P.E.R.C. NO. 80-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Respondent,

-and-

Docket No. CO-79-19-43

NEWARK COLLEGE OF ENGINEERING PROFESSIONAL STAFF ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The Commission in an unfair practice proceeding initiated by the Newark College of Engineering Professional Staff Association finds, contrary to the Hearing Examiner's findings, that the New Jersey Institute of Technology has committed an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5) by refusing to negotiate over the affect of its calendar decision upon the terms and conditions of employment of its teaching staff. The Commission, while noting that decisions by the Appellate Division in Maywood Ed Ass'n v. Maywood Bd of Ed, 168 N.J. Super. 45 (App. Div. 1979), pet. for certif. den. __ N.J. __ (1979) and Edison Twp. Bd of Ed v. Edison Twp. Ed Ass'n, P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978), reversed App. Div. Docket No. A-5164-77 (9/20/79), have cast doubt upon the continued viability of the decision/impact principle, finds that Appellate Division decisions in Byram Twp. Board of Ed v. Byram Twp. Education Ass'n, 152 N.J. Super. 12 (App. Div. 1977) and Bd of Ed, Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed Ass'n, 164 N.J. Super. 106, certif. granted __ N.J. __ (1979) as well as the Supreme Court's Burlington County College Faculty Ass'n v. Burlington County College, 64 N.J. 10 (1973) decision are controlling in the instant matter. No emergent conditions existed herein which might have precluded negotiations prior to the implementation of the Institute's school calendar decision, as was the case in Edison. Moreover, the Commission finds that the Association did not clearly and unequivocally waive its right to negotiate when it rejected the Institute's negotiations offer which the Association viewed as overly restrictive.

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Respondent,

Docket No. CO-79-19-43

-and-

NEWARK COLLEGE OF ENGINEERING PROFESSIONAL STAFF ASSOCIATION, INC.,

Charging Party.

Appearances:
For the Respondent, Norris, McLaughlin & Marcus, Esqs.
(Mr. H. Reed Ellis, on the Brief)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs.
(Mr. Michael J. Herbert, of Counsel and on the Brief)

DECISION AND ORDER

On July 28, 1978, an Unfair Practice Charge was filed by the Newark College of Engineering Professional Staff Association, Inc. (the "Association") alleging that the New Jersey Institute of Technology (the "Institute") had 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. (the "Act"). Specifically, the Association alleges that the Institute violated N.J.S.A. 34:13A-5.4 (a)(1) and (a)(5)[1/] by unilaterally requiring faculty to report for

1/ These 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; (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."

classes on August 30, 1978 and to report for preparatory conferences and meetings on August 23, 1978 as well as by refusing to negotiate a salary adjustment for this alleged alteration in working conditions.

It appearing that the allegations of the unfair practice charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 20, 1978. A hearing was held on March 19, 1979 before Alan R. Howe, Hearing Examiner of the Commission, at which time both parties were represented by counsel and were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearings the parties submitted post hearing briefs, the final one being received on June 6, 1979.

On June 18, 1979, the Hearing Examiner issued his Recommended Report and Decision[2/] which included findings of fact, conclusions of law and a recommended order. The original of the report was filed with the Commission and copies were served upon the parties. A copy of this report is attached hereto and made a part hereof. Exceptions to the report and supporting briefs were filed by the Institute on June 28, 1979 and by the Association on July 3, 1979. The Institute and the Association also filed reply briefs on July 16, 1979 and July 24, 1979 respectively.

The facts, as found by the Hearing Examiner, indicate that in the years prior to the 1978-79 academic year classes always began

2/ H.E. No. 79-41, 5 NJPER 257 (¶10147 1979).

on or after September 1st. In May of 1978, the Institute circulated to all faculty the calendar for the 1978-79 academic year, which indicated that the classes for the 1978-79 Fall semester would begin on August 30, 1978. Additionally, the Staff Handbook, submitted in evidence, indicates that faculty must be available for conferences and meetings not later than seven calendar days before the opening of the Fall semester. (See finding of fact #4 in Hearing Examiner's Recommended Report). Therefore, the change in the academic calendar meant teachers had to report by August 23, 1978 (Exhibit J-5 in evidence).

The record further establishes that upon receipt of the 1978-79 academic calendar in May 1978, the attorney for the Association wrote to the President of the Institute protesting what was alleged to be a unilateral change in terms and conditions of employment. The letter went on to indicate that the Association would accede to the change if the Institute would compensate the teachers for each day they must be on campus prior to September 1, 1978. The letter closed by requesting an early response. By letter dated July 21, 1978, the attorney for the Institute responded to the letter by indicating that the Institute did not believe that the change in the calendar constituted a violation of the Act since there was no change in the total number of instructional days. (Exhibit J-5 in evidence.)[3/] Upon receipt of the July 21, 1978

3/ Subsequently, the July 21, 1978 letter was amended to acknowledge that one more instructional day was scheduled in the 1978-79 calendar than the 1977-78 calendar. (Exhibit J-6 in evidence.)

letter, the Association filed the instant charge.

