P.E.R.C. NO. 82-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-352-35

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a recommendation of a Hearing Examiner and holds that the East Brunswick Board of Education violated the New Jersey Employer-Employee Relations Act when it voted, without prior negotiations, to eliminate 12-month elementary guidance counselor positions and to substitute 10-month elementary guidance counselor positions. The length of an employee's work year is mandatorily negotiable.

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EAST BRUNSWICK BOARD OF EDUCATION,

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-and- Docket No. CO-80-352-35

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Rubin, Lerner & Rubin, Esqs. (Frank J. Rubin, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs. (Nancy Iris Oxfeld, of Counsel)

DECISION AND ORDER

On June 3, 1980, the East Brunswick Education Association (the "Association") filed an unfair practice charge against the East Brunswick Board of Education (the "Board") with the Public Employment Relations Commission. The charge was amended on January 26 and September 15 of 1981. The amended charge alleged, inter alia, that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (3) and (5),[1/] when it voted to eliminate 12-month elementary guidance counselor positions and

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

substitute 10-month elementary guidance counselor positions, effective September 1, 1980.

On September 28, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Board filed an Answer in which it generally denied committing any violations.

On November 13, 1981, Commission Hearing Examiner Alan R. Howe held a pre-hearing conference at which the parties agreed to stipulate the facts. Based on the parties' representations at the conference, the Hearing Examiner drew up his proposed findings of fact, and sent them to the parties for their review. Neither party objected to any of the proposed findings of fact. Both parties filed briefs.

On February 16, 1982, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-32, 8 NJPER ____ (¶_____ 1982) (copy attached). He converted his proposed findings of fact into his actual findings of fact. He found no evidence to support the allegations of a subsection 5.4(a)(3) violation. He concluded, however, that the Board violated subsections 5.4(a)(1) and (5) of the Act when it unilaterally changed the work year of the elementary guidance counselors from 12 months to 10 months with a pro-rata reduction in salary. He relied principally upon Piscataway Township Board of Education v. Piscataway Township Principal's Association, 164 N.J. Super. 98 (App. Div. 1978), and Hackettstown Education Association v. Hackettstown Board of Education, App. Div. Docket No. A-385-80T3 (January 18, 1982). In these cases, the Appellate Division affirmed Commission decisions holding that a reduction in the work year of school personnel from 12 months to 10 months is a mandatorily negotiable term and

condition of employment. In re Piscataway Township Bd. of Ed., P.E.R.C. No. 77-37, 3 NJPER 72 (1977) and P.E.R.C. No. 77-65, 3 NJPER 169 (1977) and In re Hackettstown Education Assoc., P.E.R.C. No. 80-139, 6 NJPER 263 (1980). The Hearing Examiner also distinguished Commissioner of Education cases in which full time positions were legally abolished and part time positions were substituted, because the 10-month positions here were considered full time positions.[2/] As a remedy, he recommended an order requiring the Board to restore the 12-month work year of elementary guidance counselors, make the affected counselors whole by payment of monies due from September 1, 1980 to date with 8% interest, negotiate with the Association before changing the work year of elementary guidance counselors, and post a notice of its violations and remedial actions.

On March 9, 1982, the Board filed Exceptions. In its Exceptions, the Board contends that (1) the Commissioner of Education had already correctly ruled that the Board acted lawfully in abolishing the 12-month positions and creating 10-month positions; (2) no terms or conditions of employment were altered because the Board abolished the positions pursuant to N.J.S.A. 18A:28-9[3/] and filled the new positions pursuant to

2/ Wexler v. Bd. of Ed. of the Borough of Hawthorne, 1976 S.L.D. 309; Klinger v. Bd. of Ed. of Cranbury, 1981 S.L.D. ____ (decided January 6, 1982).

3/ N.J.S.A. 18A:28-9 states: "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

N.J.S.A. 18A:28-12;[4/] and (3) the Hearing Examiner erred in finding that the Board acted without prior negotiations.

On March 16, 1982, the Association filed a response. On February 23, 1981, the Association filed a Cross-Exception asking that interest be paid at the rate of 12% per annum pursuant to R4:42-11.

We have reviewed and we adopt the Hearing Examiner's findings of fact. We agree with him that Piscataway and Hackettstown control and, consequently, that the Board violated subsections 5.4(a)(5) and, derivatively, (a)(1).

