P.E.R.C. NO. 86-132

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-84-110-61

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by South River Education Association against the South River Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the salary and hours of Caroline Lineback. The Commission, however, finds that the reduction was consistent with an established past practice.

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SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Wilentz, Goldman & Spitzer, Esqs. (Steven J. Tripp, of Counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs. (Arnold S. Cohen, of Counsel)

DECISION AND ORDER

On October 17, 1983, the South River Education Association ("Association") filed an unfair practice charge against the South River Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1),(3) and (5),[1/] when it unilaterally reduced the salary

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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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority

Footnote Continued on Next Page

of a teacher, Caroline Lineback.

On December 21, 1983, a Complaint and Notice of Hearing issued. The Board then filed an Answer. It admits reducing Lineback's salary, but denies the reduction was unlawful. The Board also pleads several affirmative defenses. It asserts that the salary reduction accompanied a lawful reduction in force; it had no obligation to negotiate over either reduction; and the Association waived any right to challenge the reduction by failing to challenge it before the Commissioner of Education. It further asserts that the Commission has no authority to determine the bona fides of a reduction in force.

On March 28, 1985, Hearing Examiner Marc F. Stuart conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by June 17, 1985.

On August 26, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-9, 11 NJPER 619 (¶16216 1985) (copy attached). He found that the Board had unilaterally reduced Lineback's hours and salary by eliminating an assigned duty period and reducing her compensation accordingly. Also, he found no

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1/ Footnote Continued From Previous Page

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."

established practice permitting this action. He concluded that the Board had a managerial prerogative to eliminate a portion of Lineback's schedule, but its failure to negotiate compensation after the reduction violated subsections 5.4(a)(1),(3) and (5). He recommended that Lineback's previous salary be restored and back pay be awarded.

On September 20, 1985 the Board filed exceptions. It asserts that past practice enabled it to prorate compensation for part-time positions. Specifically, it notes that for each period -- whether teaching, preparation, or assigned duty, -- a teacher, is paid 1/8 of the full-time salary. Alternatively, it asserts that because any obligation to negotiate is based on a narrow exception to a past practice, the proper remedy would be an order directing the Board to negotiate.

On October 20, 1985 the Association filed cross-exceptions. It asserts that the Board had to negotiate over reductions in Lineback's hours and compensation. Alternatively, it asserts that even if the Board had a right to reduce hours, it was still obligated to negotiate salary. As a remedy, it seeks restoration of her 5/8's position and back pay.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-5) are accurate. We adopt and incorporate them here.

We first consider whether the Board had a managerial prerogative to reduce unilaterally Lineback's work hours and

compensation. We conclude it did not. It is well settled that such items are mandatory subjects of negotiations. E.g., Local 195, IFPTE v. State, 88 N.J. 393, 403 (1982); Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1, 6-18 (1973); Piscataway Township Board of Education, 164 N.J. Super. 98 (App. Div. 1978); Elmwood Park Board of Education, P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

The Association has shown a change in these terms and conditions of employment without negotiations. Any change imposed without negotiations violates subsection 5.4(a)(5) unless the employer can prove that the employee representative waived its right to negotiate. A waiver can come in a number of different forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed. For example, if the contract explicitly allows the employer to make the changes, the employee representative has waived any right to negotiate the changes during the term of the contract. In addition, if the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes. We now consider the Board's affirmative defense.

It asserts that it is not obliged to negotiate because a consistent past practice constitutes a clear and unmistakable waiver of the Association's right to negotiate over these changes. See, New

Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), motion for reconsid. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. No. A-2450-77 (4/2/79); see also, Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982). Since 1980, three high school teachers, including Lineback, have had their hours changed and salaries adjusted pro rata. Each prior schedule reduction involved one teaching period alone, or at least one teaching period and some combination of preparation, assigned duty or maintenance periods. However, this is the first time the Board reduced hours solely by eliminating an assigned duty period. The Hearing Examiner found that this reduction did not fall within the parameters of the established practice and that the Board had an obligation to negotiate compensation. We disagree.