The charge was received and docketed by PERC and, pursuant to its normal processing, an informal conference was held with a PERC staff member to explore any possibility for settlement.[4/] During that conference the Institute apparently agreed to negotiate the "impact" of its calendar change on the teachers' terms and conditions of employment, but limited its negotiations offer to those items set forth in two Commission decisions concerning a school calendar change necessitated by an unexpectedly high number of school days lost to snow. See In re Edison Township Board of Education, P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070 1978), and P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978). This limited proposal was confirmed by a letter dated November 8, 1978 from the Institute's representative to the Association attorney.[5/] (Exhibit J-7 in evidence). The Association, through its attorney, declined this offer contending that the conditions stated as to what would be negotiated were much too severe and amounted to no negotiations. Additionally, the offer coming at this time, was viewed as merely an attempt to obviate the unfair practice committed in July when the Institute refused to negotiate. (Exhibit J-8 in evidence.)

4/ See N.J.A.C. 19:14-1.6(c). These conferences are conducted by a staff member other than the Hearing Examiner prior to the issuance of a complaint. None of the information discussed at the conference becomes part of the record and the Hearing Examiner assigned to the case , if a complaint is issued, does not receive the file from the pre-complaint process.

5/ The letter also indicated that the Institute did not consider the May 31, 1978 letter to be a request for negotiations limited to impact, but rather as a letter requesting negotiations "over the decision itself and/or additional compensations." It further acknowledged that the Institute did refuse this offer to negotiate.

The Hearing Examiner found that the Institute did not violate Subsections (a)(1) and (a)(5) of the Act when it unilaterally promulgated the calendar for the 1978-79 academic year since decisions pertaining to school calendar are managerial prerogatives. On the other hand, the Hearing Examiner noted that the effect of such a decision upon terms and conditions of employment is mandatorily negotiable. However, he determined that the Institute had offered to negotiate the effect of its calendar decision as confirmed by the November 8, 1978 letter but that the Association rejected this offer thereby waiving its right to compel future negotiations with regard to this matter. Accordingly, the Hearing Examiner recommended that the Institute be absolved from having to negotiate the impact of its calendar decision and that the Complaint be dismissed in its entirety. Notwithstanding the fact that the Hearing Examiner recommended complete dismissal of the Complaint, the Institute did file exceptions. Citing the Appellate Division's recent decisions in Maywood Bd. of Ed. v. Maywood Ed. Ass'n., 168 N.J. Super. 45, Docket No. A-1648-77 (App. Div. 1979), certif. denied, ___ N.J. ____ (1979) and Cinnaminson Twp. Bd. of Ed. v. Cinnaminson Teachers' Assn., P.E.R.C. No. 78-46, 4 NJPER 79 (¶4039 1978), affmd in part, revd in part 6/1/79. Docket No. A-2682-77, pet for certif. denied ___ N.J. ___ (9/24/79 the Institute, in its exceptions, contends that it was never under an obligation to negotiate the impact of its calendar decision. The Institute also attempts to distinguish In re Edison Twp. Bd. of Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (¶4152 1978) and In re Belvidere Bd. of Ed., P.E.R.C. No. 78-62, 4 NJPER 165 (1978) from the matter herein on grounds that

the aforementioned decisions involved the "rescheduling of school days in what had previously been scheduled to be non-school days".[6/]

The Association also excepted to the Hearing Examiner's recommended decision. It disputes his legal conclusion that the Board's conduct in October and November constituted a bona fide offer to negotiate the effect of its calendar decision and that the Association had rejected that offer, thereby waiving its right to compel negotiations. The Association argues that the negotiations obligation in the instant matter should not be circumscribed by the same narrow limitations set forth in Edison, supra. Whereas the Edison Board was faced with an emergent condition, the Institute herein had ample time to discuss the impact of its decision with the Association prior to implementation. Furthermore, the Association takes issue with the Hearing Examiner's conclusion that the Association's letter dated November 13, 1978 constitutes a waiver of the Association's right to negotiate.

