P.E.R.C. NO. 80-116

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MADISON BOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-79-296-13

MADISON TEACHERS' ASSOCIATION,

Charging Party.

SYNOPSIS

An Unfair Practice Charge was filed by the Madison Teachers' Association alleging that the Board violated the Act by unilaterally reducing guidance personnel, expanding a Personnel Development Program and instituting a new program of counseling. The Hearing Examiner recommended dismissal of all aspects of the Complaint except that related to the new guidance counseling program. No exceptions were filed to his conclusions in these areas and the Commission adopted them. The Hearing Examiner did find that the Board violated the Act by implementing the new counseling program which he found increased the workload of guidance counselors.

Subsequent to the issuance of the Hearing Examiner's Recommended Report and Decision, the Supreme Court issued its decision in In re Bd. of Ed. of Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980). The Court discussed the need to reconcile the right of an employer to exercise management prerogatives and the duty to negotiate terms and conditions of employment. Applying that balance to the facts in this case, the Commission, contrary to the recommendation of the Hearing Examiner, concluded that the dominant issue in this case was the goal of providing a better guidance program. This rendered the workload changes which resulted from the decision to establish this program non-negotiable and mandates the dismissal of the charge. The Commisssion noted that the changed program did lead to some increase in the number of evening meetings for guidance counselors as a result of increased parent and student interest. The evening meetings were scheduled by the guidance counselors on their own in order to carry out their own views of their professional responsibilities. No Board directive required the increase in the number of evening sessions nor was any provision of the existing contract alleged to have been violated. Thus, the Commission dismissed the complaint in its entirety.

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Charging Party.

Appearances:
For the Respondent, Metzler Associates
(By Stanley C. Gerrard, Labor Consultant)

For the Charging Party, John Davis, UniServ Representative, New Jersey Education Association

DECISION AND ORDER

On April 26, 1979, the Madison Teachers' Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Madison Borough Board of Education ("Board") had violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by unilaterally reducing guidance personnel, expanding a Personnel Development Program and instituting a new program of counseling thereby increasing the workload of guidance counselors represented by the Association. A hearing was held before Commission Hearing Examiner Robert T. Snyder on November 5 and 7, 1979, and he issued his Recommended Report and Decision dated January 9, 1980, designated as H.E. No. 80-27. A copy is appended hereto and made a part hereof. Exceptions were filed by the Board, and both sides have submitted briefs.

The Hearing Examiner recommended dismissal of all aspects

of the charge except that relating to the new guidance counseling program. No exceptions have been filed as to those recommendations, and upon review of the record, we adopt them substantially for the reasons stated by the Hearing Examiner. He did conclude that the Board violated the Employer-Employee Relations Act ("Act") by implementation of the new counseling program which he found did increase workload. It is to this finding that the Board now takes exception.

Subsequent to the issuance of the Hearing Examiner's report, the New Jersey Supreme Court handed down its decision in Bd. of Ed. of Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582 (1980). In its opinion, the Court dealt with the potential conflict between the right of an employer to exercise management prerogatives, and the duty to negotiate terms and conditions of employment negotiated with the representatives of public employees. Rejected were the two extreme notions of how to handle this clash - i.e., any time a management prerogative is exercised, negotiations need never take place as to affected terms and conditions of employment, or the other side of the coin, that any time a term and condition of employment is affected by a management decision, there must be negotiations. Instead a balancing test was set forth:

> "The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration. Thus, these matters may not be included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment. See In re Maywood Bd. of Ed., 168 N.J. Super. 45, 56-58 (App. Div. 1979),

> certif. den. 81 N.J. 292 (1979).
> On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is preminent, then bargaining is appropriate. Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, then negotiation would be proper even though the cost may have a significant effect on a managerial decision to keep the schools open more than 180 days." 81 N.J. 582 at 591.