The parties own conduct demonstrates that when reductions occurred in both assigned duty periods and teaching periods they were treated similarly. The Association never sought to negotiate any prior schedule reduction. The Association argues that a distinction should be drawn between the reduction of an assigned duty period and a reduction which includes both assigned duties and in teaching periods. We do not find any significance in this distinction which would lead us to conclude that one is permitted but the other unlawful.[2/]

2/ Since it is not in dispute, we do not decide whether the Board may unilaterally reduce a part-time schedule through a reduction which consists solely of duty free time.

Further, part-time teachers have consistently been paid, per period, 1/8 of the full-time salary according to the applicable step on the salary guide. Salary distinctions have never been drawn between teaching, preparation or assigned duty periods. Compare Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82); Newark Bd. of Ed., P.E.R.C. No. 79-24, 4 NJPER 486 (¶4221 1979), P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/26/80). In fact, two other teachers had schedules identical to Lineback's (three teaching and one preparation period) and each was unilaterally paid 4/8 of the applicable salary step, the same as Lineback.

Accordingly, we find that the Board's changes conformed to the parties' prior conduct. Based upon all of the foregoing, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Reid abstained. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986

H.E. NO. 86-9

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

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-84-110-61

SOUTH RIVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the South River Board of Education violated §5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally reduced the hours and salary of one of its teaching staff by eliminating an assigned duty period from the affected individual's schedule, and reduced the individual's compensation accordingly. The Hearing Examiner recommended that the Board's action did not fall within the parameters of established practice. The Hearing Examiner did not dispute the Board's right, as a valid exercise of its managerial prerogative, to eliminate an unnecessary period; however, as a remedy for its unilateral reduction of the affected staff member's salary, the Hearing Examiner recommended that the salary be returned to the status quo ante, and that a back pay award be issued.

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. 86-9

STATE OF NEW JERSEY
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SOUTH RIVER EDUCATION ASSOCIATION,

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Appearances:

For the Respondent
Wilentz, Goldman & Spitzer, Esqs.
(Steven J. Tripp, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISIONS

The South River Education Association filed an Unfair Practice Charge with the Public Employment Relations Commission on October 17, 1983, alleging that the South River Board of Education 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., stating that on or about September 1, 1983, the South River Board of Education unilaterally and arbitrarily reduced the salary of Caroline Lineback, a teaching staff member employed by the Board,

without prior negotiations with the Association. The Association asserts that this conduct violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. 1/

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 21, 1985. Thereafter, a repetition of the pre-complaint settlement negotiations ensued, followed by a series of attempts, on the part of the parties, to stipulate to all pertinent facts attendant to this matter. Ultimately, both endeavors proved fruitless, and pursuant to the Complaint and Notice of Hearing, a hearing was held on March 28, 1985. The parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The Board filed a post hearing brief on June 10, 1985, and the Association filed its post hearing brief on June 17, 1985. The parties waived reply briefs.

Upon the entire record the Hearing Examiner makes the following findings of fact:

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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (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.

1. The South River Board of Education is a public employer within the meaning of the Act (T-8-T-9), and is the employer of the employee who is the subject of this unfair practice proceeding .

2. The South River Education Association is a public employee representative within the meaning of the Act (T-9), and is the majority representative of the subject employee.

3. The Board has had an established past practice of creating part-time positions, where necessary, and compensating these teaching staff members on a pro rata basis according to the applicable step on the salary guide (T-65; T-69; J-5).

4. Caroline Lineback has been a Spanish teacher at South River High School since 1970 (J-5).[2/] From 1970 until 1980, Lineback served as a full-time teacher of Spanish, having five Spanish teaching classes, two assigned duties and one preparation period (J-5). Her salary for that period was the full salary guide rate (J-5). Beginning in 1980, and continuing until 1983, Lineback's position was reduced from a full position to a 5/8 position composed of three Spanish classes, one assigned duty and one preparation period (J-5).[3/] Her salary for that period was

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2/ Exhibit designations are as follows: "C" refers to Commission exhibits; "J" refers to Joint exhibits; "CP" refers to Charging Party's exhibits; "R" refers to Respondent's exhibits.

