversion was not included in the Board's contracts with the custodial and cafeteria employees, she asked Garry Whalen, the Board's negotiator for advice. Without asking the Board, the Board's negotiator told her not to convert the days for the 1987-88 school year (T57). Sweeny followed these instructions and did not convert days for the 1987-88 school year, but did not erase days that had been converted in the previous two years.

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3/ The number "2" is visible by holding the document to the light.

4/ The original number written in that space is not discernible.

5/ I note that the secretaries' agreement providing that unused personal leave be converted to sick leave was not effective until July 1, 1986 (J-9).

In August 1988, William Martin, a custodian and former shop steward discussed the conversions with Frank Servis, Supervisor of Plant Operations (T27). Servis told Martin that unused personal days converted to sick leave (T27).[6/] On September 15 1988, when Martin received his annual record of absences for the 1987-88 school year, he learned that his personal leave was not converted to sick leave (T27).

6. Servis, as supervisor of plant operations, coordinated the district recycling plan to conform to the Township program (T70). During the summer of 1988, a Township representative met with Servis and told him that the District would be required to separate bottles and cans in September (T69). Since the District does not have many recyclables until school begins, the Township required the Board to begin recycling in September (T70).

After talking with the Township representative, Servis decided the best method of storing cans for recycling would be to cut the bottom out and crush them. Servis preferred this method because the crushed cans occupied less space and did not fill with water which would breed flies (T69). Servis discussed recycling procedures with Superintendent Horbelt (T70). In September 1988, at Servis' direction, Carol Mollenkopf, the cafeteria manager, instructed the cafeteria workers to begin separating garbage and crushing aluminum cans (T13, T63). Mollenkopf generally reports to

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6/ Servis did not remember the conversation, but acknowledged that it may have occurred (T69). I conclude that it did.

Horbelt, but Servis gives her instruction about garbage collection (T65). Some employees were not strong enough to crush aluminum cans (T44, T45).

Several cafeteria employees had their hours reduced from 5 1/2 hours to 5 hours per day in September 1988 (T14). The reduction limited the effect of their contractual raise resulting from the July settlement (T44). Lydia Domolki is a cafeteria employee and vice president of the cafeteria employees' unit during the 1987-88 school year. Domolki felt that the Board required the cafeteria employees to separate garbage and crush aluminum cans, in response to ongoing negotiations (T14).

7. During September 1988, the Board increased Patti DeLeo, hours from 2 1/2 to three hours daily (T14, T45). DeLeo is a recently hired cafeteria employee. The increase in hours was not posted. Helen Wolf, who works at the Edwards School, could have applied for the extra work had it been posted (T15).

Domolki thought DeLeo's hours were increased without a posting because, "Well. I thought it was negotiations also. And a lot of us were being cut back, our hours, where she was increased. And there was this other woman who could have gotten the job also." (T16).

DeLeo was assigned an extra half hour daily because her immediate supervisor, Betty Dennis, an assistant cafeteria manager working under Mollenkopf, thought that DeLeo needed extra time to clean the dish machine (T66). Mollenkopf reports to Horbelt but he

did not instruct her to increase DeLeo's hours. I find that Mollenkopf increased DeLeo's hours so that she could complete her work each day.

The Board usually posts new or vacant positions on the cafeteria bulletin board (T15, T62). It has never posted a job when an hour or two is added to a current employee's workload (T62).[7/]

Mollenkopf is not involved in negotiations (T61).

The seniority clause then governing postings for cafeteria employees provided:

> Seniority plus the ability to do the available work shall be the factors for bidding for promotion positions. Notice of a vacancy shall be posted for a period of five (5) days (working days) during which time employees desiring to fill such positions may apply.

## Analysis

The first issue is whether the Board violated the Act when it unilaterally stopped converting cafeteria employees' and custodians' unused personal days to sick leave which may be accumulated.