Herein, the Hearing Examiner found that the new guidance program was a response to complaints from parents, teachers and students aimed at better serving the students by use of group guidance techniques. The increase in workload was a direct result of the success of the group guidance program which had been developed with the approval and cooperation of the unit employees affected, including Association members.[1/] The guidance counselors themselves, called as Association witnesses, testified that they make their own schedules, including scheduling evening meetings, so that they could better meet with parents. The increase in the number of evening meetings, which was not great, resulted from increased parent and student interest generated by the information conveyed at the group meetings. It appears from the record that the guidance counselors, to their credit, scheduled these meetings on their own in order to carry out their own views of their professional

1/ The record reflects that some guidance counselors were actually provided additional funding to develop the program over the summer of 1978. (H.E. No. 80-27 at p. 4).

responsibilities (Id at 6). No Board directive required the increase in the number of evening sessions, nor was any provision of the existing contract alleged to be violated.[2/]

Under all the facts set forth in this record, it is our conclusion that applying the test set forth in Woodstown-Pilesgrove, the dominant issue in this case was the goal of providing a better guidance program, thereby rendering the workload changes which resulted from that decision non-negotiable, and the charge must therefore be dismissed.

ORDER

For the foregoing reasons and upon the entire record herein, IT IS HEREBY ORDERED that the Complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision. Commissioner Graves voted against the decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 7, 1980

2/ It is these factors which in part distinguish this case from past Commission decisions cited by the Hearing Examiner which have held that the increase in workload in analogous situations was negotiable, notwithstanding the non-negotiability of the educational policy decision. To the extent that these decisions rested solely on the ground that the change in workload, particularly when quite minimal, was negotiable as "impact", the Woodstown-Pilesgrove analysis might lead to a different result.
It should be noted that the Hearing Examiner issued his decision on January 9, 1980 and Woodstown-Pilesgrove was not decided until February 4, 1980, so he did not have the benefit of the Supreme Court's opinion.

H.E. No. 80-27

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

In the Matter of

MADISON BOROUGH BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-79-296-13

MADISON TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally, and without prior negotiations with the Association, changed the workloads of its guidance counselors in December of the 1978-79 school year. The changes were made at the time the Board implemented a new program of group guidance for its high school students and their parents. The Hearing Examiner rejected defenses interposed by the Board that the Complaint was time-barred because based upon conduct which arose more than six months prior to filing of the charge and that the Association had waived its right to demand negotiations because it had subsequently negotiated a contract containing a "fully bargained" clause. The Examiner concluded that the complained of changes in workload had only taken affect on implementation of a new phase of the group guidance program within six months of the charge and evidence of a specific waiver of rights was lacking.

By way of remedy, the Hearing Examiner recommends that the Board be ordered to restore the status quo ante as to the workloads of the affected employees prior to the changes made in their terms and conditions of employment and negotiate, on demand, retroactive to school year 1978-79, with respect to the changes as long as they remain in effect. The Examiner made clear that negotiations were to be conducted in light of the group guidance program which the Board had developed as an educational policy not subject to the negotiations obligation under the Act.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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MADISON BOROUGH BOARD OF EDUCATION,

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Appearances:

For the Respondent
Metzler Associates (By Stanley C. Gerrard, Labor Consultant)

For the Charging Party
John Davis, UniServ Representative,
New Jersey Education Association

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On April 26, 1979 the Madison Teachers Association ("Association" or "Charging Party") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Madison Borough Board of Education ("Board" or "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association alleges that the Board unilaterally increased the workload and work hours of guidance counselors employed in the negotiations unit represented by it for purposes of collective negotiations by reducing guidance personnel, instituting a new program of counseling on a group basis and expanding an existing Personal Development Program ("PDP"), in violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5). [1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act; (3) Discriminating in regard to hire (continued next page)

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued thereon on September 10, 1979. By answer filed on September 18, 1979, Respondent denied the allegations of unfair practice and in an affirmative defense averred that the charge was untimely filed. [2/] Hearing was held on November 5 and 7, 1979. Both parties were given full opportunity to examine witnesses, present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on November 30 and Respondent on December 5, 1979 and they have been duly considered.

Upon the entire record in the case and from my observation of the witnesses and their demeanor I make the following:

FINDINGS OF FACT

1. The Board operates a public school district located in Madison Borough comprising grades K to 12, including four elementary schools, grades k to 6, one Junior High School, grades 7 and 8, and one High School, grades 9 to 12. The Association, at all times material, has been the exclusive collective negotiations representatives of certain identified certificated personnel under contract including, *inter alia*, guidance counselors. The current collective agreement between the

