P.E.R.C. NO. 94-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-91-237

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Sayreville Education Association against the Sayreville Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act by requiring academic teachers to teach six classes per day when academic teachers, in the past, have taught five classes and are contractually required to teach five classes. The Association claimed that the Board had repudiated the collective negotiations agreement and violated the Act. The Board admitted that certain academic teachers at Sayreville High School had been assigned to teach six classes because a teacher resigned on the first day of school, but contended that no negotiations were necessary. Under either party's characterization of past events, the Commission believes that the evidence does not support the Association's assertion that the requisite conditions for assigning the sixth period were not met. Under these circumstances and in light of the parties' total understanding and practice concerning the assignment of the sixth teaching period, the Commission concludes that the evidence does not warrant finding an unfair practice.

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Charging Party.

Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, attorneys (Glen D. Savits, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On March 6, 1991, the Sayreville Education Association filed an unfair practice charge against the Sayreville 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 subsection 5.4(a)(5),[1/] by requiring academic teachers to teach six classes per day when academic teachers, in the

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1/ This subsection prohibits public employers, their representatives or agents from: "(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...."

past, have taught five classes and are contractually required to teach five classes. The Association further alleges that it demanded to negotiate over this issue, but the Board did not respond to its demand. The Association claims that the Board has repudiated the collective negotiations agreement and violated the Act.

On May 13, 1991, a Complaint and Notice of Hearing issued. On May 28, the Board filed a previously submitted statement of position as its Answer. The Board admits that certain academic teachers at Sayreville High School have been assigned to teach six classes because a teacher resigned on the first day of school, but the Board contends that no negotiations are necessary. It argues that the collective negotiations agreement does not restrict the number of teaching periods for high school teachers; the Association made and then withdrew a demand for a limit on teaching periods during the last round of contract negotiations; and the past practice of the district has always been that when teachers are assigned a sixth period, they are relieved of a duty period and homeroom assignment. As for the failure to answer the request for negotiations, the Board asserts that due to a mix-up and the hospitalization of the Board secretary, the Board's response was not received before this charge was filed, but that it has since been forwarded to the Association.

On November 25, 1991, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by July 8, 1992.

On December 15, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-13, 19 NJPER 70 (¶24032 1992). He found that the Board did not violate the Act when it assigned a math teacher and a science teacher to a sixth teaching period without additional compensation since the matter was governed by the contract and/or past practice with respect to such assignments.

On December 23, 1992, the Association filed exceptions. It claims that, except for special or emergency situations of short duration, it has always been the practice that academic teachers in the High School teach only five classes per day. It further claims that the Association's negotiations proposals dealt only with extending to non-academic teachers the five-period day already guaranteed to academic teachers by the past practice. The Association contends that cases relied on by the Hearing Examiner involving specific contract provisions are inapposite. It further contends that the contract is silent; a past practice controls; and if the past practice does not control, there has still been a unilateral increase in workload. Finally, the Association argues that even if the Board had a contractual right to make the assignments, it had to compensate teachers affected by its decision.

On January 5, 1993, the Board filed a reply urging adoption of the recommendation that the Complaint be dismissed. It incorporates sections of its post-hearing brief. It contends that although high school teachers generally teach five periods, past

practice establishes that teachers are assigned six teaching periods when necessary, but are relieved of a duty period and homeroom.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-9).

Substituting a teaching period for a duty period increases a teacher's workload and involves a mandatorily negotiable term and condition of employment. Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987); Buena Reg. School Dist., P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985). But an employer will have no obligation to negotiate if the matter is controlled by the collective negotiations agreement or a past practice. See 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 (3/10/87).

Here, the contract does not control the number of teaching periods for high school teachers. High school teachers generally teach five periods, have one duty period, and one preparation period. It is, however, not in dispute that high school teachers have been assigned six teaching periods under certain circumstances. The Board claims it has assigned six periods when necessary; the Association claims the Board has assigned six periods in special or emergency situations. In either case, the affected teacher is relieved of the duty period and any homeroom assignment.

