P.E.R.C. NO. 91-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY REGIONAL HIGH SCHOOL
DISTRICT NO. 1 BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-316

PASSAIC VALLEY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge file by the Passaic Valley Education Association against the Passaic County Regional High School District No. 1 Board of Education. The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act when it refused to negotiate before extending the work year of teachers and guidance counsellors by requireing them to make up two snow days at the end of the 1987-88 school year. The Commission finds that a contract article on work years authorized the Board's action.

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PASSAIC VALLEY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, DeMaria, Ellis & Hunt, attorneys (Richard M. Salsberg, of counsel; Wendi F. Weill, on the brief)

For the Charging Party, Bucceri & Pincus, attorneys (Sheldon H. Pincus, of counsel; Gregory T. Syrek, on the brief)

DECISION AND ORDER

On June 2, 1988, the Passaic Valley Education Association filed an unfair practice charge against the Passaic County Regional High School District No. 1 Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it refused to negotiate before extending

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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. (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."

the work year of teachers and guidance counsellors by requiring them to make up two snow days at the end of the 1987-88 school year.

On December 7, 1988, the Director of Unfair Practices refused to issue a Complaint. D.U.P. No. 89-5, 15 NJPER 54 (¶20019 1988). He found that the allegations involved a good faith dispute over contractual language which should be resolved through the negotiated grievance procedures. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The charging party appealed.

On March 7, 1989, we directed that a Complaint issue. P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106 1989). We found that the charge, rather than alleging a mere breach of contract, alleged that the employer had changed a past practice without the prior negotiations required by N.J.S.A. 34:13A-5.3. See NLRB v. C & C Plywood Corp., 385 U.S. 421, 64 LRRM 2065 (1967).

On April 17, 1989, a Complaint and Notice of Hearing issued. The employer's Answer asserted that the employer had a contractual right to reschedule the snow days which negated any past practice argument and that this case involved a contractual dispute which should have been resolved through the grievance procedures.

On June 2, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties stipulated the facts[2/] and waived oral argument. They filed post-hearing briefs by August 2, 1989.

2/ Because they did so, the Hearing Examiner did not decide the employer's summary judgment motion.

On October 31, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-20, 15 NJPER 674 (¶20275 1989). He concluded that the employer had a contractual right to reschedule the snow days; it had not repudiated a past practice, and only an alleged breach of contract was involved.

On November 14, 1989, the Association filed exceptions. It asserts that the Hearing Examiner erred in construing the contract apart from the past practice, finding that the employer had not repudiated the past practice, and concluding that the refusal to negotiate over the extended work year did not violate subsections 5.4(a)(1) and (5).

On November 30, 1989, the employer filed a response. It supports the Hearing Examiner's conclusions that it had a contractual right to reschedule the snow days and that it did not repudiate a past practice.

We have reviewed the record. The Hearing Examiner's report states the stipulated facts verbatim (H.E. at 4-9). We incorporate them. We add that the superintendent's affidavit stated that employees were required to make up the snow days due to a "perceived need for further curriculum development and educational pursuits." The Association accepted the affidavit's introduction into evidence, with the qualification that no inference could be drawn as to what occurred on the extra days (T19).

N.J.S.A. 34:13A-5.3 provides, in part:

> the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.
>
> * * *
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

An employer may violate its obligation to negotiate in good faith under section 5.3 by repudiating a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it. Human Services; Oak-Cliff-Golman Bakery Co., 207 NLRB No. 138, 85 LRRM 1035 (1973). Here, the Association is not claiming that the employer repudiated a clear term of the written agreement. Instead it is claiming that the employer repudiated a binding past practice which it argues was unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, and as enforceable as any written term. See Elkouri & Elkouri, How Arbitration Works, at 439 (4th ed. 1985). It wants us to find that the practice is binding and so clear cut that changing that practice constitutes bad faith.