1/ (continued)

or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ At the opening of hearing, at Charging Party's suggestion and with the agreement of Respondent and the approval of the Examiner, a preliminary hearing was held dealing solely with the threshhold issue as to whether the allegation charging unlawful unilateral implementation of the group counseling program — the only allegation claimed untimely by Respondent in opening remarks (Tr. 14, 16-17) — is time-barred under *N.J.S.A.* 34:13A-5.4(c) because it occurred more than six months prior to the filing of the charge. It became apparent to the undersigned after direct and cross-examination of witnesses called by the parties on this issue, that the Association's claim related to the implementation of the group guidance program as it affected the guidance personnel commencing in December 1978 and not before, and was thus not time-barred. Accordingly, Respondent's motion to dismiss the allegation was denied on the authority of *In re Warren Hills Regional Board of Education,* P.E.R.C. No. 78-69 (4/25/78), (Tr. 50-2).

parties, entered into November 21, 1978, covers the period July 1, 1978 to June 30, 1980. I find and conclude that the Board is a public employer and the Association is an employee organization and majority representative of employees in an appropriate unit, respectively, within the meaning of the Act.

2. From at least school year 1973-74 until the spring semester of school year 1976-77, the high school had employed five guidance counselors in a separate Guidance Department, including a director included in the bargaining unit who carried a partial workload of guiding students (Tr. 159-60; 180; 183). During this same period of time, the high school enrollment has been declining (Tr. 180). From school year 1975-76 to 1978-79 the enrollment fell from 1,230 students to 1,090 students, a loss of 140 students or 11.5% (Tr. 185).

3. In school year 1976-77 Norman Creange, the Guidance Director, took a leave of absence and Anthony Zitelli, a guidance counselor in the Junior High School, was reassigned to take Creange's place and another person, a Ms. Sinoway was assigned in Zitelli's place in the Junior High School. Dr. Saul Cooperman, the Superintendent of Schools, had learned from Creange during his leave of a desire to resign from the school system. When Creange returned, he reaffirmed his intention to leave. As another counselor, Virginia Hanna, took a sabbatical leave in the fall semester of 1977-78, Zitelli was kept on in the High School (Tr. 183; 81; 115). Upon Hanna's return, and for the one spring semester, 1977-78, before Creange left the system, there were six guidance counselors employed in the High School (Tr. 115). In order to avoid disruption and in anticipation of Creange's leaving, both Zitelli and Sinoway, who were functioning well in their new positions, were retained where they were during this interim 1977-78 period (Tr. 184). When Creange left, one of the counselors, Mrs. Tassie Livingston, was assigned as Director, and the guidance staff reverted to five in number for the 1978-79 school year (Tr. 114-115). The additional sixth guidance counselor constituted a temporary overstaffing in light of the declining enrollment, in the view of High School Principal D. Joseph Roberts (Tr. 159-160). 3/

4. Aside from the guidance counselors, the Board also employs vocational counselors in a separate department, who provide class instruction and work supervision for vocational students in their junior and senior years enrolled in Cooperative Industrial and Cooperative Office Education ("CIE" and "COE") work study

3/ I credit Roberts' denial of the claim (see Tr. 55) that he had discussed retaining a sixth guidance counselor at a spring 1978 guidance staff meeting at which a decision was made to institute a formal group guidance program for the following year (Tr. 147-8).

programs which combine half day school work with half day outside employment (Tr. 100), as well as for students enrolled in Industrial Arts (Tr. 58). Until school year 1976-77 all vocational students were counseled in course work and college or job placement by the guidance counselors (Tr. 109). Commencing in part in school year 1976-77 and continuing full time in 1977-78, the vocational counselors were given this assignment, apparently because of their supervision of the vocational students on a regular basis (Tr. 53; 101; 109-110). Then commencing in school year 1978-79 regular counseling functions for the approximately 150 work study program students were transferred back from the vocational counselors to the guidance counselors (Tr. 57-8; 105). The reasons for the reassignment were two-fold. Because of the physical separation between the two sets of counselors, student records were misplaced or lost on transfer of students to the vocational department after their sophomore year (Tr. 103). Also, vocational students tended to continue to seek guidance from the regular counselors with whom they had developed a relationship during their freshman and sophomore years rather than from the vocational counselors to whom that function has been reassigned (Tr. 144-145).

