

H.E. NO. 97-11

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

In the Matter of

OCEAN CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-174

OCEAN CITY EDUCATIONAL SUPPORTIVE  
STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends the Ocean City Board of Education violated subsections 5.4(a)(5) and (1) of the Act by assigning support staff unit work to non-unit employees. The Hearing Examiner also recommends that the unit work issue was fully and fairly litigated, notwithstanding that the charge alleged that the public employer's conduct violated only subsection 5.4(a)(3) of the Act.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent  
Michael P. Stanton, attorney

For the Charging Party  
Waltman, Reilly & Rogovoy, attorneys  
(Ned P. Rogovoy, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On December 22, 1995, the Ocean City Educational Supportive Staff Association filed an unfair practice charge against the Ocean City Board of Education. The charge alleges that the Board assigned attendance secretarial duties to a teacher in the 1995-96 term, thereby "taking work away from the secretarial bargaining unit." The Board's action allegedly violates subsection 5.4(a)(3)<sup>1/</sup> of the New Jersey

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

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On April 23, 1996, a Complaint and Notice of Hearing issued. On May 1, 1996, the Board filed an Answer, admitting that a teacher was assigned to the attendance office in the 1995-96 term during the first period (8:03 - 8:49 a.m.). It also asserts that for some time between eight and ten years ago, a clerical aide was assigned "to assist in this area." The Board contends that assigning the work to a member of the Educational [teachers] Association is a managerial prerogative.

On August 14, 1996, I conducted a hearing at which the parties examined witnesses and presented exhibits. A post-hearing brief was filed on October 4, 1996.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Ocean City Board of Education is a public employer within the meaning of the Act. The Ocean City Educational Supportive Staff Association is a public employee representative within the meaning of the Act and represents clerical aides, instructional aides, secretaries, supervisory aides, nurses aides, cafeteria workers, custodians and other support staff. The parties' collective negotiations agreement runs from July 1, 1994 through June 30, 1997 (C-3).<sup>2/</sup>

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<sup>2/</sup> "C" refers to Commission exhibits.

2. Joyce Disciascio is one of five or six aides in the unit working at the high school (T13; T21).<sup>3/</sup> Her position is identified as "attendance secretary" (T13). She has been employed by the Board for about 18 years; her duties have increased in tandem with student enrollment (T14).

3. Attendance slips completed by homeroom teachers are collected by supervisory aides and given to Disciascio in the attendance office. Students arriving late are cited and those slips are also forwarded to Disciascio (T18). She enters the data onto the school's computer, which prints out a data sheet.

4. Disciascio did this work unassisted (except for delivery of the slips) for many years. Sometime between 1986 and 1988, a supervisory aide assisted her for less than one calendar year (T23, T14-T15). The aide was transferred to another building and the work reverted to Disciascio (T15). She continuously performed the "attendance office" work unassisted until September 1995.

5. In September 1995, high school principal Michael Cipriani assigned a teacher to the attendance office for the first period (8:03 - 8:48 a.m.) (T20-T21, T22). The purpose of the assignment is to "pass [late-arriving students] to class and to record their absence in the proper position" (T19, T22). The assignment constitutes that teacher's "administrative duty

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<sup>3/</sup> "T" refers to the transcript of the August 14, 1996 hearing.

period"<sup>4/</sup> and enables Disciascio to "correlate the attendance slips...and get out the daily attendance list" (T22).

A teacher was assigned because Disciascio requested assistance and the number of students arriving late increased over the years (T21). Most late students arrive during the first period (T21).

6. Cipriani concedes that the "attendance function" has not changed (T26). He also acknowledged that in September 1995, he considered the work to be a support staff function, but the assignment was "based on availability of staff" (T26).

#### ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. The shifting of unit work from employees within a negotiations unit to other employees outside the unit is mandatorily negotiable. Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980).

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

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<sup>4/</sup> Other teacher assignments include library duty, cafeteria duty, hall duty and study hall duty (T22). At least one support staff employee is also assigned hall duty regularly (T31).

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

See also, Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322, 338 (1989).

The facts are undisputed. The "attendance function" was historically performed by support personnel exclusively until September 1995. Disciascio did the work alone for many years and was assisted briefly by another fellow unit employee around eight to ten years ago. Compare, State of New Jersey (Div. of State Police), P.E.R.C. No. 94-78, 20 NJPER 74 (¶25032 1994).