After careful consideration of the entire record in this matter, the Commission accepts the Hearing Examiner's findings of fact but, contrary to the Hearing Examiner's findings, the Commission concludes that the Institute's actions were violative of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). Initially, we note that neither party has excepted to the Hearing Examiner's finding that the Institute's decision to modify the school calendar was a non-negotiable managerial prerogative. Accordingly, that legal finding

6/ See Edison, 4 NJPER at 152.

is adopted.[7/]

The extent of the negotiations obligation with respect to those terms and conditions of employment which are affected by a managerial decision is in a state of confusion at the present time, particularly in this area involving the effects of a calendar change. However, for the following reasons the Commission believes that the Institute did have an obligation to negotiate with respect to the proposals set forth in the Association's letter of May 31, 1978 and had, as admitted by the Institute in its subsequent correspondence (e.g. Exhibit J-7, November 8, 1978), refused to even negotiate on these proposals.

Initially, the Institute is correct in its argument that the Maywood decision, supra, has cast serious doubt on the continued viability of what has come to be called the decision/impact principle. The Commission had been in agreement with several Hearing Examiners' recommended conclusions that the Maywood decision should be limited to the specific area of RIF which was the issue in that decision and is a subject controlled by extensive statutory and administrative enactments.[8/] However, on September 21, 1979, the

7/ For an indepth discussion concerning the negotiability of the school calendar, see the following judicial and Commission decisions: Burlington County College Faculty Association v. Board of Trustees Burlington County College, 64 N.J. 19 (1973); In re Greenbrook Township Board of Education, P.E.R.C. No. 77-11, 2 NJPER 288 (1977) and In re Edison Township Board of Education, P.E.R.C. No. 78-53, 4 NJPER 165 (1978).

8/ See for example discussion in the Commission's recent decision in In re Plainfield Board of Education, P.E.R.C. No. 80-42, 5 NJPER 418 (¶10219 1979), and In re Camden Board of Education, P.E.R.C. No. 80-3, 5 NJPER 286 (¶10157 1979).

The Cinnaminson decision, supra, also cited by the Institute, did rely on the Maywood rationale but that case also concerned the subject of the effects of a RIF.

Appellate Division issued its decision in In re Edison Township Board of Education which reversed the Commission's decision in P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978).[9/] (Appellate Division Docket No. A-5164-77, pet for cert filed Docket No. 16,485). The opinion in that case is quite brief and its only cited authority is the Maywood decision. Therefore, the rejection of "impact" negotiations has been extended, by one panel of the Appellate Division, at least, beyond the effects of a RIF to the effects of a calendar change.

The confusion is caused by the existence of several other Court decisions which appear to be contra to the rationale of Maywood and the holding of Edison. The Appellate Division decision in In re Byram Township Board of Education, 152 N.J. Super. 12 (App. Div. 1977) rejected a direct attack on the decision/impact principle, and upheld PERC's use of it as consistent with the principles set forth in the Dunellen Trilogy. 152 N.J. Super. at 20-21.[10/]

More recently another part of the Appellate Division has

9/ This was subsequent to the Hearing Examiner's decision, the exceptions and briefs of the party and the issuance of the Commission decision referred to in footnote 8, Id.

10/ The Byram decision is a comprehensive decision reviewing a PERC decision which involved numerous negotiations proposals. The case has been cited by numerous court decisions since; and its approval of PERC's application of the Dunellen decision was cited as correct by the Supreme Court in State of New Jersey v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) at 73-74. It should be noted, however, that the portion of Byram quoted and discussed by the Supreme Court was not the part applying decision/impact.

reversed a trial judge decision that an arbitration award finding that teachers were entitled to compensation for additional hours worked due to a calendar change involved a non-negotiable educational policy decision. Board of Education of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Education Ass'n, 164 N.J. Super 106 (App. Div. 1978) cert granted 81 N.J. 44 (1979). The dispute arose when the Board, in February 1976, promulgated the school calendar for the 1976-77 school year. It ended the prior practice of closing schools at 1:00 P.M. on the day before Thanksgiving and extended the day to a normal school day with a 3:00 P.M. dismissal for students and teachers. The Court states:

> As an initial consideration, we have no doubt that the previous procedure of terminating the school day on the day before Thanksgiving at 1 p.m. was comprehended by Article XXI, cited above, as a preserved prior practice. While the decision by the Board that the day before Thanksgiving should be a regular school day was undoubtedly one relating to calendar and therefore within the exclusive managerial prerogative of the Board, nevertheless the effect of that determination in increasing the working hours of the teachers for that day by two hours over what the working hours had been previously rendered the decision also one affecting terms and conditions of employment. The distinction is very clearly made in the leading case on the point, Burlington Cty. College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973). The Court stated:
>
> > While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation. These matters, the defendant readily acknowledges, are mandatorily

> negotiable under the Act though the negotiations are to be conducted in the light of the calendar. [at 12]
> 164 N.J. Super. at 109 11/