Under either party's characterization of past events, we believe the evidence does not support the Association's assertion that the requisite conditions for assigning the sixth period were

not met. A teacher resigned on the first day of school and the Board was unable to secure a replacement. It divided the students among the remaining teachers and assigned two of those teachers an additional teaching period. Under those circumstances and in light of the parties' total understanding and practice concerning the assignment of a sixth teaching period, we conclude that the evidence does not warrant finding an unfair practice.2/

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioner Bertolino abstained from consideration. Commissioner Regan was not present.

DATED: August 24, 1993
Trenton, New Jersey
ISSUED: August 25, 1993

2/ One Association witness testified that during the 1970s, he was paid an hourly "bedside" rate for teaching a sixth period. Any claim in this case for additional compensation under the contract must be made through the contractual grievance procedure. State of New Jersey (Dept. of Human Services), 10 NJPER 419 (¶15191 1984).

H.E. NO. 93-13

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and- Docket No. CO-H-91-237

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Section 5.4(a)(5) of the Act when, beginning in September 1990, it assigned a High School math teacher and a High School science teacher to a sixth teaching period without additional compensation since the matter was governed by the parties' collective negotiations agreement and/or past practice with respect to such assignments: Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979) and Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980). Thus, the Complaint must be dismissed.

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, Wilentz, Goldman & Spitzer, Attorneys (Glen D. Savits, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, Attorneys (Arnold S. Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 6, 1991, by the Sayreville Education Association ("Charging Party" or "Association") alleging that the Sayreville Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that academic teachers at the Sayreville High School have since September 24, 1990, been assigned to teach six classes per day as a result of the failure of the Board to replace a single teacher who resigned on the first day of school in that year; academic teachers have taught five classes in the past and are contractually required to teach only

five such classes; the Association has demanded negotiations with respect to the foregoing but the Board has failed to respond; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act.[1/]

The Association also filed a second Unfair Practice Charge on March 28, 1991, Docket No. CO-H-91-262, which, although not formally consolidated, was scheduled for hearing on the same dates as the instant Charge, Docket No. CO-H-91-237. Identical Complaints and Notices of Hearing were issued on May 13, 1991. By agreement, the Unfair Practice Charge in Docket No. CO-H-91-237 was heard first on November 25, 1991, in Newark, New Jersey. The parties were given an opportunity to examine witnesses and present relevant evidence. The hearing was concluded on that date. [1 Tr 4, 124, 125].[2/]

Oral argument was waived as to the hearings on both Unfair Practice Charges (3 Tr 179). After several extensions, post-hearing briefs were filed by July 8, 1992.

1/ This subsection prohibits public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The subject matter of the second Unfair Practice Charge of March 28th, supra, was separately litigated in hearings on January 16 and March 9, 1992, in Newark, New Jersey. The parties were also given an opportunity to examine witnesses and present relevant evidence. Since the issues in the March 28th Charge are distinct from those in the original Charge, they will be determined in a separate Recommended Report and Decision.

Upon the entire record in Docket No. CO-H-91-237, I make the following:

FINDINGS OF FACT

1. The Sayreville Board of Education is a public employer within the meaning of the Act, as amended.

2. The Sayreville Education Association is a public employee representative within the meaning of the same Act.

3. The relevant collective negotiations agreement between the parties was effective during the term July 1, 1989 through June 30, 1992 (J-1). That agreement provided, in part, in Article 7, "Work Day," Section E, that Middle School teachers in certain subjects "...will teach a maximum of five (5) teaching periods except where there are unusual and compelling circumstances...," which are thereafter defined as excessive class size and special needs. Section E concludes with the provision that "...This maximum teaching load may be exceeded by two (2) Teachers in each of the above-mentioned areas. In those situations where a Teacher is assigned six (6) teaching periods the Teachers will be relieved from other duty assignments such as, but not limited to, homeroom..." [J-1, pp. 16, 17].