In its first exception, the Board argues that the Commissioner of Education resolved the same issue in its favor in East Brunswick Education Association v. East Brunswick Board of Education, 1981 S.L.D. ____ (November 13, 1981) and that the Commission should give deference to that decision. The issue in that case, however, is not the same as the one in this case. There, the issue concerned whether an individual who had previously served as a high school principal from 1963 to 1969 was entitled to return to that position after his 12-month elementary guidance counselor position was abolished. Although the Commissioner dealt peripherally with N.J.S.A. 18A:28-9, the thrust of the case concerned only whether the particular guidance counselor could exercise his seniority and fill a position other than the newly

4/ N.J.S.A. 18A:28-12 states in part: "If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs...."

created 10-month guidance counselor position. Here, the central issue concerns the Board's obligation under our Act to negotiate before changing the terms and conditions of employment, in particular the work year, of its employees. The former case does not help resolve the latter since the issues are so different.

Additionally, the Board claims that the Commissioner of Education's interpretation of N.J.S.A. 18A:28-9 is correct. For the reasons set forth in the Hearing Examiner's decision (Slip Opinion at pp. 4-5), the cases the Board cites are inapposite. None of these cases addressed the nature of the Board's obligation under our Act to negotiate before it exercises any discretionary authority it may have under any other statute.

The Board also contends that it did not simply reduce the work year of the elementary guidance counselors, but rather abolished their positions altogether pursuant to N.J.S.A. 18A:28-9, and created and filled new ones. The Board contends that this sequence of events distinguishes Piscataway and Hackettstown. We disagree. For the reasons stated in the Hearing Examiner's decision (Slip Opinion at pp. 6-7), Piscataway and Hackettstown are right on point. As we stated in our Hackettstown decision:

> The argument by the Board that the 12 and 11 month positions were officially abolished pursuant to N.J.S.A. 18A:28-9 and that the new 10 month positions were thereafter created, rather than a simple reduction in months of service, is a distinction without a difference.
>
> The holding of the Appellate Division [in Piscataway] cannot be emasculated simply by the method advanced by the Board herein. The Commission has consistently held that the length of the work year (or the abolition of 12 and 11 month positions and the creation of 10 month positions) is a mandatory term and condition of employment.
> (6 NJPER at 263) (Footnote omitted).

While we do not dispute that the Board may have good reasons for wishing to reduce the work year of some of its employees, Piscataway and Hackettstown require it to negotiate to impasse or agreement before doing so.

In its final exception, the Board states that the decision to reduce the work year was not made unilaterally, but after negotiations with the Association. The parties stipulated that in April 1980, the Board voted to eliminate the 12-month guidance counselor positions, despite the fact negotiations for a successor collective negotiations agreement were in progress. The Board did not introduce any evidence that negotiations on this issue had reached either impasse or agreement before the Board voted. Thus, on this record, it is clear, both factually and legally, that the Board changed a mandatorily negotiable term and conditions of employment before negotiating to impasse or reaching an agreement with the Association. This conduct violated our Act. Galloway Township Bd. of Education, 78 N.J. 25, 48 (1978).

We now turn to the Association's exception. We agree that under R.4:42-11, interest should be awarded at the rate of 12% rather than 8%.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

A. The East Brunswick Board of Education cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, in particular, by unilaterally changing the work year of

elementary guidance counselors without negotiations with the East Brunswick Education Association.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, in particular by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

B. The Board take the following affirmative action:

1. Forthwith restore the work year of elementary guidance counselors from 10 months to 12 months and thereafter negotiate in good faith any proposed change in the work year with the Association.

2. Forthwith make the elementary guidance counsellors whole for lost earnings as a result of the reduction in work year by making payment of monies due from September 1, 1980 to date together with interest at the rate of 12% per annum from September 1, 1980.

3. 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 immediately upon receipt thereof and, after being signed by the Board's authorized representative, shall be maintained by it for a period of at least sixty (60) days thereafter. Reasonable steps shall be taken by the Board to insure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt of what steps the Board has taken to comply herewith.

C. The allegations that the Respondent violated N.J.S.A. 34:13A-5.4(a)(3) be dismissed in their entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett and Butch voted for this decision. Commissioner Hipp abstained. Commissioner Suskin voted against this decision. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey
May 4, 1982
ISSUED: May 5, 1982

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, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

WE WILL forthwith restore the work year of elementary guidance counselors from 10 months to 12 months and thereafter negotiate in good faith any proposed change in the work year with the Association.

WE WILL forthwith make the elementary guidance counselors whole for lost earnings as a result of the reduction in work by making payment of monies due from September 1, 1980 to date, together with interest at the rate of 12% per annum from September 1, 1980.

