I.R. NO. 87-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-87-66

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Designee of the Public Employment Relations Commission enters an order requiring the Matawan-Aberdeen Regional School District Board of Education to restore certain altered terms and conditions of employment to the status quo ante.

The Matawan Regional Teachers Association filed an unfair practice charge alleging that the Board had violated the New Jersey Employer-Employee Relations Act by unilaterally lengthening the workday of teachers at Matawan High School during negotiations for a successor collective negotiations agreement. The Commission Designee found that the Association had established a substantial likelihood of success on the merits and irreparable harm. Accordingly, the Board was ordered to cease and desist from altering terms and conditions of employment of teachers during collective negotiations and to restore the altered terms and conditions of employment (lengthened workday) to the status quo ante, pending the execution of a new agreement or until such time as the parties have exhausted the Commission's impasse resolution procedures. Because the parties were already working under the altered schedule and to enable the Board and the Association to create an orderly transition to the status quo ante, the Commission Designee made his order prospective, to become effective three weeks after its date of issuance.

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Appearances:

For the Respondent
Kenney, McManus, Kenney & Finan, Esqs.
(Malachi J. Kenney, of counsel)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, of counsel)

INTERLOCUTORY DECISION AND ORDER

On September 5, 1986, the Matawan Regional Teachers Association ("Charging Party" or "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Matawan-Aberdeen Regional School District Board of Education ("Respondent" or "Board") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, it is alleged that the Board violated subsections 5.4(a)(1) and (5) of the Act when it unilaterally changed certain terms and conditions of employment of unit employees during negotiations for a successor agreement to the

parties' expired 1983 - 1986 contract.[1/] Also on September 5, 1986 at 3 p.m., the Association filed an Order to Show Cause with Temporary Restraints with the Commission, asking that the Board be directed to show cause why an order should not be immediately entered directing the Respondent Board to rescind its actions changing the teachers' terms and conditions of employment and restoring same to the status quo ante.

On September 5, 1986, at approximately 4 p.m., a hearing was convened before the undersigned Hearing Examiner concerning the Charging Party's request for the immediate issuance of temporary restraints against the Board pending a hearing on the Order to Show Cause. N.J.A.C. 19:14-9.1 et seq. At the conclusion of that hearing, temporary restraints were denied.

An Order to Show Cause was executed and made returnable on September 17, 1986. On that date, I conducted an Order to Show Cause Hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties presented and cross-examined witnesses, submitted exhibits and argued orally at the hearing.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications. The test is twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the requested relief is not granted.2/ Both standards must be satisfied before the requested relief will be granted.

The Charging Party alleges that the Respondent violated the Act by unilaterally changing the workday of the teachers at Matawan High School during negotiations for a successor agreement to the parties' expired 1983-86 contract. The Charging Party states that the Board increased the high school teachers' workday by 10 minutes, increased the student contact time of teachers with homerooms and decreased their preparation time, all without negotiations with the Association. The Association argues that based upon these facts, it has a substantial likelihood of success on the merits of this case. Further, the Charging Party contends that if its requested interim relief is not granted, -- the restoration of the status quo ante concerning the high school teachers' workday -- the Respondent's

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2/ Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); and College of Medicine and Dentistry of New Jersey, P.E.R.C. No. 80-138, 6 NJPER 258 (¶ 11123 1980).

conduct will cause irreparable harm by its interference with the negotiations process.

The Respondent admits the essential facts in the charge -- that in September 1986, it lengthened the workday of high school teachers without negotiating same with the Charging Party. However, Respondent asserts several defenses and argues that under the circumstances of this case, its conduct does not amount to an unfair practice.

The Board contends that faced with several constraining factors: high school enrollment levels, space, staffing and State Department of Education minimum instruction times, it acted to insure compliance with Department of Education requirements while creating the smallest amount of deviation from the 1985-86 high school schedules. Thus, because it acted to insure compliance with statutory requirements, the Board argues that negotiations on the lengthened high school workday were preempted.

The Board further contends that because it had sought negotiations with the Association on a successor agreement -- which negotiations would have included a proposal on a longer high school workday -- and because the Association had refused to commence negotiations on a successor agreement, the Association cannot now complain about the Board's unilateral implementation of the longer high school workday.