The Woodstown-Pilesgrove decision seems to be very closely on point to the instant case. The Board there, and in this case, made a calendar decision well in advance of the beginning of the school year. Unlike Edison, no emergency existed which might have made negotiations prior to implementation impossible. Also directly on point is Woodstown-Pilesgrove's recognition that the payment of compensation for the consequences of the change acknowledges that the teachers' terms and conditions of employment were adversely affected but does not infringe upon the policy judgment involved in the Board's action. In the instant case, the Association's May 31, 1978 letter indicated that the teachers would conform to the new calendar and sought negotiations only on compensation for the deleterious effects of the change on the teachers' personal and financial welfare. In fact, the proposal for compensation herein was very similar to that awarded in Woodstown-Pilesgrove.[12/] It should also be noted that, like Woodstown-Pilesgrove, the calendar

11/ It is perhaps worth noting that Judge Conford, who was a member of the panel which decided Woodstown-Pilesgrove, was temporarily assigned to the Supreme Court at the time Ridgefield Park Education Ass'n. v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) and State v. State Supervisory Employees Ass'n, supra, were decided and he participated in those cases.

12/ It must be emphasized, as always, that the finding of a negotiations obligation did not mean that the Institute had to agree to that proposal contained in the Association's letter. See In re Council of New Jersey State College Locals, 141 N.J. Super 470 (App. Div. 1976). Nor does a finding that that proposal involves a term and condition of employment constitute a finding that the proposal has merit. The wisdom of agreeing to a proposal is unrelated to the question of whether it is a term and condition of employment. See In re Byram, 152 N.J. Super. at 30.

change did increase the teachers' work year slightly. In its August 24, 1978 letter, Exhibit J-6, the Institute acknowledged that one additional instructional day was being added to the teachers' work year.

The Woodstown-Pilesgrove decision is also relevant because it emphasizes the same portion of the Supreme Court's decision in Burlington County College Faculty Ass'n. v. Board of Trustees, 64 N.J. 10 (1978) at 12 as has the Commission when finding the impact of calendar decisions to be negotiable. That quotation is particularly significant not only because it is from the Supreme Court, but also because, like the instant case, it deals with a college setting rather than a board of education. The proposal of the Association herein seems to fall exactly within the parameters of the quotation. The May 31, 1978 letter acknowledges that college is open for the students but suggests that it does not in itself fix the days of work or compensation of the faculty members.[13/]

13/ Paragraphs three and four of the Association's May 31 letter read:

> To avoid inconvenience to the students, the P.S.A. is willing to ask its members for this year to meet their classes on Wednesday and Thursday, August 30 and 31 provided that the Institute agrees to recompense them on the basis of .00625 (x their overtime factor) of salary for each day they are asked to be on campus prior to September 1 (i.e., August 30 and 31 and any other day prior to September 1 that they are asked to be on campus).
>
> In addition, if being on campus before September 1 is an inconvenience for any member of the full-time teaching staff, he will not be required to be present. In such a case, the substitute(s) will cover the classes on August 30 and 31 at the above rate.

After a careful review of all these decisions of the courts, and recognizing that these two lines of decisions may be inconsistent with each other, the Commission concludes that Woodstown-Pilesgrove and Burlington County College are the cases most directly on point and therefore controlling.

One other factor is persuasive in our finding that a negotiations obligation did exist. This Commission has always maintained a distinction between the teachers' work year or work day and the student year or day. Thus, in the Edison cases themselves we concluded that the Board had no obligation to negotiate the calendar change itself because the teachers' calendar was only changed to conform to the student calendar. P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070 1978). We specifically pointed out in that decision, relying on past decisions, that:

> Thus, it is clear that the Commission has recognized the coexistence of two concepts: 1) the establishment of the academic or school calendar which is not mandatorily negotiable and 2) the determination of employees' work year which is a term and condition of employment and is mandatorily negotiable. However, it has been recognized that negotiations on the work year for teachers will, as a practical matter, recognize the parameters of the school calendar. Thus, the areas of mandatory negotiability of teacher work year must be limited to those days, both as to numbers and scheduling, in excess of the days of attendance of students scheduled by the Board to meet their required educational responsibilities. P.E.R.C. No. 78-53 at 5-6, 4 NJPER, at 152.

The Commission believed that this was the result dictated by the portion of the Burlington County College opinion quoted in Woodstown-Pilesgrove. We still adhere to that belief.

In the instant case the teachers were ordered to be available for conferences and meetings seven days before the students' classes began. Therefore, beginning classes on August 30th meant that teachers had to cut short their summer vacations, jobs, etc. and report to work by August 23, 1978. This was earlier than any prior year. Even if the student calendar was non-negotiable, which it was, the change in that portion of the calendar which only affected teachers was mandatorily negotiable. The teachers could have demanded that the seven day preparation period be reduced to require that they report no earlier than in past years as long as they were there when the students' calendar began.[14/] The proposal for compensation for this change in teacher work year only was therefore also a term and condition of employment.