EAST BRUNSWICK 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 the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 82-32

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

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-352-35

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally, and without negotiations with the Association, changed the work year of the elementary guidance counselors from 12 months to 10 months with pro-rata reduction in salary. The Hearing Examiner relied principally upon the Appellate Division decision in Piscataway Township Board of Education v. Piscataway Township Principals Association, 164 N.J. Super. 98 (App. Div. 1978), which affirmed the Commission's decisions holding that a change in work year is a mandatorily negotiable term and condition of employment. The most recent decision on the subject is Hackettstown Education Association v. Hackettstown Board of Education, App. Div. A-385-80T3 (1982) where the Court, citing Piscataway, held that a change in work year affected terms and conditions of employment, which were mandatorily negotiable and not the exercise of a managerial prerogative.

By way of remedy, the Hearing Examiner ORDERED that the affected elementary guidance counselors be restored to the 12-month work year and made whole for lost earnings since September 1, 1980 with interest at the rate of 8% per annum.

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

H.E. No. 82-32

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

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EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

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Docket No. CO-80-352-35

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the East Brunswick Board of Education
Rubin, Lerner & Rubin, Esqs.
(Frank J. Rubin, Esq.)

For the East Brunswick Education Association
Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 3, 1980, and amended on January 26, 1981 and September 15, 1981, by the East Brunswick Education Association (hereinafter the "Charging Party" or the "Association") alleging that the East Brunswick Board of Education (hereinafter "Respondent" or 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. (hereinafter the "Act"), in that the Respondent on April 16, 1980 during the course of collective negotiations for a successor agreement voted to eliminate the position of 12-month elementary guidance counselor and substitute therefor the position of 10-month elementary guidance counselor and to authorize the posting of the 10-month guidance counselor position, effective September 1, 1980, all which was alleged to be a violation of N.J.S.A. 34:

13A-5.4(a)(1),(3) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act a Complaint and Notice of Hearing was issued on September 28, 1981. Pursuant to the Complaint and Notice of Hearing, a pre-hearing was held on November 13, 1981 in Newark, New Jersey, at which time the parties reached an agreement on a stipulation of facts as hereinafter set forth. The parties did not waive a Hearing Examiner's Recommended Report and Decision. The parties filed post-hearing briefs by February 5, 1982.

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 consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, and in accordance with the stipulation of the parties, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The East Brunswick Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The East Brunswick Education Association is public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. On April 16, 1980, while negotiations were in process for a successor collective negotiations agreement, the Board adopted the following motions:

a. "Motion to extend the twelve-month elementary guidance counselor contracts from June 30, 1980 to August 31, 1980."

1/ These Subsections prohibit public employers, their representative 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 or 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."

b. "Motion to eliminate nine, twelve-month elementary guidance counselor positions effective September 1, 1980."

c. "Motion to create nine, ten-month elementary guidance counselor positions effective September 1, 1980."

d. "Motion to authorize the Assistant Superintendent for Personnel to post, advertise and recruit for nine, ten-month elementary guidance counselor positions effective September 1, 1980."

4. Thereafter the Board put into effect the changes adopted at the April 16, 1980 meeting but decided to refrain from posting the nine, ten-month elementary guidance counselor positions and the employees in the twelve-month positions were continued as the ten-month elementary guidance counselors with a pro-rata reduction in salary effective September 1, 1980.

5. Thereafter a successor collective negotiations agreement was consummated, effective through June 30, 1982, without resolution of the subject matter of the instant amended Unfair Practice Charge.

THE ISSUE

Did the Respondent Board violate Subsections(a)(1), (3)[2/] and (5) of the Act when on April 16, 1980 it adopted a series of resolutions, which eliminated the position of 12-month elementary guidance counselor and substituted therefor the position of 10-month elementary guidance counselor, effective September 1, 1980, without negotiations with the Association?

DISCUSSION AND ANALYSIS

The Respondent Board Violated Subsections (a)(1) And (5) Of The Act When On April 16, 1980 It Adopted A Series Of Resolutions, Which Eliminated The Position Of 12-Month Elementary Guidance Counselor And Substituted Therefor The Position Of 10-Month Elementary Guidance Counselor, Effective September 1, 1980, Without Negotiations With The Association

2/ The stipulated facts can under no theory support a violation of Subsection(a)(3) of the Act. Accordingly, the Hearing Examiner will recommend dismissal of this aspect of the Unfair Practice Charge.

