P.E.R.C. NO. 81-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASCACK VALLEY REGIONAL HIGH
SCHOOL DISTRICT BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-79-328-46

PASCACK VALLEY REGIONAL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice case, the Commission dismisses a Complaint filed against the Pascack Valley Regional High School District Board of Education which alleged that the Board had violated the Act by unilaterally changing the number of class periods in the school day. The Commission found that the contract between the parties permitted the employer to change the number of class periods.

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Charging Party.

Appearances:
For the Respondent, Parisi, Evers & Greenfield, Esqs. (Irving C. Evers, of Counsel)

For the Charging Party, Goldberg & Simon, Esqs. (Sheldon H. Pincus, of Counsel)

DECISION AND ORDER

The Pascack Valley Regional Education Association (the "Charging Party" or the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission on June 6, 1979, alleging that the Pascack Valley Regional High School District Board of Education (the "Respondent" or the "Board") had violated N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").[1/]

1/ The subsections prohibit 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 and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Pursuant to the Complaint and Notice of Hearing issued on December 20, 1979, a hearing was held on April 28, 1980 before Commission Hearing Examiner Edmund G. Gerber, who following receipt of briefs by May 28, 1980, issued his Recommended Report and Decision 2/ on August 28, 1980. He concluded that the Respondent had not violated the Act as alleged and recommended dismissal of the Complaint. Exceptions were filed by the Charging Party.

The case centers around a decision of the Board to unilaterally change the format of the school day from nine class periods to eight class periods beginning in September, 1979. The District's two schools had been on a nine period day since the 1972-73 school year. Prior thereto the schedule varied between eight and nine periods.

Under the nine period format, each period was forty minutes in length and teachers were assigned five teaching periods, one supervisory period and three unassigned duty-free periods.

When the eight period schedule was instituted, the length of the periods increased to forty-five minutes. Under the new format teachers were assigned five teaching periods, one supervisory period and two unassigned duty-free periods (one of which was lunch).

The result of the change was a twenty-five minute increase in actual teaching time and a five minute increase in supervisory time. The net effect was a thirty minute increase in "pupil contact time." In addition, there was a thirty minute

2/ H.E. No. 81-6, 6 NJPER ___ (¶_____ 1980). A copy of that report is attached hereto and made a part hereof.

decrease in duty-free time due to the loss of one unassigned period. It should be noted that the actual length of the school day remained the same both before and after the change in the schedule.

The Board and the Association entered into a collective bargaining agreement which was effective from July 1, 1978 through June 30, 1980. The agreement provides that the normal teaching load is five teaching periods. The agreement further provides that the length of the "school work day consist of not more than six (6) hours and fifty-one (51) minutes which shall include a duty-free period and at least one (1) planning period."

The Association alleged that the change in the number of class periods was a mandatorily negotiable term and condition of employment and that the Board violated the Act by failing to negotiate these changes with the Association prior to implementation.

The Board admitted making the unilateral changes, but it maintained that it had a right to make such changes under the collective bargaining agreement.

The Hearing Examiner found that the Board's action was subject to mandatory negotiations. However, the Hearing Examiner determined that while the change was mandatorily negotiable, the action of the Board did not constitute a unilateral change in terms and conditions of employment since it was in compliance with the collective bargaining agreement.

We substantially agree with both the Hearing Examiner's ruling that the change was a mandatorily negotiable issue as well as the Hearing Examiner's finding that the Board's action was permissible under the collective bargaining agreement and was, therefore, not a violation of the Act.

Additional support for this principle may be found in In re Maywood Board of Education, 168 N.J. Super. 45 (1979), where as in the instant case, it was argued that there had been a unilateral increase in the teachers' "pupil contact time." The Court in Maywood stated:

> It is well established that the extent of a teacher pupil contact time is mandatorily negotiable. Middlesex Cty Coll Bd of Trustees, 4 NJPER 4023; In re Byram Tp Bd of Ed, supra, 152 N.J. Super. at 26. However, 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 contract or past practices, it is not a violation of the terms and conditions of employment...[a] change in terms and conditions of employment is lawful when consistent with past practices or authorized by a collective bargaining agreement.... 168 N.J. Super. at 59-60.