Therefore, in agreement with the Hearing Examiner, we conclude that a negotiations obligation did exist in May 1978 when the Association wrote to the Institute. We also find that the Institute did refuse to negotiate by its letters of July 21, 1978 and August 24, 1978 and its conduct during this period. This refusal constituted a violation of N.J.S.A. 34:13A-5.4(a)(5) and derivatively (a)(1).

We disagree with the Hearing Examiner's conclusions that this violation was later cured or waived by the events of October

14/ Again, the requirement to negotiate did not require the Institute to agree.

and November 1978 when the Institute, as part of the settlement conference concerning this change, did make a very limited offer to negotiate "impact". The Institute's subsequent limited reconsideration of its position, evidenced by its November 8 offer to negotiate the effects of its calendar decision, does not negate the initial unfair practice committed on July 21. To permit the Institute to exonerate itself by offering to negotiate several months after implementation would not serve the purposes of the Act. Herein the majority representative requested negotiations several months prior to the implementation of a managerial decision. Ample time existed for the employer to sit down and negotiate the effects of its decision. Under such circumstances, the opportunity for meaningful negotiations was significantly and needlessly diminished.

Nor do we believe that the Association's letter of November 13, 1978 constituted a waiver of negotiations, and certainly not a waiver of the earlier violation of the Act. In disagreement with the Hearing Examiner, we do not find that the Association clearly and unequivocally waived its right to negotiate. A careful review of its November 13 letter reveals that the Association did not reject negotiations but instead rejected negotiations on the overly restrictive and pre-conditioned basis proffered by the Institute. Thus, the letter states:

> ...I had never understood the salary to be given to faculty for additional work to be outside of the framework of 'impact.' Yet, you have suggested that, only if we could show specific individual damages will you engage in negotiations....

> Unfortunately, so that there is no misunderstanding, the offer which you made at the pre-hearing conference was not an offer to commence 'impact negotiations.' You stated that you would negotiate the specific damages suffered by individual faculty members if they had to cancel vacation trips, etc.

In the context of this case we do not interpret this to be a clear and unmistakable waiver of negotiations.[15/]

ORDER

Accordingly, for the reasons set forth above it is HEREBY ORDERED that the New Jersey Institute of Technology shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with the Newark College of Engineering Professional Staff Association, Inc. concerning changes in terms and conditions of employment relating to the alteration in the calendar for the 1978-79 school year.

2. Take the following affirmative action which is

15/ The Association maintains that the Institute's November 8, 1978 letter was not an offer to negotiate but rather a continuation of the refusal to negotiate. It argues that by placing so many restrictions on what it would negotiate it was actually illegally preconditioning its offer on the requirement that the Association drop its lawful demand for compensation. We do not necessarily agree with this characterization. However, if the Institute's letter is to be considered a legitimate offer to negotiate, then the Association's response may be considered as a counterproposal.

The Commission is reluctant to be overly technical in its characterization of offers to negotiate or counterproposals. The important thing is for the parties to begin a dialogue which will lead to meaningful negotiations on the affected terms and conditions of employment and hopefully a resolution of the dispute. The public policy of the Act will not be furthered by placing form over substance in the initial parrying for position.

necessary to effectuate the policies of the Act:

a. Upon demand by the Association, negotiate in good faith concerning the effects upon terms and conditions of employment of the Institute's calendar decision.

b. Post at a central location copies of the attached notice marked "Appendix A". Copies of said notice, on forms provided by the Commission shall, after being signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by any other material.

c. Notify the Chairman, in writing, within 20 days from the date of receipt of this Order what steps have been taken to comply herewith. 16/

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp and Parcells voted for this decision. Commisioner Newbaker voted against this decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
October 31, 1979
ISSUED: November 1, 1979

16/ In its initial charge the Association sought "cash compensation" for any days worked prior to September 1, 1978. The Commission does not believe that such a remedy would "effectuate the policies of this Act". See N.J.S.A. 34:13A-5.4(c). Unlike the (Continued)

16/ (Continued)
secretaries in Galloway Township Board of Education v. Galloway Township Ass'n of Educational Secretaries, 78 N.J. 1 (1978), these employees did not have their salaries unilaterally reduced by the change in hours. No evidence of specific monetary loss exists in this record as it did in Galloway, where unlawful unilateral reduction in hours meant a unilateral reduction in pay and the award of monetary damages merely made them whole. Here, the Association proposed negotiations for additional compensation, but the Institute was free to reject this proposal. As indicated in prior Commission decisions, the Commission will not impose an agreement upon the parties. This case is more closely analogous to another Galloway case. In re Galloway Board of Education, 157 N.J. Super. 74 (App. Div. 1978) at 83-84 in which the Appellate Division rejected a remedy which would have attempted to approximate a money award for a unilateral 15-minute increase in hours worked per day by teachers.