Finally, the Respondent Board argued that the Charging Party had not been harmed by the Board's unilateral implementation

of the new work schedule. The Board contends that the lengthened workday was unavoidable, given the various scheduling factors surrounding this case. Therefore, the Board argues, even had the Association negotiated this issue (which the Board contends it [the Association] chose not to do), the result would have been the same i.e. a longer workday. Since the Board is still ready and willing to negotiate compensation, the Board argues that no irreparable harm has occurred herein.

* * *

The record reveals the following facts with regard to the Charging Party's application for interim relief.

The Board and the Association are parties to an expired collective negotiations agreement which covers a unit of all certified personnel for the period from July 1, 1983 through June 30, 1986.

As early as 1984, the Board, through its Administration and outside consultants, began studying the issue of reorganization. On October 28, 1985, the Board passed a resolution to reorganize the Matawan School District. Among other things, the plan provided that two school buildings would be closed and that 9th grade students and teachers would be transferred to the high school building where previously only grades 10, 11 and 12 had been taught. The reorganization was to take effect in September 1986.

Because of the influx of 250-300 more students into the high school, the Board, the Association and the community generally all realized that this would present a logistical scheduling

problem. Apparently, the high school facility was already being taxed somewhat by the 10th, 11th and 12th grade classes.

Subsequent to the Board's passage of the district reorganization plan, in the fall of 1985, district administrators conducted meetings at various school facilities with staff and students to discuss and explain the effects of the reorganization on them. At those meetings, unit members and Association leaders were informed that a longer student day (nine periods) was very likely to result from the reorganization. Further, they were advised that teachers' schedules would be "staggered" (i.e., some teachers would cover periods 1-8 while others would cover periods 2-9) in order to cover the instructional schedule and comply with contractual requirements (Exhibits CP-6 and CP-7 and Tr. at pp 60-65, 71-75, 123-132, 168-169).

In January 1986, the school district Administration issued a public report to the Board in which the necessity for a nine period instructional (or student) day was set forth. Sometime after January 1986, the Board's Negotiations Committee became aware that a lengthened work day would be necessary for teachers in the high school. In March 1986, the Negotiations Committee formulated and approved bargaining proposals to address this issue in collective negotiations with the Association. The full Board approved these proposals for presentation to the Association in May 1986.

Board Secretary/Business Administrator Quinn was the Administration's team leader in studying and resolving the high

school scheduling problem. Soon after they began studying the problem, the Administration concluded that the 1985-86 high school schedule was inadequate to meet the increased demands created by the transfer of the 9th grade class to the high school. In coming up with its revised high school schedule, the Board had to successfully intermesh a number of factors: (a) the sudden influx of approximately 275 students into the high school building; (b) the number of additional classes needed; (c) the course offerings and actual student selections; (d) an appropriate number of qualified teaching staff; (e) appropriate classrooms; (f) the minimum instruction requirements for high school courses of 40 minutes per day (or 200 minutes per week) imposed by the State Board of Education; and (g) the negotiated workday and workload provisions in the Board's collective negotiations agreement with the Association. The Administration tried to come up with a schedule that would require the minimum deviation from the 1985-86 high school schedule. The Administration stated that the greatest problem in creating an adequate high school schedule was the space limitations of the high school facilities.

The 1985-86 instructional schedule was based upon an "8 1/2 period day," actually constructed as follows:

Homeroom	6	minutes
Period 1	40	"
2	40	"
3	40	"
4	40	"
5	20	"
6	20	"
7	20	"
8	20	"
9	20	"
10	40	"
11	40	"
Passing time between periods	34	"
	380	minute instructional day

The Board's 1986-87 revised instructional schedule was based upon a "9 period" day, actually constructed as follows:

Period 1	40	minutes
2	40	"
3	40	"
4	40	"
5A	20	"
5B	20	"
6A	20	"
6B	20	"
7A	20	"
7B	20	"
8A	20	"
8B	20	"
9	40	"
Passing time between periods	30*	"
	390	minute instructional day

*In order to create an additional 20 minute segment in the middle of the daily schedule, the Board took the 6 minute homeroom period, 4 minutes of passing time and the newly added 10 minute segment to the school day and came up with 20 minutes. The additional 20 minute segment enabled the Board of come up with an <u>additional</u>

instructional slot during the lunch period times when classes can be scheduled. Under the 8 1/2 period schedule, this was not possible. Under the nine period schedule, homeroom period occurred in the opposite "half period" from the lunch period -- for example, if a student's lunch period was 7B, the students' homeroom period was 7A. This change in the instructional schedule enabled the Administration to more completely utilize the high school building's classrooms (Exhibit R-1).