3/ The record indicates that in April of 1980, Lineback's full time position was abolished and a 4/8 position established in its place; and in September of 1980, the 4/8 position was abolished and a 5/8 position established in its place.

calculated at 5/8 of the full-time salary for the applicable step on the guide (T-61-T-63; J-5).

5. In April of 1983, the Board was experiencing budgetary problems as a result of the voter's defeat, of the Board's proposed budget (T-63-64).[4/] Pursuant to its past practice of assigning salaries of part-time people in direct proportion to the fractional amount of time spent on the job (T-65), and as a result of the "budget crunch," the Board abolished the 5/8 position held by Lineback, and established a 4/8 position in its place, setting the salary at 4/8 of the regular salary for the applicable step on the guide (T-63-65). The new position consisted of three Spanish classes and one preparation period (T 63-65). The new position was identical to the old one in every respect, except that Lineback's non-instructional assigned duty period (monitoring a study hall) was eliminated (T-23). Representatives of the Board declined to indicate why Lineback's position was reduced rather than that of another staff member (T-47); however, the Board, through its Superintendent, acknowledged that this was the first time the Board had ever reduced a teacher's salary by eliminating only an assigned duty period (T-70). Moreover, despite the Board's established practice of abolishing positions, establishing fractional parts thereof and setting compensation at a rate equivalent to the fractional portion established, until the filing of its grievance in

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4/ "T" refers to the trial transcript of March 28, 1985.

this matter, the Association never sought to grieve or challenge any of the Board's previous actions in this regard (T-65; T-69).

6. The record indicates that three other part-time teachers employed by the Board also had teaching loads consisting of instructional assignments and preparation periods,[5/] without any assigned duty periods; however, their schedules had not resulted from the loss of an assigned duty period, only (T-54-T-55; T-66-T-68; T-68-T-69; J-5). The Association never grieved or challenged the Board's decision to implement these three schedules (T-68; T-69).

LEGAL ANALYSIS

Past Practice

The Board asserts a long standing past practice whereby periods have been added or subtracted from a particular teacher's schedule and the teacher's resulting compensation was automatically determined on a fractional basis under the existing salary guide for the teacher's particular placement on the guide. A past practice is not dependent on any written contract provision, is determined by the previous conduct of the parties and is equivalent to any other term and condition of employment. See, In re New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶ 4040 1978), motion for reconsideration denied P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073

5/ It's been the Board's past practice to provide part-time teachers with preparation periods (T-24).

1978), aff'd App. Div. No. A-2450-77 (4/2/79). However, here, the record establishes that the Board's past practice was limited to the increase or reduction of teaching periods only, and the resulting increase or reduction of salary on a pro-rata basis. In this case, and for the first time, the Board reduced a teacher's hours by taking away an assigned duty period, only. No teaching period was involved in this reduction. Accordingly, the issue here is whether this difference is significant. In Caldwell-West Caldwell Education Association v. Caldwell-West Caldwell Board of Education, 180 N.J. Super. 440 (App. Div. 1981), the court stated:

> The Board must have some flexibility in making managerial decisions. The concept of pre-existing practices should not be so rigidly adhered to as to require negotiation of every minute deviation. Unless there is room in the joints for modification and adaption necessary to make the system work, educational machinery would become stalled in endless dispute, grievance procedures, arbitration, unfair labor practice charges, hearings, reviews, and appeals. Here the issue is whether a block of seven mods set aside for math and science and a like block of time set aside for English and social studies could each be extended one mod or 15 minutes a day in exchange for equivalent mods of cafeteria supervision duty. Being inspired primarily by an educational objective, a board of education should have sufficient discretion to make this change without prior negotiations so long as the change is not unduly burdensome.
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> * * *
>
> Thus, we are impelled to rule that a change from preexisting practice which is directly related to an educational purpose

> should not be measured by caliper and micrometer. Boards of education must be given some room to manage between contracts without being forced to bargain over every move they make. There must be some rounding of the edges of contention.
> [Emphasis added; Id at 447-449]