The Hearing Examiner finds and concludes that the Respondent Board violated Subsections(a)(1) and (5) of the Act by adopting a series of resolutions on April 16, 1980, which eliminated the position of 12-month elementary guidance counselor and substituted therefor the position of 10-month elementary guidance counselor, effective September 1, 1980, without negotiations with the Association.

The Respondent argues that the action of the Board on April 16, 1980 in abolishing the 12-month elementary guidance counselor positions was a reduction in force (RIF) pursuant to N.J.S.A. 18A:28-9. The Respondent concedes that the Board simultaneously created an equal number of 10-month elementary guidance counselor positions without prior negotiations with the Association. As authority for its action the Respondent relies upon several Commissioner of Education decisions[3/] and a State Board of Education decision.[4/]

The Respondent did not submit a copy of the Commissioner of Education's decision in Wexler, but it is quoted briefly in the Commissioner of Education's decision in East Brunswick. Wexler apparently set forth guidelines for a Board of Education to follow when it desires to abolish a full-time position and establish in its place a part-time position. The instant case does not involve the creation of a part-time position and this was clearly recognized by the Commission of Education in his East Brunswick decision where on page 5 of the ALJ's decision, affirmed by the Commissioner, it is noted that: "...This ten-month position (elementary guidance counselor) is not considered in the operation of schools to be a part-time or less than full-time position..." Thus, it is clear that Wexler has no application to the instant case under any view of the law.

3/ Wexler v. Bd. of Ed. of the Borough of Hawthorne, 1976 S.L.D. 309 and East Brunswick Education Association v. East Brunswick Bd. of Ed., 1981 S.L.D. ___ (November 13).

4/ Klinger v. Bd. of Ed. of Twp. of Cranbury, Janaury 6, 1982.

The East Brunswick decision of the Commissioner of Education involves one of the affected 12-month elementary guidance counselors who sought, based on prior experience as a High School Principal, to "bump up" from guidance counselor to High School Principal. This was denied by the Commissioner of Education. Thus, the factual setting and the law of that case has nothing to do with the case at bar.[5/]

Finally, the Klinger case, cited by the Respondent, supra, involved the abolishing of a full-time position and the creation of a part-time position. Thus, like Wexler the factual situation is clearly distinguishable from the instant case, which, as noted again, does not involve the creation of a part-time position, but rather a full-time 10-month position.

The Respondent would have the Hearing Examiner believe that its action in effectuating a RIF in the instant case pursuant to N.J.S.A. 18A:28-9 somehow distinguishes the instant case from Piscataway Township Board of Education v. Piscataway Township Principals Association, P.E.R.C. No. 77-37, 3 NJPER 72 and P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd. 164 N.J. Super. 98 (App. Div. 1978) and Hackettstown Education Association v. Hackettstown Board of Education, P.E.R.C. No. 80-139, 6 NJPER 263 (1980), aff'd. App. Div. Docket No. A-385-80T3 (January 18, 1982). The Hearing Examiner rejects any such suggestion.

In Piscataway the Board unilaterally adopted a resolution reducing the yearly term of employment of certain Vice-Principals from 12 months to 10 months entailing a proportionate reduction in salary. The Commission, in a scope of negotiations decision, held that the work year is a term and condition of employment and must, therefore, be the subject of mandatory negotiations (P.E.R.C. No. 77-37, 3 NJPER 72, supra).

5/ The ALJ in the East Brunswick decision also cited a case at page 7: Williams v. Bd. of Ed. of Plainfield, 1980 S.L.D. ____ (January 9), aff'd. 176 N.J. Super. 154 (App. Div. 1980). In that case a 12-month High School Principal was reassigned to a 10-month Elementary School Principalship with no reduction in salary. The reassignment under these circumstances was held not to be violative of the law.

The Commission, also, in an unfair practice decision, held that the unilateral reduction of the work year was a violation of Subsections(a)(1) and (5) of the Act and ordered the restoration of the 12-month work year with back pay for earnings lost (P.E.R.C. 77-65, 3 NJPER 169, supra). Both decisions were considered on appeal by the Appellate Division, which said:

> "We have no doubt that the matter of length of the work year and its inseparable concomitant--compensation--are terms and conditions of employment, within the intent of the ...Act...and consequently the subject of mandatory negotiation before being put into effect by the public employer. The Board does not argue to the contrary, but asserts that its action here is properly to be regarded as a reduction in work force and that the Education Act expressly authorizes it. N.J.S.A. 18A:28-9. That statute, however, recognizes only the right of a board of education 'to reduce the number of teaching staff members employed in the district,' which may be done for reasons of economy or other good cause." (164 N.J. Super. at 100, 101).