5. While group meetings with students - particularly fall orientation with freshman (Tr. 34), an early meeting with juniors to discuss P.S.A.T's and other testing, and with seniors to discuss procedures for college applications (Tr. 35) - had been a part of the guidance counselors' functions for years (Tr. 24; 146-7), a new formal group guidance program was devised for school year 1978-79. In the spring of 1978, as a result of expressions of dissatisfaction from parents, teachers and students, a meeting was held among Principal Roberts and the guidance counselor staff out of the school building to discuss ways of changing the guidance program to make it more efficient and better serve the needs of students (Tr. 139-140). The meeting focused on improving the program by use of group guidance techniques. Such techniques, in Roberts' judgment in particular, would operate more efficiently by enabling the department to impart a uniform, basic body of information to all students and would be more productive by enabling students to profit from the reactions or questions of other students (Tr. 140-1). The proposal met with a generally favorable response from the counselors. Planning by the guidance staff commenced in the spring and funding was also provided staff members over the summer of 1978 to write the program (Tr. 141).

6. The usual freshman orientation and upper class group guidance meetings were held in the fall of 1978 (R-1). It was not until December 1978 that the scheduled group meetings under the new formal program were first held (Tr. 36-7; 146). Starting with the week of December 11, 1978, two guidance counselors met with groups of sophomores who were taken from physical education classes. Career information was presented to the students at the meetings, conducted in the gym area. Two counselors assigned together, who had previously previewed film strips and other materials, met with the assigned students three or four full periods a day for one week and showed the film strips, disseminated general information and conducted discussions (Tr. 45; 60-1). Follow-up evaluation meetings were held among all counselors and the Director. In addition, parents were invited to attend an evening meeting in connection with the group counseling program. In order to accommodate all of the parties, a series of multiple evening meetings were held for the parents in each grade and parents could attend any one. The counselors were expected to attend at least one evening meeting for each grade (Tr. 66; 95; 198). The group program continued throughout the remainder of the 1978-79 school year with grades other than 10th scheduled for group meetings on specified weeks during the students' physical education periods and evening meetings held with parents (Tr. 87). The freshman meetings focused on orientation and adjustment, junior meetings dealt primarily with testing preparation for college entrance examinations and senior meetings related college application information and procedures (Tr. 65-66). In addition, the Board sponsored a College Night program for students in the three districts of Madison Borough, Chatham and Chatham Township which previously had been conducted by one or the other two districts (Tr. 196-7). The Respondent's counselor staff conducted this program.[3a/] The group counseling program has continued in the 1979-80 school year (Tr. 127).

7. One counselor, Virginia Hanna, founded the PDP program in 1972. It is a school wide peer group counseling program not limited to guidance staff alone for its supervision and support in which upper classman counsel groups of freshman, originally with respect to use of alcohol and drugs, but more recently on adolescence, tobacco, death and dying (Tr. 91; 191). During Hanna's sabbatical leave in the fall of 1977, Zitelli became involved with the program and has continued to assist Hanna since her return. Because of their work with PDP, Hanna, and to a lesser extent, Zitelli have only been able to carry up to a maximum 75% counseling workload (Tr. 115). As a result of the implementation of the group counseling

3a/ Charging Party has not claimed in this proceeding either in the original charge or by amendment that the conduct of College Night imposed a greater workload on the counselors. It will not be considered in evaluating the evidence or reaching conclusions of law.

program since December 1978, as well as the work involved in counseling vocational students since the fall of 1978, in spite of the reduction in total number of students, Hanna testified that the number of students assigned to her remained about the same from 1977-78 to 1978-79 (Tr. 96-7). Zitelli, who had previously been able to participate in an undertaking called SEARCH, an organization of administrators, teachers and students formed to improve the school and which the prior year raised money for an Arts Festival, was not able to continue these efforts in 1978-79 (Tr. 114).

8. The Respondent has denied in its answer and throughout the hearing that any increase in workload resulted from implementation of the group counseling program. Respondent's representative elicited consistent responses from the guidance counselors who testified for the Association that they each make their own schedules of the times and length of student interviews and parent meetings, including some evening meetings with parents (Tr. 71;94) and that, as professionals, their work time varies within their discretion depending upon the nature of their responsibilities as problems arise (Tr. 127-29). With respect to teaching hours and teaching load, Article VIII of the 1978-80 agreement provides in para. A 1. "Teachers are expected to devote to their assignments the time necessary to meet their responsibilities." A minimal school work day in the high school runs from 8:00 a.m. to 3:30 p.m. Outside of these parameters work hours appear to vary among the counselors depending upon their own work habits and styles as well as the exigencies of the moment.