We hold that the Association has not proved this cause of action. The Hearing Examiner found, and we agree, that the express contract article on work years authorized the Board's action. Article 5, sections A and B give the Board the right to impose the

extra work days since it did not exceed the contractual limits of 185 work days for teachers and 193 work days for guidance counsellors. See Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

The charging party also alleges that the employer violated its negotiations obligation under section 5.3 of the Act. That section provides:

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

To prove a violation of this section a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed Ass'n, 78 N.J. 25, 52 (1978); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); East Brunswick Bd. of Ed., P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). An employer may defeat this second cause of action if it has established a clear and unequivocal waiver of the majority representative's statutory right to negotiate. A controlling contract provision is such a waiver. Our analysis of the employer's contract defense applies here as well. Accordingly, we dismiss the second cause of action.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
July 19, 1990
ISSUED: July 20, 1990

H.E. NO. 90-20

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

In the Matter of

PASSAIC COUNTY REGIONAL HIGH SCHOOL
DISTRICT NO. 1 BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-316

PASSAIC VALLEY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when on April 12, 1988, it modified the 1987-88 school calendar to require teachers and guidance counselors to work an additional two days during the school year in order to "make up" for two of the three snow days which had previously occurred. The Association contended that there was a binding "past practice" of over ten years duration whereby the work year of the teachers and the guidance counselors had exceeded that of the days of student instruction by only one day per year. Further, during this same period, teachers and guidance counselors had never been required to "make up" snow days.

However, the Hearing Examiner found that the alleged "past practice" must fall in the face of explicit contract language which permitted the Board to require teachers and guidance counselors to work 185 days and 193 days per year, respectively. Even with the April 12, 1988 requirement that teachers and guidance counselors work an additional two days during the 1987-88 school year, they still fell one day per year short of the contractual limit of 185 days and 193 days. The Hearing Examiner cited, in particular, Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980), which permitted a board of education to add additional work assignments so long as the contractual workday was not exceeded. This was the situation in the case at bar.

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. 90-20

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

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PASSAIC COUNTY REGIONAL HIGH SCHOOL
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Appearances:

For the Respondent, DeMaria, Ellis & Hunt, Esqs.
(Richard M. Salsberg, of counsel; Wendi F. Weill, on the brief)

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of counsel; Gregory T. Syrek, on the brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 2, 1988, by the Passaic Valley Education Association ("Charging Party" or "Association") alleging that the Passaic County Regional High School District No. 1 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 [Count I] for at least the past ten school years, the student and teaching staff work year has been 184 days of instruction for students and 184 days of instruction for teachers

with an additional one day worked on the day preceding the date on which students report for the beginning of the school year; in establishing the above student and teacher work year, the practice at the Passaic Valley High School has been to schedule 184 days of instruction for students and teachers but, however, if the school was closed due to inclement weather or any other emergency for four days or less, the practice has been that students and teachers have not been required to make up these days; on April 12, 1988, the Board and/or its Superintendent issued a directive which unilaterally and without negotiations extended the teacher work year by two days, as a result of which the teacher work year terminated on June 28, 1988, instead of June 24th; the teaching staff was advised that it would not receive any additional compensation for these two days of work and, notwithstanding, the Association's demand to negotiate the Board has refused to do so; and further, [Count II] the guidance counselors are required to commence their work year five days immediately prior to the first day that the teachers report and, also, their work year is further extended by three days immediately following the end of the teacher work year; as a result of the above unilateral change the guidance counselors' work year terminated on July 1, 1988, instead of June 29, 1988, and these counselors have been advised that they will not receive any additional compensation for these two days of work; all of which is

alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

On December 7, 1988, the Director of Unfair Practices determined that even if the allegations of the Association were true, they would not constitute unfair practices and, as a result, the Director declined to issue a complaint (D.U.P. No. 89-5, 15 NJPER 54 (¶20019 1988). The Association appealed the Director's decision and on March 10, 1989, the Commission reversed and remanded the matter to the Director for complaint issuance (P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106 1989).

Thereafter, on April 17, 1989, the Director issued a Complaint and Notice of Hearing with May 17 and May 18, 1989 as the dates scheduled for hearing.[2/]. On May 26, 1989, the Respondent filed with the Chairman a Motion for Summary Judgment with a Brief and supporting documents[3/] On the same date, May 26th, 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. (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/ These dates were rescheduled by agreement to one day, June 2, 1989.

3/ Respondent's Motion appears to have been triggered by that part of the Commission's decision, supra, which stated: "...Complaint issuance does not preclude summary judgment in cases where there are no material facts in dispute and the employer has a valid contract defense" (15 NJPER at 258, n. 2).

Special Assistant to the Chairman referred the Respondent's Motion for Summary Judgment to the undersigned for disposition pursuant to N.J.A.C. 19:14-4.8.