Thus, it is clear that the public employer in Piscataway argued that it had acted to RIF the affected Vice-Principals pursuant to N.J.S.A. 18A:29-9, which is exactly what is contended in the instant case with respect to the elementary guidance counselors. However, the Appellate Division rejected such a contention in Piscataway where the Court said:

> "The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiation...(citing cases)...there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under existing contract, work the full year...and without prior negotiation under existing contract, work the full year...and without prior negotiation with the employees affected, is in violation of both the text and spirit of the...Act..." (164 N.J. Super. at 101). (Emphasis supplied).

Any doubt as to the current force or vitality of Piscataway is answered by Hackettstown, supra. There the Board abolished a 12-month and an 11-month position pursuant to N.J.S.A. 18A:28-9 and simultaneously created two 10-month positions, following exactly the same pattern in the instant case. The Commission in a scope of negotiations decision, rejected the Board's argument that its actions were not

subject to mandatory negotiations. After quoting freely from the Appellate Division decision in Piscataway, supra, the Commission said:

> "The argument by the Board that the 12 and 11 month positions were officially abolished pursuant to N.J.S.A. 18A:28-9 and that the new 10 month positions were thereafter created, rather than a simple reduction in months of service, is a distinction without a difference.
>
> "The holding of the Appellate Division (in Piscataway) cannot be emasculated simply by the method advanced by the Board herein. The Commission has consistently held that the length of the work year... is a mandatory term and condition of employment." (6 NJPER at 263).

The scope of negotiations proceeding in Hackettstown, supra, came about by direction of a Judge of the Superior Court. After the Commission's decision, holding that the subject matter was mandatorily negotiable, an arbitration occurred and, after an appeal from a decision of the Judge of the Superior Court, the matter was before the Appellate Division for review. The Court, effectively affirming the Commission, noted that the action of the Board involved the elimination of a 12-month position for an agriculture teacher and an 11-month position for a elementary guidance counselor. The Court noted further that the effect of the Board's action in simultaneously creating new positions of an identical nature for a period of 10 months duration was to shorten the period of employment and to reduce compensation accordingly. The Court finally noted that the action was taken without negotiations with the Association. The Court succinctly stated:

> "We conclude that PERC correctly perceived that the board's action affected terms and conditions of employment which are mandatorily negotiable... It did not, as the board here argues, constitute an exercise of the managerial prerogative to abolish a position. See In re Piscataway Board of Education, 164 N.J. Super. 98 (App. Div. 1978)..."

The Hearing Examiner, based on Piscataway and Hackettstown finds and concludes that the Respondent Board herein violated Subsections(a)(1) and (5) of the Act by its conduct on April 16, 1980, supra, and an appropriate remedial order will be recommended.

* * * *

Upon the foregoing, and upon the stipulated record in this case, the Hearing

Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 5.4(a)(1), when on April 16, 1980 it adopted a series of resolutions, which eliminated the position of 12-month elementary guidance counselor and substituted therefor the position of 10-month elementary guidance counselor, effective September 1, 1980, without negotiations with the Association.

2. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(3) by its conduct herein.

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, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

B. That the Respondent take the following affirmative action:

1. Forthwith restore the work year of elementary guidance counselors from 10 months to 12 months and thereafter negotiate in good faith any proposed change in the work year with the Association.

2. Forthwith make the elementary guidance counselors whole for lost earnings as a result of the reduction in work year by making payment of monies due from September 1, 1980 to date together with interest at the rate of 8% per annum

from September 1, 1980.[6/]

3. Post in all places were 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 immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

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

C. That the allegations that the Respondent violated N.J.S.A. 34:13A-5.4(a)(3) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: February 16, 1982
Trenton, New Jersey

6/ See Salem County Bd. for Vocational Ed. v. McGonigle, App. Div. Docket No. A-3417-78 (1980) and County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (1981).

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, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly, by unilaterally changing the work year of elementary guidance counselors without negotiations with the Association.

WE WILL forthwith restore the work year of elementary guidance counselors from 10 months to 12 months and thereafter negotiate in good faith any proposed change in the work year with the Association.

WE WILL forthwith make the elementary guidance counselors whole for lost earnings as a result of the reduction in work by making payment of monies due from September 1, 1980 to date together with interest at the rate of 8% per annum from September 1, 1980.

EAST BRUNSWICK 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 Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780