9. On the other hand, each of the three guidance counselors who testified, noted creditably with some emphasis the extra burdens imposed by virtue of implementation of the group counseling program. 4/ While the group meetings saved the

4/ The conclusion that workload increased is reached in spite of the testimony of Principal Roberts that none of the counselors were required to, nor did they, work longer hours as a consequence of the institution of the group counseling program (Tr. 142; 149-150). Roberts' own observation of work time at school cannot be conclusive on the matter. A greater intensity and effort within the work day was not subject to his observation. A portion of the increase in workload involving paperwork was not required to be handled at the school. I also cannot conclude that Roberts was able to observe all comings and goings of the counselors. Finally, the additional evening meetings with parents generated by the new program, noted by Roberts himself (Tr. 152), clearly added to the guidance counselors' workload. These meetings were not "extra curricular," i.e.,outside the regular course of study (see Websters New World Dictionary, 2nd College Edition, 1974, p. 497). They were part of the counselors' regular functions in guiding students. Thus, para. F.1 of Article XI "Salaries" recognizing that a "normal school day load" includes, in addition to the normal

(continued next page)

time of individually conveying the information of a general nature (Tr. 74), the group guidance itself generated more frequent meetings with individual students (Tr. 69), 5/ and on those days when the counselors met with the student groups they returned to their offices to find work piled up in these absences, including telephone messages, notes from students and teachers, requests for appointments and the like (Tr. 65). These regular responsibilities had to be fulfilled. sometimes by remaining later at school (Tr. 84) or, for the counselor who consistently arrived at 7:00 a.m., by working rather than relaxing during this early period (Tr. 122). The evening meetings related solely to the group program are another facet of the counselor's added responsibilities. 6/ The record contains no evidence that the Board ever formally notified the Association after decision was reached in the spring of 1978 that it would be implementing a new group counseling program in school year 1978-79. 7/ None of the guidance counselors who participated in its preparation and who later were involved in its implementation had any representative position or office in the Association as disclosed by the record. There is also no record evidence that the Association made any demand to negotiate claims of increased workload or work day resulting from the new counseling program, reduction in staff or expansion of the PDP.

10. However, on September 20, 1978, the Association did grieve on behalf of all affected guidance personnel "...the unilateral decision to increase the workload and to disrupt the status quo conditions of employment of affected unit

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4/ (continued)
teaching assignments and responsibilities,occasional evening extra-curricular assignments,does not represent Association agreement to these additional meetings.

5/ Board President Nancy Schaenen's January 22, 1979 Level III response to the Association's grieving, in part, the Board's decision to institute group guidance, see Finding of Fact No. 10, infra states inter alia, "...the group program is achieving some success as measured by the increase in individual inquiries from students about programs and services."

6/ Superintendent Cooperman's October 16, 1978 Level II response to the grievance acknowledges that "[The Principal] feels furthermore that the new program will require only two additional night meetings per counselor during the current year, not 'approximately seven' as stated by the MTA."

7/ The parties stipulated that negotiations regarding the 1978-80 agreement commenced in October 1977 and were concluded a year later in October 1978 (Tr. 189). The agreement was executed on November 21, 1978 (Jt.-1). There is no evidence that the group program became a subject of these negotiations. The 1978-80 agreement contains a zipper or fully-bargained clause at Article II D, in the following language:

(continued next page)

members," claiming breaches of various provisions of the agreement. [Emphasis added] The Board considered and rejected the grievance at levels two and three of the procedure. On January 30, 1979, the Association grievance chairman sought clarification of one aspect of the Board's level three response. On February 20, 1979, the Board President responded. This exchange dealt with the expansion of the PDP program, the Association having sought clarification as to Board intent to compensate participants and the Board denying any intent to provide extra compensation to guidance counselors or teachers who participate, but indicating a willingness to have Roberts and Cooperman consider extra compensation for the leader, Mrs. Hanna, in 1979-80 under the present agreement or in the context of negotiations for the 1980-81 school year. This grievance did not proceed to arbitration (Tr. 188). 8/

ISSUES

1. Has the Board unilaterally increased the workload of the guidance counselors by any of the acts and conduct alleged in the charge and Complaint?

2. Is the Complaint time-barred because it alleges unfair practices occurring more than six months prior to the filing of the charge?

3. Did the Association waive its right to negotiage the alleged unilateral increases in workload by agreeing to inclusion of a fully bargained clause in the 1978-80 agreement with Respondent?