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7/ Domolki testified that she did not know of any other instance where a cafeteria worker's hours were increased without a posting (T15). Mollenkopf testified that the Board has never posted increased hours for cafeteria staff. According to Mollenkopf, cafeteria employees have had extra time added to their work day without posting (T62). I credit Mollenkopf. She is responsible for determining cafeteria employees' hours and is in a position to know staff schedules and postings at each school. Domolki works at the Dunfee School. While she knows all of the cafeteria employees at the two other schools with cafeteria service, she does not know their precise hours or when the hours changed (T19-20, T64).

Personal leave is a mandatorily negotiable. Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Willingboro Bd. of Ed., P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Dkt. No. A-1756-79 (12/8/80), certif. den. 87 N.J. 320 (1981); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982).

Terms and conditions of employment may arise from a past practice not contained in the parties' collective negotiations agreement. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977) mot. for reconsid. den., 4 NJPER 56 (¶4073 1978). If the agreement is silent or ambiguous about an issue, past practice controls. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). A past practice should demonstrate "a pattern of conduct and some kind of mutual understanding, either expressed or implied." United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970).

> Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute (Id. at 2597).

The Commission defines a past practice as a course of events, "...which is repeated, unequivocal, clearly enunciated and acted

upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Somerville Boro., P.E.R.C. No. 84-90, 10 NJPER 125, 126 (¶15064 1984) quoting Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973).

Here, the Federation negotiated the conversion of unused personal days to sick leave for teachers and secretaries in their agreements beginning July 1, 1985 and 1986 respectively. Nancy Sweeny, the Board's payroll clerk, extended that benefit to custodians and cafeteria employees. Sweeny credited custodians and cafeteria employees with sick leave for unused personal days for the 1985-86 and 1986-87 school years. She listed this credit on annual leave statements and the employees were aware of and accepted the benefit. When the Board's negotiator learned of this practice during the summer of 1988, it was discontinued. Custodians and cafeteria employees received the benefit for two years and expected to continue to receive it. The Board may have been unaware that custodians and cafeteria employees benefited from the conversion negotiated into the teachers' and secretaries' contracts, but the benefit was documented on annual sick leave reports and credited to employees. Additionally, the benefit had been extended to the secretaries for the 1985-86 school year although their agreement did not provide the benefit until the 1986-87 school year. For these reasons, I find the conversion of unused personal days to sick leave which may be accumulated is a past practice.

The Board also argues that its conversion of personal days to sick leave for two years was a clerical mistake. Since Sweeny did not have authority to decide whether to convert the unused personal days, the Board asserts that it was not bound by her actions and did not violate the Act when it stopped converting days.

Comparing this case to Matawan-Aberdeen Regional Bd. of Ed., P.E.R.C. No. 85-110, 11 NJPER 307 (¶16109 1985), app. dism., App. Div. Dkt. No. A-4463-84T1 (1985), the Board asserts that it can not be held liable for the acts of an employee because it did not know about or ratify her actions. In Matawan-Aberdeen, a Board of Education member threatened to fire two employee unless they waived contractual benefits and withdrew a pending unfair practice charge. There, the Commission found the Board member was not acting as the employer because the Board did not "have prior knowledge" of his actions and "did not ratify them." The Commission also found that the Board member was not an agent of the employer because he was acting outside the scope of his apparent authority.

Since Sweeny's error created a past practice, whether she was specifically authorized to convert the personal days to sick leave is not relevant. However, even assuming that Sweeny's lack of specific instructions to convert unused personal days to sick leave is relevant, I find that she acted within the scope of her apparent authority. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982) aff'd App. Div. Dkt. No. A-1642-82T2 (1983), citing R. Gorman, Basic Text on Labor Law, pp. 134-137 (1976).

In Commercial Tp. Bd. of Ed., the Commission adopted the agency standard used to find supervisors agents of the employer:

> In sum, the superintendent and the principal both were acting within the scope of the authority delegated to them by the Board and their apparent authority as Board agents, regardless of whether the Board formally ratified or even knew of the threats they made. Compare R. Gorman, Basic Text on Labor Law, pp. 134-137 (1976) (employer responsible for actions of supervisors which are impliedly authorized or within apparent authority of actor; whether specific acts were actually authorized or subsequently ratified is not controlling).
> [Id. at 552].