A hearing was held on June 2nd, in Newark, New Jersey, at which time the parties appeared and entered into a complete Stipulation of Facts, making an evidentiary hearing unnecessary.[4/] Oral argument was waived and the parties filed post-hearing briefs by August 2, 1989.[5/]

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists, and, based upon the stipulated record, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire stipulated record, the Hearing Examiner makes the following:

FINDINGS OF FACT

A. The Passaic County Regional High School District No. 1 Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

4/ This Stipulation of Facts appears in the transcript [1 Tr 8-21] and incorporates J-1 through J-8 and R-1.

5/ Because there is a stipulated record, there is no need to decide separately the Respondent's Motion for Summary Judgment since it is subsumed within this Recommended Report and Decision.

B. The Passaic Valley Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

STIPULATION OF FACTS

1. The Passaic Valley Education Association is the exclusive and sole representative for collective negotiations concerning the terms and conditions of employment of the certificated personnel employed by the Passaic County Regional High School District No. 1 Board of Education. [Tr 8].

2. The Association and the Board are parties to a collective negotiations agreement the duration of which is from July 1, 1986 through June 30, 1989. [Tr 8; J-1].

3. At its regular meeting of April 28, 1987, the Board adopted a school calendar for the 1987-88 school year. The calendar provided for a total of 184 days for students, 185 days for teachers, and noted that 4 days were built into the calendar for inclement weather. [Tr 8, 9; J-3(h)].

4. There were three snow days during the 1987-88 school year: January 4, 1988; January 8, 1988; and January 26, 1988. [Tr 9].

5. Students were not required to make up any of the three days on which the schools were closed for snow in 1987-88. [Tr 9].

6. At the Board of Education Meeting of Tuesday, April 12, 1988, the Board resolved to modify the 1987-88 school calendar. [Tr 9; J-5].

7. Prior to the modification of the 1987-88 school calendar, the last scheduled day for students and staff was to have been Friday, June 24, 1988. [Tr 9].

8. Subsequent to the modification of the 1987-88 school calendar, the last scheduled day for students remained Friday, June 24, 1988. Teaching staff members, however, were now also required to be present both on Monday, June 27, 1988 and Tuesday, June 28, 1988. [Tr 9; J-8 ¶10].

9. In the 1987-88 school year, teaching staff members were required to work on the day preceding the date on which the students reported for the commencement of the school year (i.e., September 8, 1987 and September 9, 1987, respectively.) [Tr 9, 10].

10. In the 1987-88 school year, guidance counselors employed by the Board were required to commence their work year five working days immediately prior to the first day that the teaching staff reported (i.e., August 31, 1987). [Tr 10].

11. In the 1987-88 school year, the guidance counselor work year was further extended to the three work days immediately following the teacher work year. [Tr 10].

12. Prior to the modification of the 1987-88 school calendar, the last scheduled day for guidance counselors was to have been Wednesday, June 29, 1988. [Tr 10].

13. Subsequent to the modification of the 1987-88 school calendar, guidance counselors were now also required to be present both on Thursday, June 30, 1988 and Friday, July 1, 1988. [Tr 10; J-8 ¶10].

14. The Board determination to modify its 1987-88 school calendar, and to extend the teaching staff and guidance counselors work year(s) was undertaken unilaterally and without further negotiations with the Association. [Tr 10, 11].

15. On April 26, 1988, the Association demanded negotiations over the change in the length of the teachers' and counselors' work year. [Tr 11; J-6].

16. On April 28, 1988, the Board's Superintendent of Schools notified the Association that it would not negotiate the changes it had made on April 12, 1988. [Tr 11; J-7].

17. The teaching staff members and guidance counselors did not receive any additional compensation for the two extra days of work in 1987-88. [Tr 11].

18. In the negotiations leading to the parties' 1986-89 collective negotiations agreement, the Board proposed increasing the teaching and guidance staff work year(s) by five days over and above the 185 day or 193 day maximum. The Board abandoned its proposal prior to the time a successor agreement was reached between the parties. [Tr 11].

19. Article 5 of the parties' agreement provides as follows:

> A. <u>In-School Work Year -- Teachers</u>
>
> The in-school work year for teachers employed on a ten (10) month basis shall not exceed one hundred eighty-five (185) days. Excluded from this section are: new teachers, who may be required to attend three additional days or orientation; and guidance counselors whose work year is defined below.

