P.E.R.C. NO. 79-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

NORTH BRUNSWICK EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding initiated by the Educational Secretaries Association, the Commission concludes, in agreement with the Hearing Examiner, that the Board of Education had acted in violation of N.J.S.A. 34:13A-5.4(a)(5) and derivatively N.J.S.A. 34:13A-5.4(a)(1) when it unilaterally, without negotiations with the Association, changed the shift hours of Carol Johnson, a keypunch operator employed by the Board, on October 3, 1977. The Commission affirmed that the matter of shift hours was a required subject of collective negotiations and dismissed exceptions filed concerning this particular issue by the Board of Education.

The Commission in sustaining exceptions filed by the Association determined however that the Hearing Examiner erred in finding that Carol Johnson was suspended and terminated solely because of the Board's dissatisfaction with her work attitude and job performance. The Commission found that the Association had established by a preponderance of the evidence that the Board's suspension and discharge of Carol Johnson was motivated at least in part by statutorily protected activities engaged in by Ms. Johnson, i.e. her complaints starting on or about September 21, 1977 relating to changes in her shift hours, and her efforts, including the filing of a grievance, to have her prior working conditions restored. The Commission thus concluded that the Board had violated N.J.S.A. 34:13A-5.4(a)(3) and derivatively N.J.S.A. 34:13A-5.4(a)(1).

Accordingly, the Commission ordered the Board to cease and desist from interfering with restraining or coercing negotiations unit members represented by the Association by refusing to negotiate with the Association in good faith with respect to changes in shift hours of its employees by its unilateral implementation of changes in shift hours of its employees. The

Commission further ordered the Board to cease and desist from suspending or discharging any of its employees to discourage them in the exercise of protected rights under the New Jersey Employer-Employee Relations Act. Additionally, the Board was ordered to restore the status quo within 30 days as to the shift hours of the keypunch operator employed by the Board as they existed prior to October 3, 1977; offer to Carol Johnson a position as keypunch operator with no loss in benefits or salary and make her whole for any monies lost as a result of her illegal suspension and discharge; post notices; and notify the Chairman of the Commission within 20 days of the receipt of the Order in this case what steps the Board was taking to comply with the Commission's order.

P.E.R.C. NO. 79-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-78-110-52

NORTH BRUNSWICK EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

Appearances:

For the North Brunswick Township Board of Education, Borrus, Goldin & Foley, Esqs. (Anthony B. Vignuolo, Esq.)

For the North Brunswick Educational Secretaries Association (Stephen E. Klausner and Jack Wysoker, Esqs.)

DECISION AND ORDER

On November 22, 1977 an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the North Brunswick Educational Secretaries Association (the "Association") alleging that the North Brunswick Township Board of Education (the "Board") 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"). More specifically, the Association in its original charge alleged that the Board unilaterally changed the working hours of Carol Johnson, a keypunch operator employed by the Board, from 8:30 a.m. to 4:30 p.m. (with lunch from 12 noon to 1:00 p.m.) to 11:00 a.m. to 7:00 p.m. (with a lunch hour from 1:15 p.m. to 2:15 p.m.) without prior negotiations with the

Association concerning proposed shift changes. On December 12, 1977 the Association amended its charge to add the allegation that the Board discriminatorily retaliated against Carol Johnson by first suspending and then discharging her when she first strenuously objected to her changed hours to her immediate supervisor on or about September 21, 1977 and then filed a grievance on October 11, 1977 and later helped initiate the filing of the aforementioned November 22, 1977 charge against the Board seeking, in part, the reinstatement of her previous working hours. The above actions were alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (a)(3), and (a)(5).[1/]

It appearing that the allegations of the unfair practice charge, as amended, if true might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 23, 1978. Hearings were held on February 27 and February 28, 1978 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 April 14, 1978.

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; (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.

On July 6, 1978 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 to this decision and made a part hereof. Exceptions and a letter memorandum in support thereof were filed by the Board on July 18, 1978. Exceptions to the report and supporting brief were filed by the Association on July 20, 1978. The Board also filed a reply brief dated July 27, 1978 in response to the Association's exceptions. Pursuant to the request of both parties and in accordance with N.J.A.C. 19:14-8.2 both parties through counsel appeared before the Commission on September 19, 1978 to argue orally with respect to this instant matter. An additional memorandum of law concerning the remedial aspects of this matter was submitted by the Association on September 19, 1978.

The Hearing Examiner found that the Board had acted in violation of N.J.S.A. 34:13A-5.4(a)(5) and derivatively N.J.S.A. 34:13A-5.4(a)(1) when it unilaterally, without negotiations with the Association, changed the shift hours of Carol Johnson on October 3, 1977, which the Hearing Examiner found to be a required subject of collective negotiations in accord with pertinent Commission and judicial decisions. The Hearing Examiner recommended that the Commission order the Board to cease and desist from unilaterally

2/ H.E. No. 79-1, 4 NJPER 269 (¶4138 1978).

implementing changes in shift hours of employees in the negotiations unit represented by the Association, negotiate in good faith with the Association with respect to terms and conditions of employment including the shift hours of employees within the unit represented by the Association, and post appropriate notices. The Hearing Examiner stated in his report that no affirmative order was recommended to restore the status quo with respect to shift hours since the only affected employee was Carol Johnson who was no longer employed by the Board.

The Board in its exceptions asserts in part that the Association clearly and unequivocally waived its right to negotiate shift changes when it agreed to a "zipper clause" in the parties' negotiations agreement,[3/] and furthermore only negotiated a provision relating to the summer hours of unit employees. The Board also argues that past practices within the school district indicated that the immediate supervisor of a particular employee fixed the hours for that employee without the need for prior negotiations on that subject. The Board further asserts that the Hearing Examiner improperly concluded that the mere alteration

3/ Article VII, Section B reads as follows:

> "This Agreement represents and incorporates the complete and final settlement by the parties of all issues which were the subject of negotiations. During the term of the Agreement, neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed the Agreement."

of working hours, when such alteration did not increase the hours of employment, was a required subject for collective negotiations. Lastly, the Board submits that the "unilateral change" issue is moot inasmuch as Carol Johnson, the only affected individual, is no longer employed by the Board of Education.

The Hearing Examiner in his decision further recommended that the Commission dismiss those sections of the instant Complaint against the Board that alleged that the Board had suspended and then terminated Carol Johnson for the filing of a grievance on October 11, 1977 and the original charge of unfair practices on November 22, 1977. The Hearing Examiner found that Johnson was suspended and terminated for independent and permissible reasons. He relied heavily upon the fact that the Board acted to terminate Johnson on November 22, 1978, the day before it had been served with the initial unfair practice charge filed by the Association. The Hearing Examiner further emphasized that the only possible protected activity in which Johnson could have been found to have been engaged was the filing of the grievance contesting her changed hours on October 11, 1977. The Hearing Examiner then concluded that the number of written memos received by Johnson, in part criticizing her work performance and attitude toward her job, before and after the filing of the grievance were about the same. He found that this evidence certainly compromised the Association's position that Johnson's exercise of protected activities under the Act first triggered the Board's efforts to "paper" her personnel file in order to justify its decision to suspend and later fire her. The Hearing Examiner determined that

in light of the above factors and additional record evidence Johnson was suspended and terminated only because of the Board's dissatisfication with her work attitude and performance.