In September 1995, the Board assigned a teacher (a non-unit employee) to assist Disciascio in the attendance office. No negotiations occurred. The teacher directs late students to class and "records their absences" accordingly. The Board concedes that this work is a "support staff function", but "staff availability" dictated the assignment.

The Board argues that teachers have duty assignments in the cafeteria, hallways, bathrooms, etc., which concern student safety and control; assignments in the attendance office fall into the same category. The Board essentially asserts that the work was shifted for economic reasons and that the work hypothetically falls within teacher job responsibilities. Neither justification concerns inherent managerial prerogatives.

In Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 164 N.J. Super 106 (App. Div.

1979), aff'd 81 N.J. 582 (1980), the Court refined the test for examining the negotiability of matter which arguably concern inherent managerial prerogatives:

The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate....

On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is pre-eminent then bargaining is appropriate.

An economic reason for shifting unit work, such as "staff availability", is mandatorily negotiable. See Monroe Tp. Bd. of Ed., P.E.R.C. No. 81-145, 7 NJPER 357 (¶12161 1981); Passaic Cty. Reg. H.S. Dist., P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981). The Board has produced no evidence showing that a teacher's presence in the attendance office furthers an educational goal. Similarly, the Commission has determined that when the same amount of work is being performed and the employer is merely revamping personnel assignments, negotiations over preserving unit work does not significantly interfere with governmental policy determinations. Rutgers; see also, Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶11 App. Div. 1983)); Middlesex Cty. College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977); Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983).

The record shows that the Board unilaterally removed unit work from the support staff unit and assigned that work to an employee in another unit as an additional job responsibility of that employee. See Toms River Bd. of Ed.<sup>5/</sup>

The Association alleged that the Board's action violates 5.4(a)(3) of the Act and the Board asserted in its post-hearing brief that no evidence of anti-union animus was presented.

I agree with the Board and dismiss that allegation. But I also recommend that the issue was fairly and fully litigated, albeit not specifically pleaded. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The charge specifically alleges that the Board "t[ook] work away from the secretarial bargaining unit." The Board witness recounted the history of the "work" in dispute and the circumstances justifying the contested assignment. The Board never sought dismissal of the Complaint because no discrimination was alleged or proven. Under these circumstances, I find that the Board knew that its assignment of the "attendance function" to non-unit personnel was in issue and that it presented a defense to its action.

I recommend that the Board violated subsections 5.4(a)(5) and derivatively (a)(1) of the Act by assigning support staff work to non-unit personnel.

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<sup>5/</sup> Cipriani testified that the Board "...lost four or five support staff years back..." (T22). This evidence fails to prove that a reduction in force was implemented.



RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Ocean City Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring support staff unit work to certificated personnel without first negotiating with the Ocean City Educational Support Staff Association.

2. Refusing to negotiate in good faith with the Ocean City Educational Support Staff Association concerning terms and conditions of employment of unit employees, particularly by transferring support staff unit work to non-unit employees without first negotiating with the Association.

B. That the Board take this action:

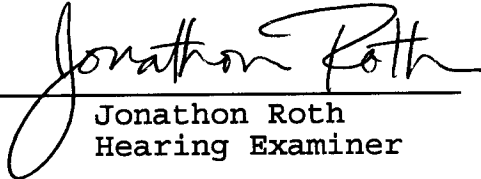
1. Return the attendance office work to support staff within 30 days.

2. Negotiate in good faith with the Association before transferring unit work to non-unit employees.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

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

  
Jonathon Roth  
Hearing Examiner

DATED: November 14, 1996  
Trenton, New Jersey



# NOTICE TO 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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring support staff unit work to certificated personnel without first negotiating with the Ocean City Educational Support Staff Association.

WE WILL NOT refuse to negotiate in good faith with the Ocean City Educational Support Staff Association concerning terms and conditions of employment of unit employees, particularly by transferring support staff unit work to non-unit employees without first negotiating with the Association.

WE WILL return the attendance office work to support staff within 30 days.

WE WILL negotiate in good faith with the Association before transferring unit work to non-unit employees.

Docket No. CO-H-96-174

Ocean City Board of Education

(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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 Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"