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees in the edercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with the Newark College of Engineering Professional Staff Association, Inc., concerning terms and conditions of employment.

WE WILL, upon demand by the Association, negotiate in good faith concerning the effects upon terms and conditions of employment of the Institute's calendar decision.

NEW JERSEY INSTITUTE OF TECHNOLOGY
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 79-41

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

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Respondent,

- and -

Docket No. CO-79-19-43

NEWARK COLLEGE OF ENGINEERING
PROFESSIONAL STAFF ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Charging Party against the Respondent Institute. The Charging Party had alleged that the Respondent refused to negotiate additional compensation regarding the "impact" of the Respondent's decision unilaterally to change the academic calendar for 1978-79 by requiring faculty members represented by the Charging Party to report on August 30 instead of September 1 or thereafter, as in the past.

The Hearing Examiner found that the Respondent in unilaterally promulgating the academic calendar for the 1978-79 academic year was exercising a managerial prerogative as to which no prior negotiations with the Charging Party were required. With respect to the "impact" of this change upon faculty members, the Hearing Examiner found and concluded that the Charging Party had waived its right to negotiations by having rejected an offer by the Respondent to negotiate impact under the criteria of the Commission in its decision in Edison Township Board of Education, P.E.R.C. No. 78-53, 4 NJPER 151 (1978).

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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NEWARK COLLEGE OF ENGINEERING
PROFESSIONAL STAFF ASSOCIATION, INC.,

Charging Party.

Appearances:

For the New Jersey Institute of Technology
Norris, McLaughlin & Marcus, Esqs.
(H. Reed Ellis, Esq.)

For the Newark College of Engineering Professional Staff Association, Inc.
Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 28, 1978 by the Newark College of Engineering Professional Staff Association, Inc. (hereinafter the "Charging Party", "Association" or "PSA") alleging that the New Jersey Institute of Technology (hereinafter the "Institute" or the "Respondent") had 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. (hereinafter the "Act"), in that the Institute in May 1978 circulated the "Institute Calendar" for the 1978-79 academic year, which advised all faculty that classes would begin on August 30, 1978, contrary to the prior practice of beginning September 1 of any academic year; this change in reporting date had been made unilaterally by the Institute and thereafter, upon demand, the Institute refused to negotiate additional compensation for the change in date, 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]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 20, 1978. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 19, 1979 [2] in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs by June 6, 1979. [3]

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing 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 record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The New Jersey Institute of Technology is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Newark College of Engineering Professional Staff Association, Inc. is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The current collective negotiations agreement between the parties is effective during the term July 1, 1977 through June 30, 1979 and contains no provision with respect to "calendar" for the academic year (J-1). [4]

1/ These 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.
"(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 hearing was originally scheduled to commence January 25, 1979 but on two successive occasions counsel for the Respondent requested a postponement, which was unopposed by counsel for the Charging Party, and granted by the Hearing Examiner on the ground that good cause had been shown.

3/ The delay in the filing of briefs is attributable to delay in the receipt of transcript by the Respondent and by the Hearing Examiner's vacation schedule. On June 13 the parties advised that no reply briefs would be filed.

4/ Compare Sayreville Board of Education, P.E.R.C. No. 78-41, 4 NJPER 70, 72 (1978).

4. The current Staff Handbook (J-2) contains in Section 217 a definition of "Academic Year", the first sentence of which states in part that "...every member of the staff shall be available for conferences and meetings not later than seven calendar days before the opening of the Fall semester..." (p. 35). This provision has been in the Staff Handbook since 1971 or 1972.

5. Sometime between the close of classes and Commencement day, May 26, 1978, the Institute circulated to all faculty the calendar for the 1978-79 academic year (J-3). The calendar indicated that the Fall Semester would begin "Wednesday, August 30".

6. The calendars for the three academic years between 1975 and 1978 indicate that classes started on September 1 in 1976-77 (R-2) and 1977-78 (R-3), and in 1975-76 the starting date for classes was September 2 (R-1).

7. Pursuant to resolution of the State Board of Higher Education, dated September 15, 1972 and still in effect, "...the regular academic year for State institutions shall fall within a ten month period and shall include 32 weeks of regularly scheduled student-teacher instructional activity..." (R-4).

8. The Institute has followed the aforesaid resolution of the State Board of Higher Education except for the three academic years between 1975 and 1978 when the academic year was 32 weeks less one day.