In its exceptions the Association asserts that the record is clear that Carol Johnson was engaged in protected activities when she first strenuously objected to the change in her hours of work in conversations with her immediate supervisor, Joseph Emanski, Manager of Data Processing, on September 21, 1977. The Association maintains that since all of the critical memoranda relied upon by the Board were prepared after the date when Johnson first registered her complaint about her changed hours, it should be inferred, in light of her satisfactory prior work record, that the Board's actions taken against Johnson, including the preparation of critical memoranda attacking her work performance and attitude and her later suspension and termination, were retaliatory in nature becuase of her protected activities in challenging through all means possible the unilateral change in her working hours. The Association submits that the Hearing Examiner, despite his findings of fact and conclusions of law adverse to the Association's position, discounted any alleged dissatisfaction with Carol Johnson by either Emanski or Robert Blessing, the Board Secretary and Assistant Superintendent for Business, prior to the issuance of the first memoranda questioning her negative attitude relating to the shift change issued on September 30, 1977.[4/] The Association

4/ Johnson had been employed as a keypunch operator by the Board since January 16, 1976.

argues that this particular finding considered in light of her favorable evaluation on May 4, 1976, the renewal of her employment contract as recently as June, 1977, and the testimony of Emanski that Johnson's keypunching was satisfactory as late as September 1977, indicated that the Board's announced reasons for terminating her were pretextual. The Association, in part, seeks the immediate reinstatement of Carol Johnson to her prior position with full back pay.

The Board in its reply brief to the Association's exceptions emphasized that the record established that there was dissatisfaction with Johnson's work prior to September 1977 and that her work performance so visibly declined after the change in her hours, as documented by the memoranda received into evidence, as to necessitate her discharge. The Board also concurred with the Hearing Examiner that Johnson's protected activity commenced only when she filed a grievance on October 11, 1977 after she had already received critical memoranda from Emanski.

After careful consideration of the entire record in this matter the Commission concludes, in agreement with the Hearing Examiner that the Board's actions in unilaterally changing the shift hours of Carol Johnson on or about October 3, 1977 without prior negotiations with the Association was violative of N.J.S.A. 34:13A-5.4(a)(5) and derivatively N.J.S.A. 34:13A-5.4(a)(1).[5/] The New Jersey Supreme

5/ See Galloway Board of Education and Galloway Township Ed. Assn, P.E.R.C. No. 77-3, 2 NJPER 254, motion for reconsideration granted, P.E.R.C. No. 77-8, 2 NJPER 284, decision on reconsideration, P.E.R.C. No. 77-18, 2 NJPER 295 (1976), affmd 157 N.J. Super. 74 (App. Div. 1978), for a discussion of derivative violations.

Court in Galloway Township Board of Education and Galloway Township Association of Educational Secretaries, 149 N.J. Super. 346 (App. Div. 1977), affmd in part, rev in part, ___ N.J. ___ (A-132/133 Sept. Term 1977 8/1/78) in pertinent part noted its approval with the Commission's determination, affirmed by the Appellate Division, that altering the hours of employees, even if the number of hours of work remained the same, in certified or recognized negotiations units without prior negotiations was a per se violation of the prescriptions of N.J.S.A. 34:13A-5.4(a)(5) requiring a public employer "...to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit....[6/] The New Jersey Supreme Court in another recent decision noted that the propriety of a contractual waiver of statutory rights, e.g. to negotiate proposed new rules or modifications of existing rules governing working conditions before they are established,[7/] was well established in the federal private sector.[8/] To be given effect, any such waiver must be clearly and unequivocally established and contractual language alleged to constitute such a waiver will not be read expansively.[9/] Applying

6/ See also Board of Education of the Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977), appeal dismissed by stipulation, App. Div. Docket No. A-1035-77 (1978); and Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

7/ N.J.S.A. 34:13A-5.3 states in part that "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

8/ See Red Bank Regional Education Assn. v. Red Bank Regional H.S. Board of Education, 151 N.J. Super. 435, pet. for certif. granted 75 N.J. 529 (1977), affmd ___ N.J. ___ (A-136 Sept. Term 1977, 8/3/78).

9/ United Steelworkers v. NLRB, 536 F.2d 550, 555 (3rd Cir. 1976).

this waiver standard which has been adopted by the Commission[10/] to the instant case we agree with the Hearing Examiner that nothing within the contract between the Board and the Association establishes that the Association waived any duty on the part of the Board to negotiate a change in the hours of employment of unit employees. There is ample judicial precedent to establish that the negotiation of a standard "zipper clause" such as that found in the contract between the Board and the Association [11/] does not represent the waiver of a statutory right to negotiate concerning specific unilateral changes in an employee's terms and conditions of employment.[12/] Moreover the existence of a contractual provision specifically referring to reduced summer hours certainly does not indicate that the Association agreed thereby that the Board could unilaterally establish the hours of work during the remainder of the school year for unit employees.

The Commission further finds that the record does not prove the Board's contention that past practices within the district permitted supervisors to regulate the hours of employees under their supervision without being subject to the constraints of collective negotiations. At most the record merely indicates that the hours of employees in the school district may have differed from school to school because of differences in pupil instructional time.

Lastly the Commission finds to be without merit the Board's exception that the subsequent suspension and termination of

10/ State of New Jersey v. Local 195, IFPTE and Local 518, SEIU, P.E.R.C. No. 77-40, 3 NJPER 78 (1977), affirmed 6/12/78 App. Div. Docket No. A-2681-76. (Unpublished Opinion).

11/ See footnote 3, supra.

12/ C & C Plywood v. NLRB, 385 U.S. 421, 64 LRRM 2063 (1967).

Carol Johnson rendered moot any "refusal to negotiate" violation since she was the only employee affected by the shift change implemented by the Board. The Supreme Court in Galloway Township Board of Education v. Galloway Township Education Assn., 149 N.J. Super. 352 (1977), ___ N.J. ___ (A-134/135 Sept. Term 1977 8/1/78) agreed with a long line of federal private sector cases that had found that judicial enforcement of orders of the National Labor Relations Board are normally not to be denied because of mootness allegedly resulting from events occurring after the commission of unfair practices, in part to prevent the recurrence of similar unfair practices, a position that the Commission exposed in that case. Moreover the Board notes that its mootness argument was predicated on the assumption that the Commission would affirm the Hearing Examiner's conclusions of law relating to the legality of the discharge of Carol Johnson. For the reasons to be hereinafter set forth we cannot affirm the Hearing Examiner's determination concerning that issue.