In the instant case, the relevant terms and conditions of the collective bargaining agreement were considered. It is clear that the change in the number of class periods is within the limits established by the collective agreement between the parties.

As previously noted, the collective agreement in force states that the normal teaching load would be no more than five classes per day. The new eight-class-periods schedule is in compliance with this provision since it requires teachers to teach five classes per day.

In addition, the collective agreement requires that teachers be given one duty-free lunch period as well as at least one non-assigned planning period. Once again, the new work schedule is in compliance with these requirements.

Lastly, the collective agreement states that "the total in-school work day shall consist of not more than six (6) hours and fifty-one (51) minutes...." Under the new schedule the total in-school work day of teachers is six hours and five minutes at Pascack Valley High School and six hours and nine minutes at Pascack Hills High School. Thus it is within the limits set by the collective agreement.

The Association's exceptions also object to the Hearing Examiner's finding that the negotiations history between the parties indicated that the parties contemplated the possibility of alteration in the number of class periods.

We find that the Hearing Examiner's ruling that the parties contemplated the possibility of alteration in the number of class periods is not an unreasonable interpretation of the evidence and testimony adduced at the hearing. Furthermore, even assuming arguendo that the Hearing Examiner's decision on this

point was not correct, the contract provisions establish that the Board's actions were consistent with the terms of the agreement.

Having reviewed the entire record in this matter, as well as the exceptions filed, we adopt the findings of fact and conclusions of law contained within the Hearing Examiner's Recommended Report and Decision. Therefore, the Unfair Practice Charge will be dismissed.

ORDER

For the foregoing reasons and upon the entire record herein, IT IS HEREBY ORDERED that the Unfair Practice Charge be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Bernard M. Hartnett, Jr.
Acting Chairman

Commissioners Hartnett and Parcells voted in favor of this decision. Commissioners Graves voted against the decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
October 21, 1980
ISSUED: October 22, 1980

H.E. NO. 81-6

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

In the Matter of

BOARD OF EDUCATION, PASCACK VALLEY
REGIONAL HIGH SCHOOL DISTRICT,

Respondent,

-and-

DOCKET NO. CO-79-328-46

PASCACK VALLEY REGIONAL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

In a Hearing Examiner's Report and Recommendations Decision, it was recommended that a charge brought by the Pascack Valley Regional Education Association in which it was claimed that the Board of Education, Pascack Valley Regional High School District unilaterally altered the terms and conditions of employment by changing from a nine period school day to an eight period school day be dismissed. Under a nine period school day, the teachers had three unassigned duty free periods. Under the eight period school day, which was imposed by the Board of Education, there were two unassigned duty free periods. The Hearing Examiner found, however, that this very topic, the number of unassigned duty free periods, was a subject of negotiations before the existing contract was signed. Since the contract language was not inconsistent with the changing of the number of duty free periods, the Hearing Examiner found that no unilateral change within the meaning of the Act occurred.

A Hearing Examiner's Report and Recommendations Decision in not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations 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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(Irving C. Evers, of Counsel)

For the Charging Party, Goldberg & Simon, Esqs.
(Sheldon H. Pincus, of Counsel)

HEARING EXAMINER'S REPORT AND
RECOMMENDATIONS DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on June 6, 1979, by the Pascack Valley Regional Education Association ("Association") alleging that on September 19, 1979, the Pascack Valley Regional High School District Board of Education ("Board") promulgated a schedule altering the teaching work day from nine periods a day to eight periods a day. Such an alteration in the teaching schedule would result in an increase in student contact time and a decrease of one preparation period. It was alleged that this act constituted an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended,

N.J.S.A. 34:13A-1 et seq. (the "Act").[1/] It appearing that the allegations of the charge, if true, may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 20, 1979. Pursuant to the Complaint and Notice of Hearing a hearing was held on April 28, 1980 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties filed posthearing briefs by May 28, 1980.

* * *

The facts in this matter are largely undisputed. The Board and the Association are parties to a collective negotiations agreement which was effective July 1, 1978 through June 30, 1980. The agreement provides that the normal teaching load is five teaching periods, one non-teaching supervisory period (such as study hall) and one homeroom period. The contract further provides that teachers shall be entitled to a "duty-free lunch and at least one planning period."