B. In-School Work Year -- Guidance Counselors

The in-school work year for guidance counselors only, shall not exceed one hundred ninety-three (193) days. The guidance counselor work year shall begin five (5) working days immediately prior to the first day that all teachers report. Specifically excluded from the five (5) days are weekends and holidays. The guidance counselor work year shall extend three (3) work days immediately following the teacher work year.

In consideration of the extended work year above, and the extended teacher hours as specified in ARTICLE 7, Section 1, the Board agrees to compensate guidance counselors, in addition to their teacher salaries, a ratio as specified in ARTICLE 20, Schedule B.

C. Inclement Weather or Similar Emergency

Teacher attendance shall not be required whenever student attendance is not required due to inclement weather or other similar emergency.

[Tr 11, 12].

20. The language comprising Article 5 has remained identical in all collective negotiations agreement since at least 1978-80. [Tr 12].

21. From at least the 1979-80 school year to the 1986-87 school year, the number of days that teachers and guidance counselors have been required to work, and on which students received instruction was determined by the number of snow days declared by the Board.

Year	Student Instruction Days	Total Teacher Days Worked	Total Guidance Days Worked
1979-80	180	181	189
1980-81	182	183	191
1981-82	180	181	189
1982-83	182	183	191
1983-84	181	182	190
1984-85	183	184	192
1985-86	181	182	190
1986-87	181	182	190

[Tr 12, 13].

22. For the period 1979-80 to 1986-87, neither students, teachers or guidance counselors were required to make up snow days, unless there were less than 180 days of instruction. [Tr 13].

23. In the 1987-88 school year the students received instruction on 181 days; teachers worked 184 days; and the guidance counselors worked 192 days. [Tr 13].

24. In establishing the student and teacher work year, the Board has scheduled 184 days of instruction for both teachers and students. However, if school was closed due to inclement weather or any other emergency for four or less days, students, teachers and guidance counselors have not been required to make up these days. [Tr 13, 14].

DISCUSSION AND ANALYSIS

This case turns upon whether or not there has existed for approximately ten years a binding past practice as to the length of the work year for teachers and guidance counselors and, also, whether or not there has existed during the same period an ambiguity

in the "Teacher Work Year" provisions of Article 5,[6/] §§A & B of the 1986-1989 collective negotiations agreement (J-1, p. 17).[7/] If a binding past practice is found to exist and the contractual language is found to be ambiguous, then the Hearing Examiner could conclude that the Board's action above constituted a repudiation of a term and condition of the parties' agreement.[8/] If the Hearing Examiner should so conclude, then the claim of the Charging Party for recompense in this forum would not be barred by State of N.J., Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).[9/]

Note of a few salient facts from the stipulated record is in order before proceeding further:

1. The number of student instruction days, teachers days worked and guidance counselor days worked between the 1979-80 and the 1986-87 school years is as set forth in Stipulation of Fact No. 21. The range of days of student instruction was 180 to 183 or an

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6/ Also, includes the Guidance Counselor "Work Year."

7/ If so, the ambiguity in Article 5 has existed since at least 1978-80 (Stip/Fact No. 20, supra).

8/ This result would obtain even though the Charging Party has not alleged that the Board repudiated a past practice as to terms and conditions of employment since we are concerned with the legal conclusions which follow from the stipulated facts. Clearly, the term "repudiation" implicates a legal conclusion.

9/ It will be recalled that the Director of Unfair Practices' initial refusal to issue a complaint was based, in part, upon the failure of the Association to have alleged a repudiation of the contract: Dept. of Human Services, supra [see 15 NJPER at 55].

average of 181.25 days; the range of days that teachers worked was 181 to 184 or an average of 182.25 days; and the range of days that the guidance counselors worked was 189 to 192 or an average of 190.25 days.[10/]

2. The Board on April 28, 1987, adopted a school calendar for the 1987-88 school year, which mandated that teachers would work 185 days, ending June 24, 1988, and that guidance counselors would work 193 days, ending June 29, 1988 [J-3(h)].[11/] The Board on April 28, 1987, also, "built into" the calendar four days for "inclement weather" [J-3(h); Stip/Fact No. 3, supra].