The teachers' workday under both the 8 1/2 period student schedule and the 9 period student schedule begins 5 minutes before the first student segment and ends 5 minutes after the last student segment. The workday under the 1986-87 schedule is 10 minutes longer than it was under the 1985-86 schedule. In 1985-86, the teachers' workday was 6 hours, 30 minutes, running approximately 7:45 a.m. through 2:15 p.m. In 1986-87, the teachers' workday is 6 hours, 40 minutes, running approximately 7:40 a.m. through 2:20 p.m. (Exhibit R-2).

The Administration seriously considered two other schedule variations (Tr. at pp. 28-32). First, they considered using a "staggered" teacher schedule (of 6 1/2 hours per day) over a 9 period student day, where a portion of the faculty would work approximately periods 1-8 and the balance would work approximately periods 2-9. In such a configuration, because of the lessened use of instructional facilities during lunch periods, a substantial portion of the high school faculty (1/3 or approximately 43 of 127

teachers) would be required to teach during both periods 1 and 9. Second, the Administration considered using the same teacher schedule as they had implemented in September 1986 with the elimination of the two five-minute periods of unassigned time occurring before and after the student day. The Administration rejected that schedule variation, concluding that the absence of teachers before the start and after the end of the student day would adversely affect student safety and control (Tr. at pp. 37-40).

In responding to this part of the Board's case, the Association essentially presented three other scheduling variations (in addition to the one implemented by the Board). The Association contends that the use of any one of those variants, in place of or in conjunction with the implemented schedule, would have enabled the Board to have adhered to the parties' expired 1983-86 agreement (Tr. at pp. 60-71, 74-76, 79-80, 138-144, 154, 156-157, 159).

Association Vice President Kosmyna testified that he had previously worked on scheduling problems with Board representatives. He indicated that he had studied the high school scheduling problem and considered a number of factors -- number of students, staff, space, etc. -- and quite candidly admitted that he did not believe that a staggered scheduled could be implemented without having some number of teachers working both first and ninth periods. However, he stated that through careful scheduling, he believed the number of teachers required to work first and ninth periods could be reduced from 43 to 22 (or at most 28). With regard

to those teachers required to work periods 1-9, the Association contended that they could be compensated for the additional time worked under the "overload" provision of the parties' agreement (Exhibit C-9, Article XIV; see also Tr. at p. 93).

At various times and places during discussions between Board representatives and teachers and Association representatives concerning the impact of the addition of the ninth grade to the high school, Board representatives were asked if they had considered hiring more staff and/or renting classroom trailers to augment available space at the high school facility. Quinn testified that adequate staff was not the problem, as the teachers who had taught ninth grade students in the junior high school were transferred over with the students. Space was the problem. Kosmyna said that Administration representatives had said they would rent classroom trailers if they needed more space to accommodate the ninth grade at the high school (Tr. at pp. 60, 144-145).

The Board's proffered reason for declining to eliminate the two five-minute periods of unassigned time (which occurred just prior to and after the student day) from the teachers' day was that they (the Board and Administration) believed adult supervision of the students entering and leaving the building was important to maintain order and promote safety. The Association suggested that the Board could have hired more aides (hall aides, bus aides, etc.) to accomplish this student supervision task. Board Secretary/

Business Administrator Quinn conceded that this was so.[3/]

Also occurring in the fall of 1985 was the Association's request to commence negotiations with the Board for a successor agreement to the parties' 1983-86 contract. After an exchange of correspondence and the Board's submission of negotiations data requested by the Association, the parties held their first negotiations session on May 13, 1986 and then met three times thereafter, on June 4, 1986, June 24, 1986 and with a Commission mediator on August 18, 1986. At these sessions, the primary subject of negotiations was the distribution of residual monies from the $18,500 minimum teaching salary legislation ("18/5"). The parties also discussed procedures for negotiations of a successor agreement.

During these negotiations, the Association advised the Board that it would only submit proposals for a successor agreement to the Board if there was a simultaneous exchange of negotiations proposals. Further, the Association stated that it was unwilling to

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3/ The Board contended at the hearing that aides cannot be responsible for the supervision of pupils except in the presence of certificated staff members. Subsequent to the hearing, the Board cited N.J.A.C. 6:11-4.5 in support of its argument. The Association argued against the interpretation advanced by the Board and contended that even assuming that the Board's argument is correct, building administrators could fulfill the rule requirement. See N.J.A.C. 6:11-4.5 and Scruspski and Soden v. Warren Twp. Bd. of Ed., Somerset County, 1977 SLD 1051 (1976).

move on to the negotiations of a successor agreement until the parties resolved the issue of the distribution of the residual 18/5 funds. The Board agreed to the simultaneous exchange of proposals and agreed to promptly provide the Association with requested salary data for purposes of negotiations concerning the 18/5 monies.