The Commission in analyzing the appropriateness of the Hearing Examiner's proposed remedy relating to the "change in shift hours" issue has chosen to modify that remedy. We believe that it would best effectuate the policies of the Act if the status quo concerning the shift hours of the district's keypunch operator as it existed prior to the October 3, 1977 change were restored during the pendency of any negotiations on that subject so that the Board may not benefit from its improper activity. Our decision in this regard would have been the same even if we had adopted the

Hearing Examiner's recommendation that all allegations within the Complaint concerning Carol Johnson's discharge be dismissed. As affirmed by the Supreme Court in its decision in Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, supra, a majority representative represents individuals in particular job titles and its responsibility directly relates to those classifications, not only to particular incumbents in those positions. To illustrate the effect of this statement hypothetically, if the hours of Carol Johnson had been changed unilaterally and Johnson as a result had voluntarily resigned, the Association could insist upon the restoration of the previous hours worked by Ms. Johnson, pending negotiations on that issue, notwithstanding the willingness of a new employee occupying that title to work the altered hours.[13/]

Moving on to the exceptions of the Association relating to the charges concerning the discharge of Carol Johnson we conclude that the Hearing Examiner erred in finding that Ms. Johnson was suspended and terminated solely because of the Board's dissatisfaction with her work attitude and job performance. We find that the Association has established by a preponderance of the evidence that the Board's suspension and discharge of Carol Johnson was motivated at least in part by statutorily protected activities engaged in by Ms. Johnson, i.e. her complaints starting on or about September 21, 1977 relating to changes in her shift hours and her efforts, including the filing of a grievance, to have her prior working conditions re-

13/ The hours need not be restored if the Association on behalf of the presently employed keypuncher agreesto retain existing hours.

stored, in violation of N.J.S.A. 34:13A-5.4(a)(3) and derivatively N.J.S.A. 34:13A-5.4(a)(1).[14/]

The attorney for the Board repeatedly asserted, and the Hearing Examiner so found, that the only possible protected activity in which Johnson could have been found to have been engaged was the filing of her grievance on October 11, 1977.[15/] The existence of memoranda documenting alleged work performance and attitudinal problems of Carol Johnson prior to October 11, 1977 was given virtually dispositive effect by the Hearing Examiner in determining that the record did not support the Association's contentions that Johnson's complaints about her changed hours and efforts to restore same triggered a wave of critical memoranda prepared to build a pretextual case against her. We disagree, however, with the Hearing Examiner's decision in this regard. It is evident to us that Ms. Johnson first engaged in protected activity when she first strenuously objected to any change in her hours to Joseph Emanski, her immediate supervisor, on or about September 21, 1977.[16/] All critical memoranda served on Ms. Johnson and submitted by the Board to support its suspension and discharge

14/ See In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) for a discussion of the standards that the Commission applies in determining whether there has been a violation of subsection (a)(3) of the Act.

15/ Counsel for the Board both during the course of the hearing before the Hearing Examiner and in oral argument before the Commission incorrectly asserted that the Association had not even referred to any earlier dates at which time Johnson had started to complain about altered shift hours. See 2/27/78 transcript, page 160 and transcript before the Commission pages 27 and 28.

16/ We find that individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act. See Dreis v. Krump Mfg. Co., 545 F.2d 320, 93 LRRM 2739 (7th Cir. 1976) and NLRB v. Interboro Contractors Inc., 388 F.2d 455, 67 LRRM 2083 (2nd Cir. 1967).

decisions were prepared subsequent to that date.

There are specific facts in the record that we find inferentially support our conclusion that the Board was improperly motivated to retaliate against Carol Johnson by suspending and then firing her in reprisal for her conduct protesting and objecting to changes in working conditions not agreed upon by the Board and the Association.

There were no critical written memoranda or evaluations prepared and communicated to Carol Johnson during her first 21 months of employment with the Board from January 21, 1976 to September 29, 1977. During this time she was never informed that her attitude or work performance had in any way jeopardized her continued employment with the Board. After she objected to her superiors about her changed hours and evinced a desire to do everything possible to restore her previous hours she was the recipient of approximately a dozen critical memoranda within approximately a six week period of time, four of which were prepared within a week of her filing of the October 11, 1977 grievance against the Board concerning the hours question. These documents in part expressed disappointment about her attitude protesting her shift change, criticized her for discussing the matter of her shift change with an NJEA consultant on the phone during working hours (although personal phone calls had not been forbidden in the past), noted that on one occasion the NJEA consultant was asked to leave the computer area during working hours when that individual sought to discuss the shift change episode with Carol Johnson, called her to task for asking about

"break time" policies, and noted dissatisfaction with Johnson's work procedures although these procedures had not been criticized in the past.[17/] Although other memoranda referred to keypunching mistakes alleged to have been committed by Ms. Johnson and criticized her worsening attitude, the essence of these documents concerns her unwillingness to accept her altered hours without complaint and her efforts to challenge the Board's directive at every level. Her November 7, 1977 letter of suspension (Exhibit R-16) in part refers to her "intimidating actions toward [her] supervisor... and failure to accept constructive criticism without intimidation...." One can only infer from the record that Carol Johnson's "intimidation" consisted of "threats" to do everything possible to challenge the change in her hours, which we today have found to have been unilaterally changed in violation of the Act.

Carol Johnson was only formally evaluated once during her employment with the Board and on that occasion on May 4, 1976 she received a favorable report. Her supervisor had noted the following: "I am very pleased with your progress in the short time you have been here." The record also supports the Hearing Examiner's conclusion that he had discounted any alleged dissatisfaction with Johnson's work performance prior to the issuance of the first critical memorandum on September 30, 1977, the day after Johnson had expressed her dissatisfaction with her new hours and threatened to sue the Board Secretary. Carol Johnson's last contract had been

17/ See Exhibits CP-3, R-2, R-10, R-11 and R-12.

renewed as late as June 23, 1977 despite her non-tenured status and the testimony of Board witnesses that there had been problems with her attitude months prior to the change in her hours.

Testimony from Robert Blessing, the Board Secretary and Assistant Superintendent for Business, establishes that as early as December 1976 he explained to Johnson's immediate supervisor, Joseph Emanski, that if Emanski had any concerns about the attitude and work performance of Johnson he should document these concerns. Emanski, however, did nothing to document Johnson's "shortcomings" until after she had acted to fight the change in her hours.

The Commission does not doubt that Carol Johnson's work performance worsened after her hours were changed on October 3, 1977.[18/] It may well be that the Board had some valid reasons to discharge Johnson in November of 1977. However, we find, for the reasons set forth above, that the Association has met its burden to establish that one of the motivating factors for the Board's decision was Carol Johnson's exercise of her protected rights to complain about, grieve and otherwise challenge the Board's decision to alter -- unilaterally and in derogation of the Act -- her working hours. When one of the motivating factors for an employer's decision is to retaliate against the exercise of protected activities, a violation of the Act will be found, no matter how many other valid reasons exist for an employer's decision.[19/]

18/ It is certainly arguable that her work and attitude would not have deteriorated had her hours not been changed in violation of the Act.