3. During the 1987-88 school year there were three snow days on January 4, January 8 and January 26, 1988 (Stip/Fact No. 4, supra). The students were not required to make up any of the three snow days on which schools were closed but the Board on April 12, 1988, voted to modify the school calendar such that teachers would be required to work an additional two days on June 27 and June 28, 1988, and, further, that guidance counselors would be required to work an additional two days on June 30 and July 1, 1988 [J-5; Stip/Facts Nos. 5,6, 8, 11, 13, supra].

10/ The precise number of days worked was determined by the number of snow days during any school year and whether or not the Board required that teachers and guidance counselors make up the snow days at the end of the year. [See Board's Main Brief, p. 5].

11/ The collective negotiations agreement provides in Article 5, §§A & B that the work year for teachers shall not exceed 185 days and that the work year for guidance counselors shall not exceed 193 days (Stip/Fact No. 19, supra).

4. This extension of two additional work days for teachers and guidance counselors resulted from the decision of the Board that the teachers and guidance counselors should "make up" two of the three snow days, supra (see J-5 and Board's Main Brief, p. 5). Thus, teachers, who were originally scheduled to work 185 days and who lost three days due to snow [182 days] had added to their work year two additional days for a total of 184 days worked, for which they received no additional compensation (Stip/Facts Nos. 17 & 23, supra). Also, the guidance counselors, who were originally scheduled to work 193 days and who also lost three days due to snow [190 days] had added to their work year two additional days for a total of 192 days worked, for which they received no additional compensation (Stip/Facts Nos. 17 & 23, supra).

5. The determination of the Board to modify the 1987-88 school calendar on April 12, 1988, thereby extending the work year for teachers and guidance counselors, was undertaken unilaterally and without negotiations with the Association (Stip/Facts Nos. 14-16; J-6, J-7).

6. In the negotiations leading to the current agreement of the parties, the Board proposed increasing the work year of teachers and guidance counselors by five days over and above the existing 185-day and 193-day maximum but the Board abandoned this proposal prior to the reaching the current agreement (J-1; Stip/Fact No. 18, supra).

7. During the period 1979-80 through the 1986-87 neither students, teachers nor guidance counselors were required to make up snow days unless there were less than 180 days of instruction

(Stip/Fact No. 22, supra). In the 1987-88 school year the students received instruction on 181 days worked; teachers worked 184 days; and the guidance counselors worked 192 days (Stip/Fact No. 23, supra).

Respondent Board Did Not Violate Sections 5.4(a)(1) And (5) Of The Act When It Unilaterally And Without Negotiations With The Association Modified The 1987-88 School Calendar By Extending The Work Year Of Teachers And Guidance Counselors Two Days In Order To "Make Up" Two Of The Three Prior Snow Days.

The Association argues, and the Hearing Examiner agrees, that the alleged binding "past practice" involved in this case is twofold, namely: (1) from 1979 through 1987 the work year for teachers was one day longer than the student instructional year and the work year for guidance counselors was nine days longer than the student instructional year; and (2) during this same period, neither students, teachers nor guidance counselors had been required to make up snow days since the number of student instructional days was never less than 180 days in any of these school years. This relationship between student instructional days, teacher workdays and guidance counselors workdays between 1979 and 1987 is borne out by taking an average of the respective days of student instruction, teacher workdays and guidance counselor workdays, which indicates that student instructional days averaged 181.25, teacher workdays averaged 182.25, and guidance counselor workdays averaged 190.25. These facts as to "past practice" are supported by the stipulated record. [See Stip/Facts Nos. 21, 22 & 24, supra].

The parties' Stipulation of Facts also contains the contractual provisions of Article 5, Sections A and B, which provide that the in-school work year for ten-month teachers shall not exceed 185 days and that of the guidance counselors shall not exceed 193 days (Stip/Fact No. 19, supra). Further, this language has remained identical in all of the parties' collective negotiations agreements since at least 1978 (Stip/Fact No. 20, supra).

Thus, during the ten-year period that the alleged binding "past practice" has existed with respect to the work years of teachers and guidance counselors, there has also existed in parallel the contractual work year limit of 185 days and 193 days for teachers and guidance counselors, respectively. The question to be adjudicated is whether or not the twin "past practice," supra, overrides the language in Sections A and B of Article 5 of the current agreement (J-1, p. 17).