Gorman also provides the standard for employees who are not supervisors:

> It has generally been held that employees who are not supervisors are not presumed to be acting on behalf of the employer unless they are acting within the general scope of their employment or management has instigated such conduct or has ratified it after the fact (either expressly or by silence). Gorman at p. 135, (emphasis added).

In Technodent Corp., 133 LRRM 1088 (1989),[8/] the NLRB found a rank and file employee had apparent authority to act on management's behalf in carrying out an anti-union campaign. There, the employee posted a notice to employees and held meetings to urge employees to "stick behind" the Company. In finding the employee an agent of the employer, the NLRB found:

> ...Essentially, this test is one of determining whether the employee had apparent authority to act

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8/ In Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970), the New Jersey Supreme Court approved the Commission's use of private sector precedent in unfair practice litigation.

for the employer in the matters in question. Thus, the judge also cited Corrugated Partitions West, 295 NLRB 894, 900 , 119 LRRM 1223 (1985), in which the Board adopted a judge's holding that:

> "[T]he Board has long held that where an employer places a rank-and-file employee in a position where employees could reasonably believe that the employee spoke on behalf of management, the employer has vested the employee with apparent authority to act as the employer's agent, and the employee's actions are attributable to the employer (Citations omitted)."
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> * * * * *
>
> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. NLRB v. Donkin's Inn, 532 F.2d 138, 141 [91 LRRM 3015] (9th Cir. 1976); Alliance Rubber Co., 286 NLRB No. 57 slip op. at 4 fn. 4 [126 LRRM 1217] (Sept. 30, 1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency §27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at §8.

133 LRRM at 1089.

Here, Sweeny, as the payroll clerk, mistakenly extended the unused personal day conversion benefit to custodians and cafeteria employees. Those employees received notice of the benefit on annual copies of the Board's records of absence and accumulated sick leave. These forms had a separate line for converted unused

personal days. Converting unused personal days was within the general scope of Sweeny's employment. The employees presumably relied on what they thought was a benefit in deciding whether or not to use their available personal days. It appeared to the employees that the Board agreed to grant them an extra benefit that it had negotiated with other units. I therefore find Sweeny acted within the scope of her apparent authority.

The Board argues that the contract did not permit the accumulation of personal days and when it learned that they were being converted to sick leave it ended the practice.

An employer meets its negotiations obligation when it makes a change that is permitted under the collective negotiations agreement. Sussex-Wantage Regional Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). Past practices which are construed contrary to the express provisions of a collective agreement cannot be relied upon to change the clear meaning of the agreement, Randolph Twp. Bd. of Ed. The contract provides a defense to a unilateral change in a past practice only where it specifically and expressly authorizes the change, Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). Section 5.3 rights are waived only where the contract clearly and unequivocally authorizes the change. Elmwood Park Bd.

of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 2985); North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977).

In State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985), the Commission listed the relevant factors it considers when determining whether the parties' agreement constitutes waiver of the statutory right to negotiate:

> [I]n determining the existence of a waiver of statutory rights prescribing bargaining responsibilities, [we] will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized.

The cafeteria employees' and custodians' contracts in effect for the 1987-88 school year provide that personal days may not be accumulated. The Board argues that since their contracts did not provide that unused personal days could be converted to sick leave which may be accumulated--they did not have a contractual right to have unused personal days converted.

The agreements are silent about whether personal days may be converted to sick leave. The agreements provide that "personal days may not be accumulated" and that they can not be construed, "to preclude the Employer from giving any further benefits to its employees." The agreements do not restrict the Board from converting personal days to sick leave. The agreements do not limit the accumulation of sick leave.

Before the Board stopped converting unused personal days to sick leave, it entered a memorandum of understanding with the Federation covering the terms and conditions of employment for custodians and cafeteria employees. Despite the Federation's proposal to memorialize the practice, the memorandum of understanding simply extends the terms of the agreements between the SEIU and the Board until June 30, 1988. The practice, though it had been discontinued by the Board, was included in the parties' master agreement beginning July 1, 1988.