9. The current collective negotiations agreement contains in Appendix "A" the salary schedules for faculty who are on "10-month appointments" and those on "12-month appointments" (J-1). The overwhelming number of faculty are on 10-month contracts or appointments, and the Hearing Examiner finds that the 32 weeks of instruction under 10-month contracts has in academic years prior to 1978-79 occurred between September 1 and June 30. There is no dispute, and the Hearing Examiner finds, that faculty on 10-month contracts have not in the past performed work in June.

10. There are several references in the Staff Handbook (J-2) to dates on or before September 1 regarding operative events in the academic year (see pp. 12-14, 19 and the Faculty Council By-Laws appended thereto at pp. 63 and 65).

THE ISSUES

1. Did the Respondent violate the Act when it unilaterally promulgated the calendar for the 1978-79 academic year, which provided that the Fall semester would commence on August 30, 1978 rather on or after September 1 as had been the consistent practice in prior years?

2. Did the Respondent violate the Act by refusing to negotiate the "impact" of the calendar change for the 1978-79 academic year?

DISCUSSION AND ANALYSIS

Positions of the Parties

The Charging Party in its brief contends that the Respondent violated Subsections (a)(1) and (5) of the Act by refusing to negotiate "the impact of the work year extension" (emphasis supplied) and urges that the Commission should award two days' pay for all affected faculty members. (See also J-4). Although appearing to recognize the right of the Respondent to establish the academic calendar in the first instance, without prior negotiations with the Charging Party, the Charging Party cites and discusses at length New Jersey court decisions which have rejected actions by public employers that have unilaterally extended or reduced the hours or days of work of public employees without negotiating the initial decision with the public employee representative. 5/ The Charging Party quotes extensively from the Appellate Division's decision in Woodstown-Pilesgrove, which was a case involving a unilateral change by the employer with respect to the day before Thanksgiving, converting it to a full day from what had in the past been a half-day. The Appellate Division there rejected the employer's argument that its action constituted a non-negotiable change in school calendar, as had been recognized by the New Jersey Supreme Court to be a managerial prerogative in Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10 (1973). (See Charging Party's brief, pp. 9-11). Finally, the Charging Party cites several Commission decisions involving unilateral changes in the work day or year, which were found to be violations of the Act. 6/

The Respondent contends that the adoption of a school calendar, which may be different from prior calendars, is not negotiable, citing Ridgefield Park

5/ Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 149 N.J. Super. 346 (App. Div. 1977), rev'd. on other grounds, 78 N.J. 1 (1978); In re Piscataway Township Board of Education, 164 N.J. Super. 98 (App. Div. 1978); Piscataway Township Board of Education v. Piscataway Township Education Association, 164 N.J. Super. 102 (App. Div. 1978); Board of Education of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association, 164 N.J. Super. 106 (App. Div. 1978) and In re Byram Township Board of Education, 152 N.J. Super. 12 (App. Div. 1977).

6/ North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (1978); City of Garfield, P.E.R.C. No. 79-16, 4 NJPER 457 (1978); Cherry Hill Board of Education, P.E.R.C. No. 79-18, 4 NJPER 462 (1978).

Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978); Belvidere Board of Education, P.E.R.C. No. 78-62, 4 NJPER 165 (1978); Edison Township Board of Education, P.E.R.C. No. 78-53, 4 NJPER 151 (1978); and Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976). With respect to the impact of the Respondent's calendar decision upon unit members represented by the Charging Party, the Respondent, citing Maywood Board of Education v. Maywood Education Association, __ N.J. Super. __ , 5 NJPER 171 (App. Div. 1979), pet. for certif. pending, Docket No. ____, 7/, contends that even "impact" is not negotiable. In the alternative, the Respondent argues that on October 27, 1978 and again on November 8, 1978 it offered to negotiate "impact" under the criteria of the Commission's decision in Edison Township Board of Education, supra (J-7), but under date of November 13, 1978 the Charging Party rejected this offer (J-8).

The Respondent Did Not Violate The Act When It Unilaterally Promulgated The Calendar for The 1978-79 Academic Year, The Fall Semester of Which Commenced August 30, 1978, Notwithstanding The Prior Practice of Commencing on or After September 1

The Hearing Examiner finds and concludes that the Respondent Institute did not violate Subsections (a)(1) and (5) of the Act in May 1978 when it unilaterally, and without negotiations with the Association, promulgated the calendar for the 1978-79 academic year. This was plainly the exercise by the Institute of a managerial prerogative, i.e., major educational policy decision, of the type clearly recognized by the New Jersey Supreme Court in Burlington County College Faculty Association, supra. It is of no moment that the commencement of the Fall semester for 1978-79 was August 30, notwithstanding that in all prior years, based upon the instant record, the academic year had not commenced prior to September 1. There was plainly no obligation on the part of the Respondent to negotiate the relevant dates on the 1978-79 academic calendar with the Charging Party.