19/ See In re Haddonfield Borough Board of Education, supra, and City of Hackensack v. Winner, Sarapuchiello and Krejsa, P.E.R.C. No. 77-49, 3 NJPER 143, reversed App. Div. Docket No. A-2546-76, pet. for cert. filed by Respondents, Supreme Ct. Docket No. 15,201.

Emanski and Blessing believed that it would be much more efficient to alter the hours of a keypunch operator to accommodate the flow of out of district work. This change in hours as they viewed it was a critical component in maximizing the work product of the data processing center. Once Carol Johnson sought to set aside the decision to change her new hours she was marked for termination. Her particular deficiencies that had been tolerated in the past, apparently without any unfavorable comments being directed at her, suddenly became very intolerable because of her statutorily protected activities.

In summary we therefore reverse the Hearing Examiner's determination that Carol Johnson was suspended and terminated for reasons which were not connected with the exercise of rights protected by the Act. We conclude that the Board violated N.J.S.A. 34:13A-5.4(a)(3) and derivatively N.J.S.A. 34:13A-5.4(a)(1) when it first suspended Carol Johnson for three days without pay and discharged her effective December 23, 1977. We further conclude that Ms. Johnson should be offered reinstatement with back pay to make her whole for her illegal suspension discharge and to effectuate the policies of the Act.

ORDER

Accordingly, for all the reasons set forth above, IT IS HEREBY ORDERED that the North Brunswick Township Board of Education:

1. Cease and desist from:

(a) Interfering with, restraining or coercing negotiations unit members represented by the North Brunswick Township

Secretaries Association by refusing to negotiate with the Association in good faith with respect to changes in shift hours of its employees by its unilateral implementation of changes in shift hours of its employees.

(b) Suspending or discharging any of its employees to discourage employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Within 30 days of the date of this Decision and Order, restore the status quo ante as to the shift hours of the keypunch operator employed by the Board as they existed prior to October 3, 1977, i.e. from 8:30 a.m. to 4:30 p.m. with a lunch from 12:00 noon to 1:00 p.m.

(b) Offer to Carol Johnson without prejudice to any rights or privileges enjoyed by her, a position as Keypunch Operator at the salary level under the current contract between the Board and the Secretaries Association consistent with the level she would be at had she not been discharged, effective December 23, 1977.

(c) Reimburse Carol Johnson monies she would have earned from December 23, 1977 to the time of compliance with the Commission's Order as well as during her three day suspension had she not been discriminatorily suspended and discharged, less all monies actually earned by Ms. Johnson during the same period of time.

(d) Post in all places where notices to employees are customarily posted, copies of the attached notice. Copies of said notice on forms provided by the Commission shall, after being signed by the Board's representative, be posted for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Board to insure that such notices are not altered, defaced or covered over by any other material.

(e) Notify the Chairman, in writing, within 20 days from the receipt of this Order what steps have been taken to comply herewith.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves and Hartnett voted for this decision. Commissioners Hipp, Parcells and Schwartz abstained. None opposed.

DATED: Trenton, New Jersey
October 23, 1978
ISSUED: October 25, 1978

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 negotiations unit members represented by the North Brunswick Township Secretaries Association by refusing to negotiate with the Association in good faith with respect to changes in shift hours of its employees by our unilateral implementation of changes in shift hours of its employees.

WE WILL NOT suspend or discharge any of its employees to discourage employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL within 30 days of the date of this Decision and Order, restore the status quo ante as to the shift hours of the Keypunch Operator employed by the Board as they existed prior to October 3, 1977, i.e. from 8:30 a.m. to 4:30 p.m. with a lunch from 12:00 noon to 1:00 p.m.

WE WIL offer to Carol Johnson, without prejudice to any rights or privileges enjoyed by her, a position as Keypunch Operator at the salary level under the current contract between the Board and the Secretaries Association consistent with the level she would be at had she not been discharged, effective December 23, 1977.

WE WILL reimburse Carol Johnson monies she would have earned from December 23, 1977 to the time of compliance with the Commission's Order as well as during her three day suspension had she not been discriminatorily suspended and discharged, less all monies actually earned by Ms. Johnson during the same period of time.

NORTH BRUNSWICK TOWNSHIP 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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION

Respondent,

- and -

Docket No. CO-78-110-52

NORTH BRUNSWICK EDUCATIONAL SECRETARIES ASSOCIATION

Charging Party.

SYPNOSIS

A Hearing Examiner recommends that the Public Employment Relations Commission: (1) sustain charges of unfair practices against the Board, which alleged that the Board had engaged in an unfair practice when it unilaterally and without negotiations with the Association changed the shift hours of one Carol Johnson on October 3, 1977; and (2) dismiss charges of unfair practices against the Board, which alleged that the Board had suspended and then terminated Carol Johnson for filing a grievance on October 11, 1977 and the original charge of unfair practices on November 22, 1977.

As to the original charge of unfair practices, the Hearing Examiner concluded that under Commission precedent the Board was mandatorily obligated to negotiate with the Association before unilaterally changing the shift hours of Carol Johnson. The leading case cited was Galloway Township Board of Education and Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976), affirmed in pertinent part by the Appellate Division, 149 N.J. Super 346 (1977), cert. granted, 75 N.J. 29 (1977), appeal pending.

The Hearing Examiner, in concluding that the Board had not violated the New Jersey Employer-Employee Relations Act, as amended N.J.S.A. 34:13A-1 et seq, when it suspended and then terminated Carol Johnson, based his conclusion upon the fact that Carol Johnson was not discriminated against in retaliation for having filed a grievance on October 11 or the original unfair practice charge on November 22, 1977. The Hearing Examiner found that Carol Johnson was suspended and terminated for independent and permissible reasons.

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.

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

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION [1/]

Respondent,

- and -

Docket No. CO-78-110-52

NORTH BRUNSWICK EDUCATIONAL SECRETARIES ASSOCIATION

Charging Party.

Appearances:

For the North Brunswick Township Board of Education
Borrus, Goldin and Foley, Esqs.
(Anthony B. Vignuolo, Esq.)

For the North Brunswick Educational Secretaries Association
Mandel, Wysoker, Sherman, Glassner and Weingartner, Esqs.
(Stephen E. Klausner, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 22, 1977 by the North Brunswick Educational Secretaries Association (hereinafter the "Association") alleging that the North Brunswick Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq (hereinafter the "Act"), in that the Board unilaterally changed the shift hours of one Carol Johnson on or about October 3, 1977 without collective negotiations with the Association, which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5). [2/] Under date of December 12, 1977 the charge of unfair practices was amended

1/ As amended at the hearing.

2/ These subsections prohibit employers, their representatives or agents from:
"(1) Interfering with, restraining or coercing employees in the exercise
(cont'd page 2)

to allege, additionally, that after the filing of a grievance by the said Carol Johnson on October 11, 1977, and the filing of the aforesaid unfair practice charge on November 22, 1977, the Board, in retaliation, first suspended and then discharged 3/ the said Carol Johnson, both of which actions are alleged to be violations of N.J.S.A. 34:13A-5.4(a)(1) and (3). 4/

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 23, 1978. Purusant to the Complaint and Notice of Hearing, hearings were held on February 27 and February 28, 1978 in Trenton,New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. A post-hearing brief was filed by the Association under date of April 11, 1978 and by the Respondent under date of April 14, 1978.