4. In the negotiations preceding the 1989-1992 collective negotiations agreement (J-1, supra), the Association submitted certain proposals for language changes, one of which involved Article 7, "Work Day." In particular, a change was sought in Section E to provide that High School teachers would also teach a

maximum of five (5) teaching periods unless a teacher volunteers to accept six (6) teaching periods (CP-1; 1 Tr 29-31).[3/]

5. The Association also sought in the negotiations preceding J-1 to obtain certain language changes in Article 10, "Teacher Employment," Sections A-F (CP-2). However, this proved to be tangential to the hearing in this matter since each of these proposed changes in contract language were withdrawn by the Association at the conclusion of the J-1 negotiations (1 Tr 31, 32, 69, 70).[4/]

6. On November 16, 1990, and again on November 28th, the Association filed essentially duplicate grievances, based upon an occurrence on September 24th when an academic teacher was assigned to teach six (6) classes, which was alleged to be a violation of the longstanding past practice of Academic Teachers being assigned to teach five (5) classes in violation of Articles 7F, 12 and 15 of the agreement (J-2A & 2B; 1 Tr 10).

3/ The complete proposal by the Association for the language change in Article 7, Section E, provided that: All Middle School and High School Teachers will teach a maximum of five teaching periods. Exceptions to the above will be on a voluntary basis. Such Teachers shall be paid an additional one-fifth (1/5) of his/her salary. In those situations where a teacher volunteers to accept six (6) teaching periods, that Teacher will be relieved from other duty assignments such as, but not limited to, homeroom." (CP-1).

4/ In the negotiations leading to J-1, the Association presented additional proposals to the Board, dated August 29, 1989 (R-1). These were also withdrawn by the Association (1 Tr 70-72).

7. The background to the above grievances was that during the summer of 1990, the Board had concluded that it could justify one teacher in a combination of science and math. The Board hired a teacher for this position prior to the commencement of the school year in September 1990. However, that teacher resigned during the summer. A replacement was hired and this teacher reported on the first day that staff was to report. But on the second day he called his principal and announced that he was "quitting." Thereafter, the Board used a substitute when it failed to obtain a replacement by September 24, 1990, notwithstanding that it had advertised. At this point the Board concluded that it would be less disruptive to the staff and to the students if two teaching staff members were assigned an extra class and relieved of their duty periods. The teachers so assigned were Fred Gilfillan of the Math Department and Joseph Capria of the Science Department. As a result Gilfillan's teaching load was increased from 62 students to 78 students and Capria's teaching load was increased from 102 students to 127 students. [1 Tr 44, 87-92; 37-39].

8. The grievances were answered by the Principal on November 26, 1990. Each was denied, essentially, on the basis of past practice and that the Board was responding to an emergency [J-2B (attachment)]. The Superintendent, Marie Parnell, affirmed the denial of the grievances on December 3, 1990, with a statement that there is nothing in the agreement which precludes any teacher from teaching more than five periods, notwithstanding that the

practice in the district has been that teachers generally teach only five classes. However, past practice has clearly recognized that in special or emergency situations academic teachers have taught more than five classes. [J-4].

* * * *

9. On February 6, 1991, the Association advised the Board that it had decided to "drop" the two above grievances without prejudice (J-2C).[5/] On the same date, February 6th, the Association requested negotiations with respect to the teaching of six periods at the High School (J-3A). On February 27th, the Board's Assistant Secretary acknowledged the Association's decision to "drop" the two grievances with the additional response that "no negotiations are necessary" since Article 7 does not state how many periods per day are required to be assigned and that the only guarantee to High School teachers is that they are to receive one or two daily periods of prep time. Finally, the Assistant Secretary stated that the past practice has always been that when teachers are assigned a sixth period, they are compensated by being relieved of all duty periods and homeroom assignments, which, "...practice shall continue..." [J-3B; 1 Tr 73].

10. Susan Maurer, the Association's Negotiations Chairperson for the past two contracts, testified without

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5/ The two grievances referred to were those filed by the Association on November 16 and November 28, 1990 (J-2A & J-2B).

contradiction that she prepared and circulated a questionnaire under date of November 26, 1990, to all High School teachers, seeking information on class size (1 Tr 28, 41). The responses which she received from Gilfillan and Capria were marked in evidence as CP-3 and CP-4, respectively (1 Tr 42-45). Each of these teachers, Gilfillan and Capria, had been assigned a sixth period, beginning in September 1990. Their questionnaires so indicate as do the Master Schedules prepared by the Board (CP-5, CP-6; 1 Tr 43-45).