7/ (continued)

> This Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the term of this Agreement neither party shall 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 executed this Agreement.

8/ The agreement provides for binding arbitration at level four of the process of certain categories of unresolved grievances. On the record the Respondent reaffirmed its consistent position that it was unwilling to waive the expired contractual time limits to arbitration of the underlying dispute (Tr. 187). Without determining whether the grievance is arbitrable under the agreement, I conclude that in view of the Respondent's position, there is no basis for deferral of this proceeding to the arbitration process. See Board of Education of East Windsor and Hightstown Education Association, E.D. No. 76-6, 1 NJPER 59 and City of Trenton and Trenton P.B.A. Local No. 11, P.E.R.C. No. 76-10, 1 NJPER 58.

4. If Respondent committed any unfair practices, what affirmative relief, if any, is appropriate on the record in this proceeding?

ANALYSIS

The Charging Party claims that implementation of four separate Board decisions increased the workload of guidance counselors. The first is the alleged reduction in number of counselors. As level of staffing is an educational policy decision within the Board's managerial prerogative, [9/] and as the decision to retain five counselors in school year 1978-79 is "inescapably inseparable from an increase in workload" [10/], the Board may not be compelled to negotiate with respect to the assignment of additional guidance duties resulting therefrom. In any event, the consistent past practice, except for the temporary transitional period in spring semester, 1978 (see Findings of Fact Nos. 2 and 3) was employment of five counselors. The workloads related to retention of five counselors in 1978-79 was not a change in terms or conditions of prior employment.

The second Board decision was the reassignment of guidance duties for vocational work study program students. The evidence fails to sustain a finding that the imposition of this duty commencing in 1978-79 constitutes a change in past practice regarding workload. In the absence of inclusion of a term or condition of employment in the contract between the parties, such a term or condition may be established by reference to the past practice between the parties. [11/] The past practice as established on the record shows that until 1976-77 the guidance counselors counseled vocational students and that the function was thereafter assigned to vocational counselors for a limited period of time. Lacking evidence that the reassignment of this function in 1978-79 was contrary to a consistent practice between the parties, the Charging Party's claim of increased workload predicated on the reassignment must fail.

9/ Cinnaminson Tp. and Cinnaminson Police Ass'n., P.E.R.C. No. 79-5 at p. 6.

10/ Newark College of Engineering Professional Staff Ass'n. and New Jersey Institute of Technology, P.E.R.C. 80-27 at p. 6.

11/ See Hudson Cty. Board of Chosen Freeholders and Hudson Cty. PBA Local 5, P.E.R.C. No. 78-48, 4 NJPER 87 (par. 4041 1978), affm'd. App. Div. Docket No. A-244-77 (4/9/79).

The third Board decision, regarding the Personal Development Program, also fails to sustain the charge of increased workload. In existence since 1972, the program appears to have achieved some success and been gradually expanded over the years utilizing personnel other than counselors. Since its inception, it has been spearheaded by a guidance counselor, Ms. Hanna, whose guidance load as a consequence has been part-time for some years. Counselor Zitelli's involvement in PDP commenced in the fall of 1977 and has continued thereafter. The Association has not pointed to any particular Board decision expanding PDP which increased guidance counselor workload in school year 1978-79 as alleged. Accordingly, its continued operation in 1978-79 has not unilaterally increased counselor workload.

The fourth Board decision involves the group counseling program. It is evident that commencing in December 1978 the counselors were compelled to hold an increased number of conferences with individual students as well as conduct the group meetings during the group conference periods. Further increases in workload resulted from the necessity of performing normal activities in the limited time remaining after conducting group sessions and leading the additional evening parent meetings. (See Finding of Fact No. 9). I therefore conclude that commencing in December 1978 the Board increased the workload of the guidance counselors and did so without prior negotiation with the Association. 12/ Such conduct is violative of the Act 13/ unless under the facts in this record the Charging Party's complaint

12/ While the Board does not claim any waiver of the right to negotiate by virtue of Association failure to demand negotiations, I feel some comment is appropriate. Normally, neither the Association's filing of the grievance in September 1978 (Finding of Fact No. 10), nor its filing of the instant charge would relieve it of the obligation to seek bargaining over the subject matter. See Auto Workers Local 417 (Falcon Industries), 245 NLRB No. 75, 102 LRRM 1466 at 1468. However, the grievance relates to the Board's decision to increase workload by adopting the group program. Not until December 1979, could the Association perceive the precise manner in which implementation of the program increased workload. By that time, after implementation, the Association would not be required to request negotiations. Furthermore, in light of the Respondent's consistent position that workload was not affected by the program, it would have been futile for the Association to have sought bargaining after the plan was adopted.