Under these circumstances, I find that the contracts do not clearly and unequivocally permit the Board to stop the practice of converting unused personal leave to sick leave. Accordingly, I find that the Board violated subsections 5.4(a)(5) and derivatively (a)(1) when it did not convert unused personal days to sick leave for the 1987-88 school year. Since the parties have already negotiated over the issue and the benefit is included in the agreement effective from July 1, 1988 though June 30, 1991, I recommend that the Commission immediately order a return to the status quo for the 1987-88 school year.

The Federation asserts that the Board's actions in requiring cafeteria employees to separate garbage and crush cans for recycling, and in increasing DeLeo's hours during negotiations in September 1988 violated subsection 5.4(a)(3). Whether an employer illegally discriminates in retaliation for union activity requires a charging party prove that protected activity was a substantial or

motivating factor for the employment action, In re Bridgewater Tp., 95 N.J. 235, 244 (1984). Ordinarily, the charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise of protected rights. If the charging party proves that hostility toward exercise of protected rights was a substantial or motivating factor in the employer's action, the burden shifts to the employer to show the action would have occurred absent protected activity. The employer's affirmative defenses need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the action.

Here, the Federation's argument rests on the timing of the Board's actions and testimony that employees believed the Board's actions to be retaliatory because they occurred during negotiations.

Timing is an important factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1986). DeLeo's hours were increased and the cafeteria employees were assigned recycling duties during September 1988. The Board and the Federation were also negotiating during September 1988. They had been in negotiations for one unit or another virtually continuously since June 1987. In July 1988, the parties agreed to a contract for the custodians and cafeteria employees through June, 1988. The parties had begun successor negotiations on a master agreement. The mere fact that the parties were negotiating when these changes occurred, does not prove that they were retaliatory.

I find that the Federation has not shown that animus was a motivating factor in the Board's decision to assign recycling duties to cafeteria employees in September 1988 and to increase DeLeo's hours by one half hour daily during the same month. I find that the Board's conduct was based on legitimate reasons. The Board assigned recycling duties to cafeteria employees in September 1988 because that is when the Township required the Board to begin participating in a County-wide recycling effort. Mollenkopf increased DeLeo's hours to give her enough time to clean the dish machine. It was logical to assign the extra half hour per day to the individual already working in that school. While another cafeteria worker could have bid for the additional half hour, it is not clear whether that employee worked in the same school. Thus, the Federation did not prove that the failure to post violated a contractual position or an established practice. Moreover, there is no evidence that Mollenkopf participates in negotiations or that she was instructed to increase DeLeo's hours by someone who does. The contract requires only that vacancies be posted. Increases in hours are not treated as vacancies.

For these reasons, I recommend that the Commission dismiss the allegations that the Board violated subsections 5.4(a)(3) and, derivatively, (a)(1) when it required cafeteria employees to separate garbage and crush aluminum cans for recycling and when it increased DeLeo's hours without posting the availability of increased hours.

RECOMMENDED ORDER

I recommend that the Barnegat Township Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing custodians and cafeteria employees in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by unilaterally eliminating the practice of converting unused personal days to sick leave for custodians and cafeteria employees.

2. Refusing to negotiate in good faith with the Barnegat Federation of Teachers over the elimination of the practice of converting unused personal days to sick leave for custodians and cafeteria employees.

II. Take the following affirmative actions:

A. Immediately restore personal days not used by custodians and cafeteria employees in the 1987-88 school year to those employees as accumulated sick leave.

C. 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 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.

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Joyce M. Klein
Hearing Examiner

DATED: March 27, 1990
Trenton, New Jersey

Appendix "A"

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly by unilaterally eliminating the practice of converting unused personal days to sick leave for custodians and cafeteria employees.

WE WILL cease and desist from refusing to negotiate in good faith with the Barnegat Federation of Teachers over the elimination of the practice of converting unused personal days to sick leave for custodians and cafeteria employees.

WE WILL restore immediately personal days not used by custodians and cafeteria employees in the 1987-88 school year to those employees as accumulated sick leave.

Docket No. CO-H-89-102

Barnegat Tp. 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.