Thus, although the Caldwell-West Caldwell Court reasons in favor of a liberal construction of the concept of past practice, it is careful to place its conclusion in the context of the Board's mandate to carry out its educational objectives. Here, the record indicates that the Board's unilateral reduction of a study hall was not related to any educational purpose. Instead, the Board's motivation was purely financial. Additionally, this was the first time the Board attempted to reduce a teacher's hours and resulting compensation soley by the reduction of an assigned duty period. Thus, I conclude that the reduction of Lineback's teaching schedule from a 5/8 to a 4/8 schedule did not fall within the parameters, of the established practice whereby the affected individuals' compensation would be determined by their pro-rata placement on the salary guide.

Reduction of Hours and Salary

Under In re IFPTE Local 195 v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable if:

> ...(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially pre-empted by statute or regulations; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To

> decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, the subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Here, there can be no doubt that the unilateral reduction of hours and salary affects the work and welfare of public employees. Moreover, the subject has not been fully or partially pre-empted by statue or regulation. Finally, a negotiated agreement in this area would not significantly interfere with the determination of governmental policy. Accordingly, we are dealing with a mandatorily negotiable subject.

Boards of education are entrusted with certain rights and obligations inherent to administrative and certain other bodies which enable them to carry out society's educational mandates. Here, it seems clear that the Board had a right to eliminate an unnecessary study hall if this decision was made as a valid exercise of its managerial responsibility to administer its schools. Cf., In re Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (¶ 16024 1984). However, merely going through the exercise of abolishing positions and creating new ones does not alter the fact the Board has effectively reduced the hours and, as a result, the salary of one of its teaching staff members without first seeking to negotiate the change. In re East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (¶ 13145 1982); In re Hackettstown Bd. of Ed., P.E.R.C.

No. 80-139, 6 NJPER 263 (¶ 11124 1980), aff'd App. Div. Docket No. 385-80T3 (1/8/82), pet. for certif. den., 89 N.J. 429 (3/16/82). In Cherry Hill, supra, cited by the Board in its post hearing brief, this Commission stated, that "[p]ermitting a unilateral reduction in working hours would destroy the parties' explicit agreement concerning work hours and the integrity of the negotiated relationship between working hours and salaries" 11 NJPER at 46. Nevertheless, absent the finding of a past practice, this is exactly what the South River Board has done. As in Cherry Hill, supra, this Board failed to distinguish between its right to unilaterally eliminate a study hall where such an elimination is a valid exercise of its responsibility to administer its schools, and its obligation to negotiate work hours and compensation. Accordingly, it is my recommended decision that the Board's unilateral reduction in Lineback's schedule from a 5/8 to a 4/8 schedule, was a valid exercise of its managerial prerogative; however, the Board violated its obligation to negotiate compensation as a result of this reduction.

ORDER

The South River Board of Education is ordered to:

(1) Cease and desist from unilaterally reducing work hours and resulting compensation of its teaching staff members;

(2) Negotiate in good faith before altering work hours and resulting compensation of teaching staff members;

(3) Immediately negotiate hours and resulting compensation of Caroline Lineback;

(4) Pay to Lineback, the monetary difference, together with interest at 12% per annum, between the amount she would have earned had she worked a 5/8 schedule and the amount she did earn in her 4/8 schedule;

(5) Post in all places where notices to employees are customarily posted, copies of the notice marked Appendix A, stating the finding of an Unfair Practice. Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained for a period of at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other material.

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

Marc F. Stuart
Hearing Examiner

Dated: August 26, 1985
Trenton, New Jersey

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 cease and desist from unilaterally reducing work hours and resulting compensation for our teaching staff members.

WE WILL negotiate in good faith before altering work hours and resulting compensation of our teaching staff members.

WE WILL immediately negotiate hours and resulting compensation of Caroline Lineback.

WE WILL pay to Caroline Lineback the monetary difference, together with interest at 12% per annum, between the amount she would have earned had she worked a 5/8 schedule and the amount she did earn in her 4/8 schedule.

SOUTH RIVER BOARD OF EDUCATION
(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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 Telephone: (609) 292-9830