11. Maurer acknowledged on cross-examination that there was nothing in the agreement that restricted High School teachers to the teaching of five periods, but added: "Nothing but the practice." (1 Tr 48). She also acknowledged that both Gilfillan and Capria had probably taught their additional subjects previously but insisted that each had to prepare for more students (1 Tr 51, 52). It was stipulated that the actual hours (workday) for the two teachers, Gilfillan and Capria, were not increased during the 1990-91 school year and that each teacher had had removed from his schedule a duty and a homeroom period (1 Tr 24-26).[6/]

12. It is undisputed that Academic High School teachers teach five periods and have a duty and a home room period plus a lunch period and a planning period, totaling eight periods (1 Tr 32,

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6/ Parnell testified without contradiction that the average class size is about 25 students and, thus, even with six periods, Capria was teaching about that average over the entire day while Gilfillan was teaching below the average of 25 students (1 Tr 86, 90, 91).

33).[7/] Superintendent Parnell testified without contradiction that when "...for various reasons we have needed to use teachers to teach six periods the high school has always reserved the right to do so and never (has) been limited by its contract from doing that..." (1 Tr 73). Further, when this has occurred, the affected teacher has been relieved of a duty and a home room period (1 Tr 73).

13. Maurer also testified credibly that past practice has been recognized in "special" or "emergency" situations where Academic Teachers have taught more than five classes. For example: (1) situations involving illness, resignations or death; or (2) if a substitute could not be hired then another teacher would be assigned to a sixth period for a short duration and would be relieved of a duty and a home room period (1 Tr 35, 36).[8/]

14. The Board introduced in evidence the Master Schedules for 16 High School teachers spanning the school years 1983-84 through 1990-91 (R-2 through R-10; 1 Tr 76-86).[9/] These exhibits establish that during every school year between 1983 and 1991, certain of the Board's Academic or Non-Academic High School teachers

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7/ The "Work Day" for teachers is defined in Article 7, §A(1) as the time that pupils are in attendance plus pre- and post-pupil attendance time of 15 minutes each day. [J-1, p. 15].

8/ Although not material to resolving the instant dispute, it is a fact that teachers have in the past volunteered for a sixth teaching period in order to be relieved of the demands of home room duty and a duty period (1 Tr 73).

9/ Several of the 16 named teachers appear on more than one Master Schedule.

were assigned six teaching periods for the entire school year. None of these teachers received additional compensation nor did the Association file an unfair practice charge on their behalf. Also, in none of these instances from 1983 through 1991, was there any increase in the work load of the affected teachers (1 Tr 86).

ANALYSIS

Positions of the Parties

The Board notes first that a genuine emergency arose on the first day of school in September 1990 when a newly hired teacher quit that morning and that, thereafter, an advertising program failed to produce a replacement. By September 24th the Board decided to assign Gilfillan, a math teacher, and Capria, a science teacher, to a sixth period, removing their duty period and homeroom period.

Although the agreement does not expressly address the assigning of an additional (sixth) teaching period to Academic Teachers in the High School, Academic Teachers and Non-Academic Teachers have in the past been assigned a sixth periods, the latter in "special" or "emergency" situations [Finding of Fact No. 8]. Gilfillan's teaching load was, after the assignment of a sixth period, well below average while Capria's teaching load was about average.

While the Board does not dispute that pupil contact time is negotiable, it asserts that it has no obligation to negotiate in the

instant case since the assignment of a sixth teaching period for Gilfillan and Capria was within the terms of the parties' collective negotiations agreement and/or past practice. Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); So. Amboy Bd. of Ed., P.E.R.C. No. 87-125, 13 NJPER 303 (¶18127 1987); Philipsburg Bd. of Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986); State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985); and Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

Further, while the agreement is silent as to the maximum number of teaching periods assigned in the High School, the longstanding practice has been the assignment of five teaching periods, except that in the case of "special situations," particularly illness or resignations, the Board has assigned a sixth teaching period without additional compensation.