After the June 24, 1986 session, the Board declared an impasse existed and requested a mediator from this Commission. After it was clarified that the parties were at impasse concerning only the 18/5 issue, a mediator was assigned to this matter. After the August 18, 1986 session, the parties were still unable to reach agreement on the distribution of the residual 18/5 monies.

On August 22, 1986, the Board advised the Association that due to the refusal by the Association to exchange proposals on a successor agreement since May 1985, the workday for high school teachers would be increased, due to the inclusion of the ninth grade at the high school. The Board stated that in order to accommodate the number of students at the high school in a limited space, it had become necessary to add 10 minutes to the teachers' workday. On September 2, 1986, all high school teachers (127 teachers) were given work schedules which included an increase of 10 minutes in their workday over what it had been under the expired contract covering the 1985-86 school year. In addition, the 48 high school teachers who were assigned homeroom duty also received a 10 minute increase in pupil contact time.

The Board argues that the Association has but proffered several scheduling alternatives and has demonstrated nothing thereby.

* * *

The Hearing Examiner does not agree with the Board's argument that the changes made herein were not negotiable because the Board was acting to insure compliance with a State Board of Education regulation. Compliance with the 200 instructional minutes per week requirement would not, even under the circumstances of this case, preempt negotiations on the issue of work schedule and workload (Tr. pp. 50-60). Woodstown-Pilesgrove Reg. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582 (1980); Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶ 15312 1984); Wanaque Borough Dist. Bd. of Ed., P.E.R.C. No. 80-13, 5 NJPER 414 (¶ 10216 1979).

Based upon this record, I am unable to conclude that the scheduling option which the Board selected and unilaterally implemented in September 1986 was the only feasible available alternative under the circumstances of this case. It appears that there were other feasible choices here available to the Board and that such choices were consonant with the terms of the parties' expired agreement.

* * *

The Board argues that the Association is not entitled to equitable relief because it was at least in part the Association's own conduct which created the necessity for unilateral

implementation by the Board of a lengthened teacher workday. The Board asserts that because of the Association's position in negotiations -- that it would not exchange negotiations proposals concerning a successor agreement until the parties had resolved the issue of distribution of residual 18/5 monies -- the Board was deprived of the opportunity to timely negotiate concerning a revised high school teacher workday. The Board asserts that a lengthened teacher workday was one of its negotiations proposals. Thus, the Board contends that the Association has "unclean hands" in this regard and cannot obtain equitable restraints against the Board.

In January 1986, the Board decided upon a nine period student day at the high school. Prior to March 1986, the Board and its administrators had planned to use a staggered teacher work schedule to cover the nine period day. The affected teachers and the Association's leadership were clearly and repeatedly informed that the high school's nine period instructional day would be covered by some variant of a staggered teacher work schedule (Tr. at pp. 60-65; Exhibits CP-1, CP-6 and CP-7). The discussions of the staggered work schedule all presumed that such a schedule would comply with the parties' agreement. In March 1986, the Board concluded that, based upon all considerations, it needed a lengthened teacher workday to best cover the nine period student day. The Board was aware that this would require an alteration of the existing collective negotiations agreement.

At the same time that the "scheduling events" were transpiring, the parties were gearing up for and beginning their negotiations for a successor collective negotiations agreement. In late September 1985, the Association requested the commencement of negotiations; eventually, in May 1986, the parties held their first negotiations session. At that meeting, the Association presented its position on negotiations procedures or "ground rules" -- simultaneous exchange of proposals and no negotiations for the successor agreement (1986-87) until the 18/5 monies were settled (technically an 1985-86 issue). The Board agreed to, or at the least, acquiesced in, these procedural proposals. Accordingly, at their meetings in May, June and August, the parties tried (unsuccessfully) to resolve the 18/5 issue. The parties never reached substantive negotiations on the successor contract.

Clearly, the high school scheduling issue was an important one to the Board. Board representatives stated on the record herein that they had wanted to resolve this matter during contract negotiations with the Association. Regardless of the Association's position on the 18/5 matter, the Board did not attempt to broach the subject of the high school work schedule with the Association, even as the negotiations wore on, closer to September.