13/ In Rahway Board of Education and Rahway Education Association, P.E.R.C. No. 79-30, 5 NJPER 23 (par. 10015 1979), the Commission determined that the issue of workload of guidance counselors is a required subject for collective negotiations and denied the employer's request for a restraint of arbitration relating to workload issues. The Association there noted that it was not attempting to set aside any aspect of the Board's reorganization of the guidance department. Similarly, in the case, sub judice, it is the workload increase which is subject to the negotiations obligation, and not the group guidance program which the Board determined to establish purusant to its managerial prerogative. (The Association makes this concession in its brief).

is time-barred or it wavied its right to require negotiations.

Respondent argued during the hearing, and renews that argument in its brief, that this allegation is time-barred. Respondent asserts that the group program was implemented at the beginning of the 1978-79 school year, more than six months before the charge was filed on April 26, 1979. Respondent adds that the Association's filing of a grievance protesting the program, on September 20, 1978, shows recognition of the effects of the program at that time rather than later, in December 1978, as claimed at the hearing. Respondent is correct that the filing of the grievance did not toll the running of the six month statute. [14/] However, my ruling made at hearing on the record (Tr. 50-2) [15/] is reaffirmed. Those aspects of the program which were implemented in September and early October 1978 outside the six month period were a continuation of a pre-existing practice of group meetings in particular with freshman and juniors and evening meetings with their parents regarding high school orientation and preparation for PSATs, respectively. It was only when the new phase of the program began in December 1978 involving three or four group meetings a day for a full week for the counselors and additional related evening meetings with parents that the Association filed its charge in protest. These meetings constitute a radical departure from the past guidance programs and imposed greated workloads on the counselors (see Finding of Fact No. 9 and footnotes 5 and 6 in particular). The September grievance does not constitute an inconsistent position by the Association. It disputes the decision to increase workload related to the new program. The actual impact could not, and indeed, was not felt, until the December schedule was underway. I therefore reaffirm my ruling rejecting Respondent's defense of time-bar.

I next address whether by agreeing to the "fully bargained" clause in the 1978-80 agreement, signed on November 21, 1978, after having grieved the decision to increase workload, the Association has waived its right to demand negotiations. The contract clause is very similar to the clause in North Brunswick Twp. Board of Education and North Brunswick Educational Secretaries Association, P.E.R.C. No. 79-14, 4 NJPER 451 (par. 4205 1978), affm'd. App. Div. Docket No. A-698-78 (4/11/79). In reliance on its own and federal precedent, and applying a strict

14/ N.J.S.A. 34:13A-5.4(c). See State of New Jersey v. Council of N.J. State College Locals, P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd. 153 N.J. Super. 91 (1977), cert. den. 78 N.J. 326 (1978).

15/ See footnote 2, supra.

waiver standard, the Commission refused to find that negotiation of a standard "zipper clause" constituted a waiver of a statutory right to negotiate concerning specific unilateral changes in an employees' terms and conditions of employment, Id. at 8 and 9 and cases cited thereat. Applying that rationale to the instant proceeding, in the absence of any facts showing that the Association sought a provision relating to the anticipated workload increase 16/ or showing any of the circumstances surrounding the bargaining, 17/ I conclude the Charging Party has not waived its contractual right.

CONCLUSIONS OF LAW

1. By increasing the workload of its high school guidance counselors during the implementation of the group counseling program, without negotiation, Respondent has engaged in, and continues to engage in conduct in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). 18/

2. By employing five guidance counselors,and reassigning to them the guidance duties for vocational work study program students, and by continuing the Personal Development Program, commencing in the 1978-79 school year, Respondent has not engaged in conduct in violation of N.J.S.A. 34:13A-5.4(a)(1),(3) or (5).