The Association contends that since the Board allowed the assignment of Gilfillan and Capria to continue for the major part of the 1990-91 school year, the Board is required to make payment to them of additional compensation. However, the Association does not indicate exactly when the payment of this additional compensation

should have commenced.[10/] In the negotiations for the 1989-1992 agreement, the Association attempted to gain for the High School teachers the same five teaching period limitation enjoyed by the Middle School teachers (CP-1 and CP-2). However, this effort failed and the proposals were withdrawn by the Association during the negotiations preceding J-1.

The Association relies almost exclusively upon Andover Regional Bd. of Ed., P.E.R.C. No. 87-4, 12 NJPER 601 (¶17225 1986). This case involved two separate species of changes in teaching assignments by the Board, one being the requirement that seventh and eighth grade teachers teach one additional conventional instructional period per day by the elimination of a previously assigned "mini-course" of supplemental instruction and library supervision assignments. Such changes were deemed by the Commission to be workload increases in violation of the Act.[11/] Thus, did the Commission restate the proposition that a change from a non-teaching supervisory duty period to a conventional instructional period is mandatorily negotiable.

10/ I note here that the Board established that during the period 1983 to 1991, sixteen High School teachers were involuntarily assigned a sixth period with no additional compensation. Also, the Association failed to file an unfair practice charge on behalf of these teachers during this period. [Finding of Fact No. 14].

11/ See Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (1982); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104, 106 (¶14057 1983); and Buena Reg. Bd. of Ed., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10071 1979).

The second aspect of Andover involved a change in reverse direction from "mini-courses" to conventional instructional periods. Here the Commission concluded such a change did not amount to "...an increase in workload sufficient to trigger the negotiations obligation. There was no increase in teaching assignments or a substitution of a teaching assignment for a nonteaching assignment..." (12 NJPER at 602). In other words, the action of the Board there predominantly involved the assigning of one form of instructional duties for another.

The Association proceeds to argue from Andover that since the past practice has been for High School teachers to teach five periods daily, when Gilfillan and Capria were assigned a sixth period, at the end of September 1990, this constituted a clear increase in workload without compensation. The "emergency" or "special" situations identified by Parnell are dismissed by the Association as having been applicable only to short duration assignments. The Association's proposals in the last negotiations (CP-1, CP-2 & R-1) are deemed inapplicable since they only dealt with Non-Academic Teachers. The Association also dismisses out of hand the Master Schedules of the 16 teachers, who were assigned six teaching periods, between 1983 and 1991, on the ground of irrelevancy since not all of these were "Academic" Teachers. However, one of them was Gilfillan, a math teacher who is involved in the instant proceeding.

The Respondent Board Did Not Violate Section 5.4(a)(5) Of The Act When, To Meet A "Special"/"Emergency" Situation It Assigned Two High School Teachers To A Sixth Teaching Period During The 1990-91 School Year.

I have decided to accept the arguments of the Board over those of the Association because the issue appears to be controlled by the agreement and past practice. The Board has, from time to time, assigned Academic Teachers to a sixth teaching period. Such assignments have been effectuated without the payment of additional compensation or the filing of an unfair practice charge. In so concluding, I find no significant distinction as to whether or not the teachers assigned to a sixth period have been "Academic" or "Non-Academic."[12/]

It cannot be gainsaid but that a unilateral change in teaching assignments would normally constitute a mandatorily negotiable increase in workload: See Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Dover Bd. of Ed., supra; Bridgewater-Raritan Reg. Bd. of Ed., supra; Buena Reg. School Dist., P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985); Deptford Tp. Bd. of Ed., P.E.R.C. No. 86-54, 11 NJPER 706 (¶16244 1985); Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987).

12/ Although I have accorded only marginal significance to Exhibits CP-1, CP-2 and R-1, which were submitted by the Association in the pre-J-1 negotiations, my decision does not rest upon the Association's strategy in having first proffered these documents and then having withdrawn them.