An Unfair Practice Charge, as amended, 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 briefs filed by 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 North Brunswick Township Board of Education is a public employer

2/ (cont'd. from page 1)

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."

3/ The suspension was for three days without pay, November 9-11, 1977. The discharge was by Board action on November 22, 1977, which with 30 days required notice was effective as of December 23, 1977 (C-1 and Exhibit "C" thereto).

4/ The Association did not allege that the discharge was a violation of N.J.S.A. 34:13A-5.4(a)(4), which prohibits employers, their representatives or agents from: "Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act." Even if alleged, based upon Findings of Fact Nos. 20 and 21 , infra, there was no violation of subsection (a)(4) of the Act.

within the meaning of the Act, as amended, and is subject to its provisions.

2. The North Brunswick Educational Secretaries Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The parties are governed by a collective negotiations agreement, effective during the term July 1, 1977 through June 30, 1979, pursuant to which the Association is recognized as the majority representative for Secretaries, Clerks, Attendance Officer, Head Bookkeeper, Computer Operator/Keypuncher, Keypunch Operator and Transportation Coordinator (J-1, Article I).

4. Carol Johnson was hired as a Keypunch Operator on January 16, 1976 and was covered by the aforesaid collective negotiations agreement at all times material hereto.

5. At the time of her hire Ms. Johnson was assigned to work from 8:30 a.m. to 4:30 p.m. with lunch from 12:00 noon to 1:00 p.m. These hours of work remained unchanged until October 3, 1977. 5/

6. Ms. Johnson was favorably evaluated on May 4, 1976 (CP-1); she was not evaluated again during the term of her employment. There was no contractual impediment to a second evaluation (J-1, Article IV). The Board's Secretary and Assistant Superintendent for Business, Robert W. Blessing, recommended in June 1977 6/ that Ms. Johnson's contract of employment be renewed for one year.

7. With the prior approval of Mr. Blessing, Joseph Emanski, the Data Processing Manager, and Ms. Johnson's immediate supervisor, informed Ms. Johnson on September 21 that, due to the keypunching needs of the Department, it was necessary to change her shift hours. Her work day of seven hours was to remain unchanged and Mr. Emanski offered Ms. Johnson flexibility in the starting and ending of the work day, suggesting that she could start as early as 10:00 a.m. and end as late as 11:00 p.m. Ms. Johnson stated that it would be inconvenient but that she wanted a few days to think about it, to which Mr. Emanski agreed.

8. When Mr. Emanski had not heard from Ms. Johnson regarding her suggestions as to shift hours by September 28, he issued a memo on that date advising

5/ Article VI, Section F of the collective negotiations agreement provides that: "All 12 month clerical employees to work 6 hours per day during the months of July and August." Although the record is silent, presumably Ms. Johnson worked only until 3:30 p.m. during July and August of 1976 and 1977.

6/ All dates hereinafter are 1977 unless otherwise indicated.

Ms. Johnson that effective October 3 her new hours would be 11:00 a.m. to 7:00 p.m. with a lunch hour from 1:15 p.m. to 2:15 p.m. (R-8).

9. As a result of protests by Ms. Johnson that she would be the only woman working those hours and that she would be alone at night and not safe, a meeting was convened on September 29 with Ms. Johnson, Mr. Emanski and Mr. Blessing in attendance. Ms. Johnson continued to express her dissatisfaction with the proposed change in hours and among other things threatened to sue Mr. Blessing, to which he responded that the contract provided a grievance procedure. Ms. Johnson's suggestion to hire a part-time employee to work until 7:00 p.m. was rejected by Mr. Blessing. Mr. Blessing advised Ms. Johnson that there would be a custodian on the premises during the proposed new shift hours. The result of the meeting was that Mr. Emanski's decision to change Ms. Johnson's hours remained unchanged.

10. At the request of Mr. Blessing, Mr. Emanski on September 30 wrote a memo to Ms. Johnson, in which he recapitulated the events since September 21 (R-1). Ms. Johnson commenced working the new shift hours on October 3 and continued to do so until her termination.

11. It is undisputed that no one on behalf of the Respondent Board asked the Association to negotiate the proposed change in hours of Ms. Johnson prior to October 3, it being the position of the Board, as testified to by Mr. Blessing, that the matter of hours of work was an administrative prerogative and that the setting of hours is up to the immediate supervisor (1Tr. 118, 2Tr. 16-19). There is no Board policy on the changing of hours or on supervisors setting the hours for their employees (2Tr. 16, 38).

12. The collective negotiations agreement has no specific provision with respect to hours of work except the provision on summer hours for 12 month clerical employees. 7/ A past President of the Association, June Ewald, testified that there was no need to have a specific provision on hours in the agreement since "school hours" determined the hours of work. She also testified that no one in the collective negotiations unit is scheduled to work after 5:00 p.m.

13. Further, the collective negotiations agreement does not contain a management rights or prerogative clause, but does contain in Article VII, Section B, a "zipper" clause, which provides as follows:

> "This Agreement represents and incorporates the complete and final settlement by the parties of all issues which were the subject of negotiations. During the term of the Agreement,

7/ Article VI, Section F of J-1, quoted in footnote 5, supra.

> neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed the Agreement." (J-1)

14. Although Mr. Blessing and Mr. Emanski testified with respect to some dissatisfaction with Ms. Johnson's work performance and attitude toward her job prior to September 1977, it is undisputed that there was no written documentation of any such dissatisfaction communicated to Ms. Johnson prior to the written memoranda which will be referred to hereinafter (2Tr. 36, 37). 8/

15. With the assistance of Wayne Dibofsky, the President of the North Brunswick Education Association and a staff consultant of the New Jersey Education Association, Ms. Johnson prepared and filed a grievance with respect to her change in hours on October 11 (CP-4). 9/

16. The said grievance alleged a violation of Article I, "Recognition," Sections A and B, and of Article III, "Grievance Procedure," Section A-1, the latter being the definition of "grievance." The statement of the grievance contained reference to changes in "terms and conditions" of employment with regard to the new hours of Ms. Johnson. The grievance was denied at the first two steps by Mr. Emanski and Mr. Blessing on October 11 and October 17, respectively, 10/ and by the Board on November 9 (R-7).

17. Ms. Johnson testified on direct examination that the number of memos that she received was about the same before and after the filing of the grievance on October 11 (1Tr. 54). Her testimony is substantially borne out by the written memos introduced in evidence. Thus, see CP-3 (9/30); R-1 (9/30); R-10 (10/3); R-11 (10/3); R-12 (10/11); R-13 (10/13 and 10/17) R-14 (11/1); R-15 (11/2); R-16 (11/7) and R-17 (11/18). Mr. Emanski testified that Ms. Johnson never responded to any of the memos directed to her although she was informed that she had the right to do so (2Tr. 171, 172), The aforesaid written memos all pertained to Ms. Johnson's

8/ Note is taken of R-5, dated April 18, which is a memo from Mr. Emanski to Mr. Blessing and which was not communicated to Ms. Johnson. This was the only documentation to which Mr. Blessing could refer prior to September 1977.