THE REMEDY

Having found that the Respondent has engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5), I will recommend that it cease and desist therefrom and take certain affirmative action. Charging Party in its brief argues that for affirmative relief Respondent either restore workloads to those which prevailed prior to the 1978-79 school year, or Respondent continue the present schedules and compensate each affected unit member retroactively to make him whole. With respect to the former remedy, Charging Party would require Respondent to maintain an appropriate staff to handle pre-existing workload and

16/ Contrast Twp. of West Windsor and West Windsor PBA, Local 271, P.E.R.C. No. 79-19.

17/ See Radioear Corp., 214 NLRB No. 33, 87 LRRM 1330 (1974).

18/ In the absence of any evidence adduced in its support, I shall recommend dismissal of that portion of the Complaint alleging violation of subd. (a)(3).

to compensate counselors for services rendered under the unilaterally increased workload.

On the record before me, I cannot recommend a compensatory remedy for the unilateral increase in workload. While I am not unmindful that commencing in December 1978, the work effort was intensified and the counselors were burdened with additional individual student conferences and evening parent meetings, the thrust of Charging Party's case is that workload was increased and not work hours. In such circumstances and lacking a precise method to measure the loss suffered by each counselor, the Courts [19/] and the Commission [20/] have been loathe to award monetary relief. However, I will recommend that Respondent, upon demand of the Association, negotiate in good faith retroactively to December 1978, with respect to the changes in workload it unilaterally made at that time and which continued thereafter. I will also recommend that within 60 days of the date of the Commission's final order, the Respondent restore the status quo ante as to the workloads of the guidance counselors prior to the unilateral charges made commencing in December 1978.

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, it is HEREBY ORDERED that the Madison Borough Board of Education shall:

1. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with the Madison Teachers Association concerning terms and conditions of employment of guidance counselors employed in the unit and more specifically, by making unilateral changes in the workloads of such unit employees.

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

(a) Within sixty (60) days of the date hereof, restore the status quo ante as to workloads of the guidance counselors prior to the changes therein made

19/ Galloway Twp. Bd. of Ed. and Galloway Twp. Ed. Assn., 157 N.J. Super. 74 (App. Div. 1978); Maywood Ed. Assn. v. Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), pet. for certif. den. 81 N.J. 292 (6/26/79).

20/ Jackson Twp. Bd. of Ed. and Jackson Twp. Admin. Assn. and Frank J. Morra, P.E.R.C. No. 80-48 at 2-3.

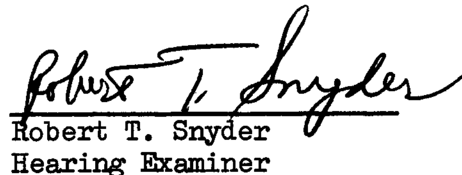
commencing in December of the 1978-79 school year and upon demand of the Association, negotiate in good faith with respect to these changes for the period commencing at that time and continuing during such time as the counselors had greater workloads unilaterally imposed. Such negotiations must be conducted in light of the existence of the Group Guidance Program. 21/

(b) Upon demand, negotiate in good faith any proposed changes in the workloads of employees prior to the implementation of such changes.

(c) Post at all places where notices to employees are customarily posted, copies of the attached notice marked Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately by the Respondent 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.

(d) Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

It is further ORDERED that all other portions of the Complaint alleging violations of N.J.S.A. 34:13A-5.4(a)(1) and (5) related to staffing, reassignment of guidance responsibilities or student personal development program, and all portions of the Complaint alleging violation of N.J.S.A. 34:13A-5.4(a)(3), are hereby dismissed.



DATED: January 9, 1980
Newark, New Jersey

Robert T. Snyder
Hearing Examiner

21/ The right of the Respondent to establish a group guidance program necessarily carries with it the right to assign counselors to conduct group student meetings and parent conferences. The negotiations must therefore be conducted in light of the necessity of the guidance counselors performing their assignments under the program. See Northvale Board of Education and Northvale Teachers Association, P.E.R.C. No. 80-79, 5 NJPER par. ___; Burlington County College Faculty Assn. v. Bd. of Trustees, 64 N.J. 19 (1973).

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 by refusing to negotiate in good faith with the Madison Teachers Association concerning terms and conditions of unit employees and more specifically, by making unilateral changes in their workloads.

WE WILL, within sixty (60) days of the date hereof, restore the status quo ante as to the workloads of our guidance counselors prior to the changes in their workloads made in December of the 1978-79 school year and upon demand of the Association negotiate in good faith with respect to these changes in workload as long as they remain in effect.

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