However, the controlling decision in the case at bar is Maywood Bd., supra, followed by Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

The Appellate Division in Maywood stated that:

> It is well established that the extent of teacher pupil contact time is mandatorily negotiable (citations omitted)...However, the board contends that if the increase in time of the two teachers is within the negotiated terms of the contract between the parties, or accepted past practices, it is not impermissible. Rather, says the board, if it is within the terms of the contact or past practices, it is not a violation of the terms and conditions of employment...(168 N.J. Super. at 59, 60).

Maywood was cited and relied upon by the Commission in Pascack which is somewhat similar to the case at bar. It involved a unilateral change in teacher scheduling from nine periods to eight periods per day. However, the teachers continued to be assigned five teaching periods, one supervisory period and one homeroom period as in the prior year. The result of the change was a 25-minute increase in actual teaching time and a five-minute increase in supervisory time, i.e. an increase of 30 minutes in pupil contact time per day. There was also a corresponding 30-minute decrease in unassigned time due to the loss of an unassigned duty-free period. The duty-free lunch period and the unassigned duty-free "prep" periods remained changed. Finally, the contractual length of the school day remained constant at six hours and 51 minutes. These facts appear to be consistent with the facts as to Gilfillan and Capria (Finding of Fact No. 11).

The Commission concluded that since the change in the number of teaching periods was "...within the limits established by the collective agreement between the parties..." (6 NJPER at 555) and the normal teaching load did not exceed the contractual limit of five teaching periods per day, the changes fell within the contractual length of the school day.

Several subsequent cases worthy of note are also based upon the Pascack principle. For example, in Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982) the Commission reiterated the necessity of reading "...the contract as a whole...," particularly provisions setting the length of the workday, the number and length of the teaching periods and the number of preparation or other duty-free periods. These, when read together, may sanction a unilateral change (8 NJPER at 601).

A more recent Commission decision on point, which relies, inter alia, upon Pascack is Glen Ridge Bd. of Ed., P.E.R.C. No. 90-33, 15 NJPER 619 (¶20258 1989). In that case the record established that the agreement provided for a 7-1/2 hour workday; that teachers must perform duties beyond assigned class periods, including student supervision; that there shall be at least a 30-minute duty-free lunch; that elementary teachers were to be provided eight 40-minute preparation periods and were to retain 123 minutes of unassigned time each day. The unilateral change in Glen Ridge was an increase in minimum pupil contact time of 70 minutes every six days or an average daily increase of 11.66 minutes.

The Commission concluded that, notwithstanding that a mandatorily negotiable workload increase had occurred, the change was within the limits of the contractual requisites negotiated by the parties. Thus, no unfair practice had been committed by the Board: Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Linden Bd. of Ed., P.E.R.C. No. 84-137, 10 NJPER 349 (¶15162 1984); Randolph Tp. Bd. of Ed., supra; Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Freehold Bd. of Ed., P.E.R.C. No. 82-38, 7 NJPER 604 (¶12269 1981); Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley Bd. of Ed., supra; and Maywood Bd. of Ed., supra.

I note here that the parties did not argue the issue raised by Maywood and Pascack, supra, namely, the relationship, if any, between the length of the contractual workday and the September 1990 assignment of a sixth teaching period to Gilfillan and Capria. Nevertheless, I am not precluded from applying the principles of law, which I deem germane to the issue, notwithstanding that such points of law have not been presented to me by the parties. I have drawn upon Maywood and Pascack because of the force of their precedent and their relevance to the issue at hand.

* * * *

Based upon all of the foregoing, it is my conclusion that the Charging Party has failed in its proofs and that, therefore, the Complaint must be dismissed.

CONCLUSION OF LAW

The Respondent Board did not violate 34:13A-5.4(a)(5) of the Act when, beginning in September 1990, it assigned Fred Gilfillan, a math teacher, and Joseph Capria, a science teacher, to a sixth teaching period without additional compensation since the matter was governed by the parties' collective negotiations agreement and/or past practice with respect to such assignments.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

Dated: December 15, 1992
Trenton, New Jersey