In the opinion of the Hearing Examiner, the express language of Article 5, Sections A and B must, contrary to the position of the Association, be deemed controlling and, thus, the asserted binding "past practice" must fall.[12/] This express contractual language gave the Board the prerogative to modify the school calendar on April 12, 1988, since under this modification the teachers worked 184 days (one day under the contractual limit) and

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12/ The Hearing Examiner has carefully considered the legal argument of the Association with respect to the establishing of a binding past practice (Association brief, pp. 9-11).

the guidance counselors worked 192 days (also, one day under the contractual limit) [Stip/Fact No. 23, supra]. Therefore, the Association's claim for two days of additional compensation for teachers and guidance counselors must be rejected.

In so finding and concluding, the Hearing Examiner has carefully considered all of the cases cited by the parties. An early Commission decision on point is Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980) where the board in September 1979 unilaterally changed the school day from nine class periods to eight class periods. A nine-period day had existed since 1972. The result of this change was a 25-minute increase in actual teaching time and a five-minute increase in supervisory time, which resulted in a net increase of 30 minutes of "pupil contact time" per day. The parties' contract provided, inter alia, that the length of "...the school workday consist of not more than six (6) hours and fifty-one (51) minutes..." The board admitted making the unilateral change but maintained that it had a right to do so under the contract. The Commission, citing Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979) quoted, in part, from the Court's opinion as follows:

> 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).

Based on Maywood and the cases cited therein, the Commission concluded that the Board's change in the number of class periods was "...within the limits established by the collective agreement between the parties..." and the complaint of unfair practices was dismissed (6 NJPER at 555).

The Respondent cites Bound Brook Bd. of Ed., P.E.R.C . No. 83-11, 8 NJPER 439 (¶13207 1982), where the Commission cited Pascack in dismissing a complaint alleging an unlawful unilateral increase of ten minutes per day for eight classroom teachers. The Commission noted that the contractual workday was defined as seven hours and 15 minutes, including the lunch period, and that the collective negotiations agreement did not contain a provision preserving the parties' past practices.[13/] The Commission noted further that it was undisputed that the board had not exceeded the contractual length of the workday in making the admitted increases of ten minutes per day for eight classroom teachers. In support of its decision to dismiss the complaint, the Commission cited Pascack and Maywood, supra, and an additional case, decided in 1980: Randolph Tp. Bd. of Ed., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980). In Randolph the contract provided for a workday not to exceed seven hours and 30 minutes; the workday of a speech therapy teacher was increased by by 15 minutes twice a week (ending at 3:30 p.m.) while the workday of other teachers ended at 3:15 p.m.; and the

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13/ An examination of J-1 herein likewise discloses that the agreement contains no past practice preservation clause.

Association argued that a longstanding past practice had existed. However, the Commission rejected the past practice argument in the absence of a contractual clause preserving the past practices of the parties in the face of clear language defining the length of the workday, which had not been exceeded in that case.

The Respondent also cites State of N.J. (Dept. of Education), P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988), where the Hearing Examiner found that a contractual provision with respect to vacation leave duly authorized a unilateral change by the State. The Commission agreed with the Hearing Examiner that the prior practice could not override the specific language in the contract, citing Pascack, supra, and the relevant holdings with respect to contractual waiver. To find a contractual waiver the agreement must clearly and unequivocally sanction the employer's unilateral change: Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978) and State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). These cases make clear that for a waiver of statutory rights to have occurred, several factors must be considered, including the precise wording of the contract clauses, the evidence of the negotiations that occurred leading up to the execution thereof and the completeness of the clause that is under scrutiny (14 NJPER at 138).

Although the Hearing Examiner has previously stated that "repudiation" of a past practice is a legal conclusion, which although not alleged may follow from a given set of facts, the

Hearing Examiner has concluded that this case does not involve such "repudiation." Of course, if the provisions of Article 5, Sections A and B were cast in ambiguous language, then the above twin "past practice" of the parties could be deemed controlling with the result that the Board's action of April 12, 1988, constituted the "repudiation" of a binding "past practice" and a violation of Sections 5.4(a)(1) and (5) of the Act. However, since the Hearing Examiner has previously concluded that the express provisions of Article 5, Sections A and B with respect to the length of the work year for teachers and guidance counselors are controlling no violation of the Act can be found.