The district's two schools have been on a nine period day since the beginning of the 1972-73 school year. Prior thereto

1/ It was specifically alleged that the Board violated subsections 5.4(a)(1) and (5) of the Act. These subsections provide in pertinent part that employers, their representatives or agents are prohibited 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 schedule varied between eight and nine periods. Under a nine period day teachers were assigned five teaching periods, one supervisory period and three unassigned duty-free periods. A lunch period is included in these three unassigned duty-free periods. Each period is 40 minutes long.

In October of 1978 during the term of the then-existing agreement, the Board informed the Association that it was considering changing the format of the teaching day from a nine period day to an eight period day beginning September, 1979. The Charging Party requested negotiations concerning this change but the Board refused to negotiate claiming "The decision to go from a nine period day to an eight period day is strictly a managerial prerogative and the Board therefore may not negotiate such subject matter." In September 1979 a new eight period schedule was instituted. The format of the new schedule resulted in the length of periods being increased to approximately 45 minutes. Teachers were still assigned five teaching periods, one supervisory period, and a homeroom period. However, they had only two unassigned duty-free periods. The result of the change was a 25 minute increase in actual teaching time and a five minute increase in supervisory time for a 30 minute increase in pupil contact time. There was a corresponding 30 minute decrease in unassigned time due to the loss of one unassigned or duty-free period. One of these two periods was a lunch period. It is noted that the actual length of the school day remained constant.

The Association alleges that the Board's actions totally ignored its negotiations responsibility under the Act by unilaterally altering pre-existing terms and conditions of employment.

The Board admits making the alleged change in the teaching day. It argues that it had a right to under the contract. The Board also claims that such actions are within its managerial prerogative; the change was made to ensure a thorough and efficient education of its pupils. The Board asserts that since the length of the teaching day as set forth in the agreement was not changed, no violation has occurred.

The Board claims that it changed the number of periods in the day because there had been a drop in student enrollment going from 2733 pupils in September 1978 to 2576 in September 1979. As a result of the declining student enrollment, courses were dropped and there had been a reduction in force. There were also budgetary problems.

In Board of Education of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Ass'n, 81 N.J. 582 (1980) the court stated:

> 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...when this policy is preeminent, then bargaining is appropriate. Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, then negotiations would be proper even though cost may have a significant effect on a managerial decision....
> At p. 591.

The court goes on to p. 594:

> There being no demonstration of a particularly significant educational purpose, then the budgetary consideration being the dominant element, it cannot be said that negotiations... of that matter significantly trenched upon the managerial prerogative of the board of education.

So too in the instant case. The change instituted by the Board did not go to thorough and efficient education, it was taken for budgetary considerations. See also Newark Board of Education v. Newark Teachers Union, P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), PERC affmd App. Div. Docket No. A-2060-78 (2/26/80), where it was held that a change in the number of teacher preparation periods is mandatorily negotiable. Accordingly, it is clear that the actions taken by the Board were subject to mandatory negotiations.

The second question is whether the actions taken by the Board were in compliance with the existing labor relations contract and therefore did not constitute a unilateral change in terms and conditions of employment within the meaning of the Act. The contract is silent as to the number of periods in the day. The language which ensures the teachers of a duty-free preparation period reads: "At least one preparation period." This would seem to indicate that the contract was written in contemplation of an alteration in the number of periods during the day. During the course of negotiations for the contract in question, the Association "wanted to put into the contract the fact that we had two additional unassigned periods." 2/ This demand was dropped

2/ Tr. p. 30, l. 20.

and the language remained as before. In the Matter of New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (¶4047 1978), the Commission recognized that an obligation to negotiate may arise based on a past practice rather than contractual language. Here, however, the language of the contract, coupled with the negotiations history, indicates that the parties did contemplate the possibility of alteration in the number of school periods. As noted above, the 1971-72 school year also consisted of eight periods rather than nine. It cannot be said that there was a past practice which created an obligation to negotiate and the action taken on the part of the Board was not a unilateral change in the terms and conditions of employment.

Accordingly, for the reasons set forth above, I recommend that the Commission dismiss the Complaint in its entirety.

Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
August 28, 1980