9/ Article III of the collective negotiations agreement in Section A specifically covers Ms. Johnson as having standing to grieve individually. A "grievance" is there defined as a complaint in writing by a member of the staff "...that there has been as to him a violation, misinterpretation, or inequitable application of any of the provisions of this agreement..." (J-1).

10/ See CP-4.

work, work habits, and attitude toward her job. 11/

18. Without rebuttal or contradiction by Ms. Johnson, Mr. Emanski credibly testified that, after the change in hours on October 3, the work of Ms. Johnson "visibly declined", and he stated further that "She resisted this change" (2Tr. 106; see also, R-1). 12/

19. Based upon the memos from Mr. Emanski to Ms. Johnson, supra, and Mr. Emanski's ultimate recommendation to Mr. Blessing, Mr. Blessing recommended to the Board that Ms. Johnson be terminated (2Tr. 22, 23). The Board acted on Mr. Blessing's recommendation and terminated Ms. Johnson on November 22 (2Tr. 23). The action of the Board was communicated to Ms. Johnson by letter dated November 23 (C-1, Exhibit "C").

20. The Board was not served with the initial Unfair Practice Charge until November 23 (2Tr. 23, 24).

21. Ms. Johnson was not terminated in retaliation for having filed a charge of unfair practices with the Commission on November 22, one day prior to service upon the Board.

22. Counsel for the Association, at the commencement of the hearing, made an oral motion for summary judgment, based upon paragraphs 2 and 3 of the original charge, filed November 22, it being the position of counsel that the Respondent Board had made the necessary admissions in paragraphs 3 and 5 of its answer to the original charge. A ruling was reserved pending disposition of the entire case. (1Tr. 14-17; C-1, C-2). 13/

23. Counsel for the Respondent Board, at the conclusion of the Association's case, moved orally to dismiss portions of the amended charge of unfair practices, filed December 12, noting that this "count" dealt basically with retaliatory termination. Specific reference was made by counsel to the allegations

11/ Especial note is taken of R-16, the memo dated November 7 from Mr. Blessing to Ms. Johnson, informing her of her three-day suspension. It contained a warning that unless her work habits improved upon the conclusion of the disciplinary action, Mr. Blessing would recommend to the Board that she be given a 30-day notice of termination. No evidence was introduced that Ms. Johnson filed a grievance with respect to this disciplinary action.

12/ It is noted that Mr. Emanski acknowledged on cross-examination that, as of the September 29 meeting with Mr. Blessing and Ms. Johnson, the keypunching of Ms. Johnson was acceptable (2Tr. 172).

13/ Based upon a fair reading of the paragraphs referred to by counsel for the Association in the original charge and answer, the motion for summary judgment is denied as the requisite admissions are plainly missing. However, as will be apparent hereinafter, the Hearing Examiner finds a violation of subsections (a)(1) and (5) of the Act (see Discussion and Analysis, infra, pp. 8-11).

in the amended charge that Ms. Johnson was terminated in retaliation for her filing the original unfair practice charge on November 22 and, also, in retaliation for filing the grievance on October 11. A ruling on this partial motion to dismiss was likewise reserved. (1Tr. 144-151, 156, 157; C-1). 14/

THE ISSUES

1. Did the Respondent Board violate the Act when it unilaterally and without negotiations with the Association changed the shift hours of Carol Johnson?

2. Did the Respondent Board violate the Act when it first suspended and then terminated Carol Johnson?

DISCUSSION AND ANALYSIS

The Respondent Violated the Act When It Unilaterally and Without Negotiations With the Association Changed The Shift Hours of Carol Johnson

1. The Positions of the Parties

The Association cites three cases, originating with the Commission, in support of its position that the Respondent violated the Act when it changed the shift hours of Ms. Johnson without prior negotiations with the Association. 15/ The Association also contends that "past practice" governs the disposition of the instant case since the hours of Ms. Johnson remained unchanged from the date of her employment until October 3, citing New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (1978) and the decisions of several arbitrators on past practice. Finally, the Association meets an anticipated contention that the "zipper" clause in the collective negotiations agreement might constitute a waiver by citing

14/ The motion to dismiss so much of the amended charge of unfair practices as alleges retaliation in termination of Ms. Johnson for filing the unfair practice charge on November 22 and for filing the grievance on October 11 is granted. The foregoing Findings of Fact, in the opinion of the Hearing Examiner, demonstrate that there was no element of retaliation in the termination of Ms. Johnson, particularly as to the filing of the original unfair practice charge, since the Board's action of termination took place the day before it received the charge. For reasons more fully set forth hereinafter, the Hearing Examiner is likewise persuaded that Ms. Johnson was not terminated in retaliation for having filed a grievance on October 11 (see Discussion and Analysis, infra, pp. 11-14)

15/ Galloway Township Board of Education and Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976), 149 N.J. Super 346 (App. Div. 1977), cert. granted, 75 N.J. 29 (1977), appeal pending; Board of Education of the Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977), appeal dismissed by stipulation, App. Div., Docket No. A-1035-77 (1978); and Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).

several decisions of the National Labor Relations Board and the courts, which hold that evidence of a waiver statutory rights must be clear, convincing, unmistakable and unequivocal. 16/

The Respondent, in urging that there is no violation of the Act, first contends that the Association erred in filing a charge with the Commission rather than filing a legal action in the courts seeking a judicial determination as to whether or not the Board had violated the provision of Section 5.3 of the Act, which states that: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." The Board then cites two decisions where it contends such a procedure was followed and, must necessarily be followed here. 17/ Finally, the Respondent, citing the "zipper" clause in the collective negotiations agreement, and C & C Plywood Corp., supra, contends that the Association has waived any duty on the part of the Respondent to negotiate a change in the hours of employment of Ms. Johnson. 18/

2. The Association's Position is Sustained

The Hearing Examiner finds and concludes that the three decisions cited by the Association, namely, Galloway, Willingboro and Hillside, supra, sustain the allegations in the original charge that the Respondent Board violated Subsections (a)(1) 19/ and (5) of the Act when it unilaterally and without negotiations with the Association changed the shift hours of Ms. Johnson on October 3. 20/ Consideration will, however, be given in due course to the full positions of the parties as above set forth.

16/ NLRB v. C & C Plywood Corp., 385 U.S. 421, 64 LRRM 2065 (1967), aff'g. C & C Plywood Corp., 148 NLRB No. 46, 57 LRRM 1015 (1964); Proctor Mfg. Corp., 131 NLRB No. 142, 48 LRRM 1222 (1961); and Press Co., Inc., 121 NLRB No. 116, 42 LRRM 1493 (1958).