As these events were developing, both parties realized their negotiations had bogged down. However, the Board was aware of the importance that the negotiations proceed so as to enable the parties to <u>bilaterally</u> resolve the scheduling issue. The

Association then believed that the scheduling issue would be handled by using a staggered work schedule within the limits of the parties' expired agreement.[4/] Thus, it may well have viewed this issue without particular urgency (Tr. at p. 132). Based upon these circumstances, as set forth in this record, I am unable to conclude that the Charging Party would be estopped from receiving interim relief.

4/ The Association contends it was not aware that the Board was going to unilaterally increase the workday of high school teachers and the pupil contact time of high school homeroom teachers until the issuance of the Board's announcement on August 22, 1986. Prior to that time, the Association asserts it believed, as the Board had indicated, that a staggered schedule would be used and that it would comport with the parties' agreement.

The Board sought to show that the Association was aware (prior to August 1986) of the Board's negotiations proposal to lengthen the high school workday and put on a witness to establish that fact. The Association countered this testimony with its own witness. Beyond this contradictory testimony, the testimonial and documentary record elsewhere is replete with references to what were the Association's impressions and beliefs concerning how the Board would cast the high school schedule in order to accommodate the influx of ninth graders -- the Association was informed by Board representatives that some variant of a staggered schedule would be used in the high school which would conform to the 6 1/2 hour day set forth in the parties' agreement (Tr. at pp. 123-132; Exhibits CP-1, CP-6 and CP-7). Indeed, it appears that the Board and most of its own agents had this same impression until March 1986. Some Administration members apparently held that belief until at least the end of the 1985-86 school year (Exhibit CP-1). Further, the record does not indicate that the Board had ever submitted (prior to August 22, 1986) a written proposal to the Association concerning the high school work schedule. Accordingly, based upon this record, I am unable to impute to the Association definite knowledge of the Board's increased high school work schedule proposal prior to August 1986 (Tr. at pp. 177-187).

* * *

In considering interim relief requests in unfair practice cases alleging unilateral changes of terms and conditions of employment, we are guided by the New Jersey Supreme Court's decision in Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978). The Court stated:

> Our Legislature has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees. It has incorporated a rule similar to that of Katz in the following provision of N.J.S.A. 34:13A-5.3:
>
> > Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.
> >
> > * * *
>
> ...Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative.

Galloway, supra, at 48.

Based upon the record in this emergent proceeding and all of the foregoing, I conclude that the Association has demonstrated a substantial likelihood of success on the merits and that irreparable harm will occur if the requested relief is not granted. State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶ 12235 1981), County of Morris, I.R. No. 85-12, 11 NJPER 271 (¶ 16096 1985). Accordingly, I

am issuing an order restraining the Board from altering terms and conditions of employment of teachers during the negotiations for a successor agreement and requiring the Board to restore the altered terms and conditions of employment to the status quo ante pending execution of a new agreement or until such time as the parties have exhausted the Commission's impasse resolution procedures. See Harrison Township, I.R. No. 83-3, 8 NJPER 462 (¶ 13217 1982); Mainland Reg. H.S. Dist. Bd. of Ed., I.R. No. 83-9, 8 NJPER 620 (¶ 13295 1982); Cf., Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶ 11086 1980) and City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); but see, County of Union, I.R. No. 86-26, 12 NJPER 565, (¶ 17213 1986).

However, the Hearing Examiner is aware that the school year commenced on or about September 3, 1986. Thus, the parties have been working with the changed schedule for about three weeks. While I am concerned that this order be promptly implemented in order to promote the policies of the Act, I am equally concerned that an order from this Commission shall not inappropriately interfere with students' education. Accordingly, to enable the Board, the Association and the teachers at Matawan High School to create an orderly transition to the status quo ante during the course of negotiations for a new agreement, this order shall be prospective, to take effect at the close of business on October 17, 1986.

ORDER

IT IS HEREBY ORDERED that the Matawan-Aberdeen Regional School District Board of Education cease and desist from altering terms and conditions of employment of teachers (i.e., lengthened workday and increased student contact time of high school teachers) during the negotiations for a successor agreement and restore the altered terms and conditions of employment to the status quo ante. This order shall be effective as of the close of business on October 17, 1986.

BY ORDER OF THE COMMISSION

Charles A. Tadduni
Commission Designee

DATED: September 26, 1986
Trenton, New Jersey