A principal case cited by the Association in support of its position is Somerville Bd. of Ed., H.E. No. 87-48, 13 NJPER 173 (¶18077 1987), adopted P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987). The problem for the Charging Party in citing Somerville is that although there was a contractual provision that the work year for ten-month teachers "...shall not exceed 185 days," the case principally involved secretaries, represented by the teachers union, and supervisors and administrators. It was upon the complaint of the secretaries, supervisors and administrators, that the decision of the Hearing Examiner was based. If one examines the recommended order of the Hearing Examiner it will be noted that it pertains to the board's ceasing and desisting from unilaterally increasing the length of the work year of "...administrators, supervisors and secretaries..." beyond the established past practice of the board

(13 NJPER at 179). In the absence of exceptions, the Hearing Examiner's decision was adopted by the Commission (13 NJPER 323, supra).

The Association's citation of Spotswood Bd. of Ed., P.E.R.C. No. 85-92, 11 NJPER 148 (¶16065 1985) likewise does not advance its cause in this proceeding. It is true that the Commission found a violation in Spotswood, but this was based on a longstanding past practice with respect to the release of secretaries on the day before Thanksgiving and the day before the Christmas recess which, in the face of a latent ambiguity in contractual language as to the calendar, allowed that past practice to govern. The problem in the instant case for the Association is the clear contractual language with regard to the teacher and guidance counselor work year (J-1, Article 5, Sections A & B).

The Hearing Examiner would be remiss if he did not discuss briefly the Charging Party's citation of the Commission's decision in Edison Tp. Bd. of Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070 1978) where, upon a stipulated record, it was found that the board in May 1977, adopted a calendar for teachers, which, consistent with the contract, provided for three days for inclement weather while still providing for 180 school days. The board had closed schools six times due to inclement weather, which left the district three days short of the required 180 days of instruction. On February 9, 1978, the Board met to decide how to make up the deficiency and on February 13th adopted a resolution requiring attendance on three future holidays in the school year without negotiations with the Association. The Commission, in finding no violation of the Act,

stated that "...the areas of mandatory negotiability of teacher work year must be limited to those days...in excess of the days of attendance of students scheduled by the Board to meet their required educational responsibilities (180 days of instruction)...the Board, in this case, was not obligated to negotiate the change in the days of work of the teachers necessitated by the change in the school calendar either as a direct change in terms and conditions of employment or as the impact of their educational policy decision necessitated by the lost snow days..." (4 NJPER at 152).[14/]

Finally, another case of note cited by the Association is Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978), which involved the unilateral reduction in the work year and annual compensation of certain principals from twelve months to ten months without collective negotiations. There was, however, not involved in Piscataway the issue of past practice versus explicit contract language. Thus, this case has no application to the matter at bar.

In view of the foregoing, the Respondent Board's urging that Dept. of Human Services, supra, applies is most persuasive.

14/ The Commission in dictum also addressed a contention by the Association that the Board should have to negotiate impact, stating in footnote 6, inter alia, that it did not "...believe that the contract relieves the Board of its obligation to negotiate with regard to the impact on the employees...created by the unanticipated change in the calendar..." (4 NJPER at 152). The Respondent Board herein has taken this language out of context in arguing that the instant parties "...did negotiate and come to an understanding, memorialized in their collective bargaining agreement, as to both the handling of a snow emergency and, as a completely separate issue, the maximum of days teachers and guidance counselors may work..." Respondent's Reply Brief, p. 4). This contention is not supported by Edison, supra.

The Hearing Examiner has found no repudiation of either a binding "past practice" or contractual provision within the meaning of Human Services. Since only an alleged breach of contract is involved, the Board's action of April 12, 1988, did not constitute a refusal to negotiate in good faith within the meaning of Section 5.4(a)(5) of the Act. [10 NJPER at 421, 422].

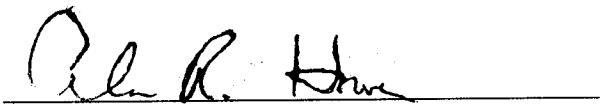
For all of the foregoing reasons, the Hearing Examiner must recommend that the Complaint must be dismissed. Accordingly, upon the entire stipulated record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) when the Board on April 12, 1988, resolved to modify the 1987-88 school calendar to require teachers and guidance counselors to work an additional two days in order to "make up" for two of the three snow days since the parties' collective negotiations agreement permitted such a modification to be made.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

DATED: October 31, 1989
Trenton, New Jersey