17/ Passaic County Probation Officers Association v. Passaic County, 132 N.J. Super 247 (Chan. Div. 1975), modif. and aff'd., 73 N.J. 247 (1977); Prosecutor's Detectives etc. Essex County v. Hudson County Board of Freeholders, 130 N.J. Super 30 (App. Div. 1974).

18/ Interestingly, the Respondent also cites New Brunswick Board of Education, supra, urging as a binding past practice on the parties the fact that the immediate supervisors of the employees such as Ms. Johnson have always fixed the employees' specific work hours.

19/ The Subsection (a)(1) violation is derivative, not independent. See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

20/ There was no evidence adduced by the Association that the Respondent violated Subsection (a)(3) as originally alleged. Accordingly, the Hearing Examiner will recommend dismissal as to this Subsection.

Considering first the Galloway case, supra, the Appellate Division affirmed the Commission's finding that the employer there committed an unfair practice when it unilaterally and without negotiations altered the working hours of six secretaries. The working day of four secretaries was reduced from seven to four hours, the hours of another secretary were changed from 7:15 a.m. to 2:45 p.m. instead of from 7:45 a.m. to 3:15 p.m., and, finally, another secretary's work day was shifted by five minutes. Although Galloway involved changes made during the course of negotiations for an agreement, and not during the term of an already negotiated agreement, such as in the instant case, the language of the Appellate Division is pertinent hereto. The Court said, in pertinent part:

> "...appellant (employer) is confronted by settled federal law that a unilateral change by an employer in the terms and conditions of employment during collective bargaining constitutes an unfair labor practice. (citing cases)...
>
> "Unquestionably, the alteration of two secretaries' working hours and the reduction of four other secretaries' total working day effected changes in the terms and conditions of their employment...We affirm the determination that both the announcement at the time made and the implementation of the changes had a chilling affect on the right of collective negotiations and amounted to a refusal to negotiate in good faith." (149 N.J. Super at 350, 351)

The Commission in Willingboro, supra, a case involving negotiations for a successor agreement, was confronted with the unilateral action of the employer in reducing the duty-free lunch period of teachers from 60 minutes to 35 minutes, with a corresponding reduction in the length of the teachers' work day, i.e., a reallocation of the hours of work. Thus, each teacher was in school no longer after the change than before the change. This is precisely the situation of Ms. Johnson in the instant case in that she continued to work seven hours before and after the change on October 3. The Commission, citing the Appellate Division decision in Galloway, supra, said: "...Therefore, the Commission concludes that, even assuming arguendo that the Board's actions are viewed as simply reallocating duty free time, these actions unilaterally undertaken, were violative of the Act." (3 NJPER at 372). Thus, violations of Subsections (a)(1) and (5) of the Act, as alleged, were sustained.

In Hillside, supra, a scope of negotiations preceeding, the length of the work day for four guidance counselors was extended on a rotating basis with compensatory time off the same work day. Thus, the total number of hours remained unchanged. The Commission concluded that an alteration in the hours of employment is a change in terms and conditions of employment and is, therefore, mandatorily

negotiable, citing Englewood Board of Education v. Englewood Education Association, 64 N.J. 1 (1973). (See 1 NJPER at 57).

Turning now to the "past practice" contentions of the parties, the Hearing Examiner is not persuaded that the Commission's holding on past practice in New Brunswick Board of Education, supra, should be applied in the instant case. First, in New Brunswick there were a number of employees and classifications involved, unlike the instant case where there is only one employee involved. Secondly, in New Brunswick the practice of an 11-month work year had been in existence "...for a significant number of years, 18 in one case...", unlike the instant case where Ms. Johnson had only worked the same hours for a period from January 16, 1976 to October 3, 1977. The Hearing Examiner is inclined to conclude, therefore, that past practice in the instant situation is de minimis at best.

Further, and specifically with respect to the Respondent's past practice contention regarding supervisors regulating the hours of their employees, there was a failure to prove any such practice by a preponderance of the evidence. Even assuming such proof arguendo, the Hearing Examiner would not have been inclined to predicate a binding past practice finding upon an alleged prerogative of management.

The next matter for consideration is the respective contentions of the parties with respect to the "zipper" clause in the collective negotiations agreement, quoted in Finding of Fact No. 13, supra. Taking into consideration the testimony of past Association President June Ewald (1Tr. 121-125), and the arguments and authorities contained in the Association's Brief at pp. 12-15 therein, the Hearing Examiner finds and concludes that the Association did not waive its right to negotiate on the matter of the hours change of Ms. Johnson merely by agreeing to include the "zipper" clause in its collective negotiations agreement. It is noted that, other than pointing to the quoted language in the "zipper" clause, Respondent has failed to adduce evidence of waiver of a statutory right within the meaning of the test established by the NLRB, namely, that the evidence of waiver must be "clear and unmistakable." [21/]

Finally, the Hearing Examiner considers the contention of the Respondent that the Association should properly first seek a judicial determination of its rights under Section 5.3 of the Act "(b)efore the Commission can consider whether the Board committed an unfair labor practice by refusing to negotiate..." [22/] The two cases cited by the Respondent [23/] plainly do not support its argument that the

21/ C & C Plywood Corp. and Proctor Mfg. Corp., supra, footnote 16.

22/ Respondent's Brief, p. 7.

23/ Footnote 17, supra.

Association must go to court for a determination on negotiability before the Commission can ajudicate an unfair practice.

In the Passaic County case, supra, the negotiating representative of the County probation officers instituted an action in the Chancery Division to enjoin the enforcement of a change in office hours by an administrative directive. The bargaining agreement contained no reference to hours of employment. It should be noted that the facts in that case arose at the time that Chapter 303 of the Act was in effect although it was heard after Chapter 123 became effective. Neither party urged the applicability of Chapter 123. The Court held that the change in hours was a reasonable exercise of the administrative and supervisory authority of the County Judges, and was fully consistent with the agreement between the parties. The Court did not state that the change in hours was a modification of an existing "work rule" in contravention of Section 5.3 of Chapter 303 of the Act. Plainly, the Passaic County case has no applicability to the instant case where the Commission is vested under Section 5.4(c) with exclusive power to prevent and remedy unfair practices.

The Hudson County case, supra, involved the reversal of a Civil Service Commission decision, decided in 1974 when Chapter 303 was likewise in effect. The only pertinent reference to the Act appears at 130 N.J. Super, p. 45, where note is made of the impasse procedures of the Commission. This case likewise has no relevance to the disposition of the instant case.

Having considered all of the arguments and contentions of the parties, the Hearing Examiner reiterates his finding and conclusion that the Respondent violated Subsections (a)(1) and (5) of the Act when it unilaterally, without negotiations with the Association, changed the shift hours of Carol Johnson on October 3, 1977.

The Respondent Did Not Violate
The Act When It First Suspended
and Then Terminated Carol Johnson

The positions of the parties will not here be set forth since the contentions and arguments made in the respective Briefs are factual only, with references to the transcript, and do not contain any legal arguments or citations.