The cases cited by the Charging Party 8/ do not compel a contrary result. Galloway, Piscataway, Woodstown-Pilesgrove and Byram, as well as the Commission decision cited by the Charging Party, 9/ stand collectively for the proposition

7/ See also, Cinnaminson Township Board of Education v. Cinnaminson Teachers Ass'n., __ N.J. Super. __, 5 NJPER __ (App. Div. 1979) following Maywood, supra.

8/ See footnote 5, supra.

9/ See footnote 6, supra.

that changes, whether an increase or decrease, in the hours, days or months of work in a given year are mandatorily negotiable in the first instance.

In the instant case, the record establishes that the Institute's conduct in May 1978 pertained solely to the 1978-79 academic calendar and in no way involved the number of hours, days or months that the faculty members were expected to work in the academic year 1978-79. Notwithstanding that the Fall semester was to commence on August 30 rather than September 1, the 10-month faculty members were required to provide only 32 weeks of instruction, as in the past, pursuant to the 1972 resolution of the State Board of Higher Education (R-4).

Thus, with respect to the calendar decision, supra, the Respondent did not violate Subsections (a)(1) and (5) of the Act.

The Respondent was Obligated Under The Act To Negotiate The "Impact" Of Its Calendar Decision and This Obligation Was Fulfilled On October 27 and November 8, 1978 When It Offered To Negotiate With The Charging Party, Based Upon The Commission's Decision In Edison Township, Which The Charging Party Rejected Under Date Of November 13, 1978

The Respondent urges that it was under no obligation to negotiate the "impact" of its calendar decision by reason of the Appellate Division decision in Maywood, supra. The Appellate Division in Maywood was confronted with a "RIF" (reduction-in-force) of tenured teachers and held that there was no obligation on the Board to negotiate the "impact" of the "RIF" upon the remaining teachers. Subsequently, another panel of the Appellate Division in Cinnaminson, supra, followed the holding in Maywood in a case involving the "RIF" of non-tenured teachers.

The Hearing Examiner herein elects to distinguish Maywood and Cinnaminson, based upon the fact that the instant record does not involve a "RIF", but rather involves faculty members who have remained employed but who, nevertheless, may have suffered adversely from the Respondent's calendar decision for the 1978-79 academic year. Accordingly, the Hearing Examiner finds and concludes that there was an obligation on the part of the Respondent to negotiate the "impact" of its decision upon faculty members for the 1978-79 academic year. 10/

10/ Burlington County College Faculty Association, supra, 64 N.J. at 12; Rutgers, The State University, supra, 2 NJPER at 17; Edison Township Board of Education, supra, 4 NJPER at 151, 152.

On October 27, 1978, as confirmed in a letter dated November 8 (J-7), the Respondent Institute offered to commence "impact negotiations" under the criteria of the Commission's decision in Edison Township Board of Education, supra, and a subsequent decision involving the same party, P.E.R.C. No. 79-1, 4 NJPER 302 (1978). 11/

The Charging Party confirmed by letter dated November 13, 1978 (J-8) its rejection of the Respondent's offer to negotiate "impact" under the criteria of Edison Township, supra. Instead, the Charging Party contended that court decisions cited by it supported its position that the Respondent was obligated to compensate all 10-month faculty members two days' pay for reporting early, August 30, 1978. The Hearing Examiner finds and concludes that by its letter of November 13 the Charging Party has waived its right to compel negotiations with the Respondent with respect to "impact". While waivers are not lightly found by the Commission, 12/ a waiver may be found where a party's conduct is clearly and unequivocally manifested. 13/

In conclusion, the Respondent is absolved from having to negotiate the matter of "impact" of its calendar decision and has not, therefore, violated Subsections (a)(1) and (5) of the Act.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Institute did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by its unilateral decision to promulgate the academic calendar for 1978-79 nor by its conduct with respect to "impact" negotiations thereafter.

11/ The Commission in the latter Edison Township case stated, inter alia, that "The personal and financial welfare of employees is obviously included within the meaning of the phrase terms and conditions of employment...Requiring a public employer to negotiate the impact of its managerial decisions does not alter or expand the negotiation duty. Only actual terms and conditions of employment are negotiable...It is this effect or impact which must be negotiated..." (4 NJPER at 303).

12/ See North Brunswick Township Board of Education, supra, 4 NJPER at 452.

13/ See Township of West Windsor, H.E. No. 79-38, 5 NJPER 137, 139; aff'd., P.E.R.C. No. 79-79, 5 NJPER 193 (1979).

RECOMMENDED ORDER

The Respondent Institute not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

DATED: June 18, 1979
Trenton, New Jersey

Alan R. Howe
Hearing Examiner