The gravamen of the Association's amended charge of unfair practices, filed December 12, is that the Respondent retaliated against Ms. Johnson for protesting her change in shift hours, beginning September 30, and continuing with the filing of the grievance on October 11, the suspension of November 9-11, and finally, the termination, allegedly following the filing of the original unfair

practice charge on November 22. 24/ Based on the entire record in this case, the Hearing Examiner finds and concludes that Ms. Johnson was not suspended and terminated in retaliation or reprisal for the exercise by her of any rights protected by Subsection (a)(1) of the Act.

It will be recalled that the amended charge of unfair practices alleges a violation of Subsections (a)(1) and (3). The Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) adopted the following standard in cases alleging a violation of Subsection (a)(3) of the Act:

> "...A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.
>
> "Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.
>
> "...Discriminatory acts by employers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act.
>
> "Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by the preponderance of the evidence (citing N.J.A.C. 19:14-6.8)." (Emphasis supplied in part) (3 NJPER at 72)

See also, City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), appeal pending, App. Div., Docket No. A-2546-76.

In Haddonfield, supra, the Commission agreed with the Hearing Examiner in that case that the Charging Party had failed to meet its burden of proof by a preponderance of the evidence. So, too, has the Hearing Examiner concluded in the instant case.

24/ The Hearing Examiner has previously found that the termination was not in retaliation for Ms. Johnson having filed a charge of unfair practices on November 22; Finding of Fact No. 21, supra.

If the record in this case had supported a finding that Ms. Johnson was retaliated against by the Respondent, first by suspension and then by termination, the Hearing Examiner would have had no hesitation in concluding that she was discriminated against on account of the exercise by her of a right protected by Subsection (a)(1) of the Act, namely, the filing of a grievance. 25/

The problem is that the proofs adduced by the Association failed to demonstrate to the Hearing Examiner that Ms. Johnson was suspended and terminated because she filed a grievance on October 11. Ms. Johnson acknowledged that the number of written memos received by her before and after the filing of the grievance was about the same, and this testimony was substantially borne out by the written memos introduced in evidence (Finding of Fact No. 17).

Further, there was nothing in the way in which the Respondent responded to the grievance of Ms. Johnson, which indicated there was anything for which the Respondent could be criticized. Ms. Johnson had alleged violations of two articles of the collective negotiations agreement, Recognition and the Grievance Procedure, which were promptly and properly denied by her immediate supervisor, Mr. Emanski, on October 11, by Mr. Blessing on October 17 and, ultimately, by the Board on November 9 (Finding of Fact No. 16). It is the opinion of the Hearing Examiner that no sustainable grievance could be predicated on the Recognition and Grievance Procedure articles under the circumstances of the proposed change in hours for Ms. Johnson effective October 3.

The Hearing Examiner, in the light of the testimonial and documentary evidence, is persuaded that Ms. Johnson was suspended and terminated for objective reasons, unrelated to the exercise by her of any protected activity under the Act.

There has been no showing by the Association of any independent anti-union animus toward Ms. Johnson by the Respondent. As noted previously, the only possible protected activity in which she could have been found to have been engaged was the filing of the grievance on October 11.

The Hearing Examiner has discounted any alleged dissatisfaction with Ms. Johnson by Mr. Emanski and Mr. Blessing prior to the issuance of the written memoranda, the first of which were issued on September 30 (CP-3 and R-1). (Finding of Fact No. 14, and footnote 12, supra). The written memoranda issued by the Respondent to Ms. Johnson dealt with her work, work habits and attitude toward her job (Finding of Fact No. 17).

25/ Cf. College of Medicine and Denistry, P.E.R.C. No. 76-46, 2 NJPER 219 (1976). See, Michigan Employment Relations Commission v. Reeths-Puffer School District, 1 PBC para. 10,237 (Mich. Supr. Ct. 1974); Town of Halifax, Case No. MUP-2059, MassLRC (1975).

On November 7, Mr. Blessing informed Ms. Johnson of her three-day suspension; the memo stated explicitly that unless her work habits improved upon the conclusion of the suspension, Mr. Blessing would recommend to the Board that she be given a 30-day notice of termination (R-16). No grievance was filed by Ms. Johnson with respect to the three-day suspension, which she had every right to do under the agreement. She had already filed a grievance on October 11, with the assistance of Mr. Dibofsky, and could have done so on, or shortly after, the issuance of the memo of November 7. The suspension thus stands uncontroverted.

The Hearing Examiner has credited the testimony of Mr. Emanski that the work of Ms. Johnson "visible declined" after the change in hours of October 3 and, further, that Ms. Johnson "resisted this change" (Finding of Fact No. 18). Her resistance of the proposed hours changed was indicated as early as the September 29 meeting between Mr. Blessing, Mr. Emanski and Ms. Johnson, when Ms. Johnson stated that she was "just not going to work those hours" (see R-1, p. 2). 26/

Thus, the Hearing Examiner is compelled to find and conclude that Ms. Johnson was suspended and terminated for reasons which were in no way or manner connected with the exercise by her of any rights protected by the Act, i.e., Ms. Johnson was suspended and terminated because of Respondent's independent dissatisfaction with her work attitude and performance. 27/

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent violated Subsections (a)(1) and (5) of the Act when it unilaterally and without negotiations with the Association changed the shift hours of Carol Johnson effective October 3, 1977.

2. The Respondent did not violate Subsection (a)(3) of the Act when it unilaterally and without negotiations with the Association changed the shift hours of Carol Johnson effective October 3, 1977.

3. The Respondent did not violate Subsection (a)(3) of the Act when it suspended and then terminated Carol Johnson.

26/ It is noted that Ms. Johnson was not called by the Association in rebuttal to the testimony of Mr. Blessing and Mr. Emanski, nor to rebut the substantive content of the written memoranda issued by Respondent to her beginning with R-1 and concluding with R-10 through R-17.

27/ See PLRB v. Lehigh County, Case No. C-4856-C, 5 PaPER 111 (1974).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate with the Association in good faith with respect to changes in shift hours of employees.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment, including unilateral implementation of changes in shift hours of employees in the negotiations unit represented by the Association.

B. That the Respondent take the following affirmative action:

1. Upon demand, negotiate in good faith with the Association with respect to the terms and conditions of employment, including changes in shift hours of employees in the negotiations unit represented by the Association.

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

3. Notify the Director of Unfair Practices within twenty (20) days of receipt what steps the Respondent has taken to comply herewith. 28/

C. That the allegation of a violation of Subsection (a)(3) in the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: July 6, 1978
Trenton, New Jersey

28/ No affirmative order is recommended to restore the status quo with respect to shift hours since the only affected employee was Carol Johnson, as to whom the Respondent did not violate the Act when it suspended and terminated her.

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 our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL, upon demand, negotiate in good faith with the Association with respect to the terms and conditions of employment, including changes in shift hours of employees in the negotiations unit represented by the Association.

_____
(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, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780