P.E.R.C. NO. 85-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAYWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-83-139-82

MAYWOOD EDUCATION ASSOCIATION,

Charging Party.

## SYNOPSIS

The Public Employment Relations Commission holds that the Maywood Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally increased teachers' pupil contact time without negotiating over possible additional compensation for this increase.

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-and- Docket No. CO-83-139-82

MAYWOOD EDUCATION ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Gladstone, Hart & Rathe, Esqs.
(James R. Freeswick, of Counsel)

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, of Counsel)

DECISION AND ORDER

On December 1, 1982 and December 27, 1983, the Maywood Education Association, NJEA ("Association") filed, respectively, an unfair practice charge and an amended charge against the Maywood Board of Education ("Board") with the Public Employment Relations Commission. The charge, as amended, alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"), specifically subsections 5.4(a)(1) and (5),[1/] when it unilaterally changed the first day of school in September 1982 and two of the last school days in June 1983 from half-days of instruction to full days, thus

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; 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."

increasing the teachers' pupil contact time.[2/]

On January 30, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing.

On February 9, 1984, the Board filed its Answer. It did not specifically deny unilaterally increasing the amount of pupil contact time on the days in question, but denied that these changes constituted an unfair practice. It also averred, as separate defenses, that the charge was time-barred and that the parties' collective negotiations agreement permitted the changes and estopped the Association from contesting them.

On March 13, 1984, Commission Hearing Examiner Judith E. Mollinger conducted a hearing. The parties examined witnesses and presented exhibits. They waived oral argument, but submitted post-hearing briefs.

On July 12, 1984, the Hearing Examiner issued her report and recommended decision, H.E. No. 85-1, 10 NJPER ____ (¶_____ 1984). She concluded that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally increased the teachers' pupil-contact time. She recommended that the Commission order that the Board compensate the teachers for any past increases in the teachers' pupil contact time and that it negotiate over compensation for any prospective increases.

On July 25, 1984, the Board filed exceptions. The Board asserts that the Hearing Examiner erred in: (1) not deferring

2/ The amended charge made no allegation concerning the 1983-84 school year. The parties, however, fairly and fully litigated the issue of whether increases in pupil contact time during that year violated the Act.

the dispute to the parties' negotiated grievance procedures or finding that the Association waived its claim by not using those procedures; (2) finding that the change from one-half days to full days increased the teachers' workload; (3) concluding that the Board was obligated to negotiate with the Association over compensation prior to increasing pupil contact time; and (4) finding that Article 12B2 in the 1981-83 collective negotiations agreement did not relieve the Board of any duty to negotiate. In addition to these exceptions, the Board has requested that the record be reopened.[3/]

On August 10, 1984, the Association filed exceptions. It asks that the Board be ordered to restore the previous half days of school.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-9) are accurate with the following exceptions.[4/] We adopt and incorporate them here.

As a threshold matter, we consider the Board's contention that this case should have been deferred to the parties' negotiated grievance procedures. We disagree. Deferral is inappropriate because the parties' grievance procedures do not end in binding arbitration and the Board has raised a scope of negotiations

3/ The Board has also requested oral argument. We deny that request.

4/ We modify finding of fact no. 4 to reflect that full days of instruction were required in all the district's elementary schools and its only middle school. We modify finding of fact no. 10 to reflect that the Association's president hand-delivered the request for negotiations. We finally modify finding of fact no. 18 to reflect that the correct contract citation is Article 3B6b.

defense. See In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975).[5/]

We next consider the Board's contention that it had a managerial prerogative to make the changes in question without negotiating compensation for increased pupil contact time. We disagree. Here, the Board had an 11 year practice of scheduling half-days of classes on the first day and each of the last three days of school. In the 1982-83 and 1983-84 school years, the Board unilaterally altered this past practice by scheduling full days of classes on the first day and two of the last three days of school. This change increased the amount of time teachers spent teaching classes. The Association requested negotiations concerning this change and the Board refused. The Commission and New Jersey's courts have consistently found that school boards do not have a managerial prerogative to increase pupil contact time without negotiating compensation and that a refusal to negotiate is an unfair practice. See, e.g., Bd. of Ed. of Woodstown-Reg. School Dist. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. (1980); In re Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41

5/ A related question is whether we have jurisdiction over the Association's charge in the first instance. Compare In re State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER ___ (¶_____ 1984) with In re City of South Amboy, P.E.R.C. NO. 85-16, __ NJPER ___ (¶_____ 1984). We do. This case involves a claimed unilateral alteration in a term and condition of employment rather than a mere breach of contract claim. Further, the Board has asserted a scope of negotiations defense. Accordingly, under all the circumstances of this case, we will assert our unfair practice jurisdiction. Another related question is whether the Association waived its right to file an unfair practice charge by not filing a grievance. For the same reasons, the answer is no.

(¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/26/80); In re Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82). Even if we assume the Board had a managerial prerogative to require full days of classes on these days as an incident of its right to establish the school calendar, that prerogative does not enable it to mandate that teachers teach these extra classes without any additional compensation. Accordingly, the Board, in the absence of a contract defense, had an obligation to negotiate before it increased pupil contact time. See In re New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978).

We next consider the Board's contention that Article 12B2 of the parties' collective negotiations agreement negated any obligation to negotiate over increased pupil contact time it otherwise would have had. We disagree. Article 12B2 merely gives the Board the right, on days when students are dismissed early, to require teachers to remain in school until their regular dismissal time, with three exceptions permitting teachers to be dismissed earlier. This clause does not specifically or inferentially give the Board a right not to negotiate over compensation for increased pupil contact time resulting from a change in established past practice concerning half-days of instruction. Further, the negotiations history concerning this clause confirms that it was not directed at this issue and instead was directed solely at determining the half-days on which teachers would be allowed to leave 15 minutes after students.[6/]

6/ We also deny the Board's request that the hearing be reopened to take testimony concerning what happened after the hearing during negotiations for the 1983-85 agreement. Such evidence would not be relevant to determining whether the Board committed an unfair practice.

Finally, we consider the appropriate remedy. Under all the circumstances of this case, we believe that the appropriate remedy is an order requiring negotiations over compensation for past or future increases in pupil contact time. We do not believe an order restoring half days of school on the days in question is necessary or appropriate. In particular, there is ample time between now and the end of the school year for the parties to negotiate over appropriate compensation for any decision to schedule full days of classes at the end of this school year.

ORDER

The Maywood Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and refusing to negotiate in good faith with the Association concerning compensation for increases in pupil contact time.

B. Take the following affirmative action:

1. Negotiate in good faith with the Association concerning compensation prior to any proposed future increase in pupil contact time.

2. Negotiate in good faith concerning compensation for past increases in teachers' pupil contact time.

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 Township's authorized representative shall be maintained by it for at least sixty (60) consecutive

days. Reasonable steps shall be taken by the Township 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 regarding what steps the Board has taken to comply with this order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Butch, Suskin, and Wenzler voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984

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 negotiate in good faith with the Association concerning compensation for past and future increases in pupil contact time.

MAYWOOD BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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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. 85-1

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

In the Matter of

MAYWOOD BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-83-139-82

MAYWOOD EDUCATION ASSOCIATION,

Charging Party.

## Synopsis

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Maywood Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act. The Board unilaterally increased the teacher pupil-contact time and workload when it changed half-days to full-days on the first school day in September 1982 and on the second and third from last school days in June 1983. The Board repeated its action for the 1983-84 school year.

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. 85-1

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

In the Matter of

MAYWOOD BOARD OF EDUCATION,

Respondent,

- and - Docket No. C0-83-139-82

MAYWOOD EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Gladstone, Hart & Rathe
(James R. Freeswick, of Counsel)

For the Charging Party
Zazzali, Zazzali & Kroll
(Paul L. Kleinbaum, of Counsel)

HEARING EXAMINER'S
REPORT AND RECOMMENDED DECISION

On December 1, 1982, as amended December 27, 1983, the Maywood Education Association, NJEA ("Association") filed an unfair practice charge against the Maywood Board of Education ("Board") with the Public Employment Relations Commission ("Commission"). The charge alleged that the Board violated subsections 5.4(a)(1) and (5) [1/*] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"). It alleges that the Board changed the practice governing the teachers' working hours and workload, in August 1982, during the term of the existing collective agreement. The Board, unilaterally increased the teachers' workload and work hours by increasing pupil

* Footnotes appear at the end of this decision.

contact time when it changed half-days to full-days on the first school day in September 1982 and on the second and third from last school days in June 1983. This action was repeated for the school year 1983-1984.

On January 30, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1 (C-1). 2/

The Board then filed its answer (C-2) in which it denied making unilaterial changes in terms and conditions of employment. It set forth separate defenses: 1) the unfair practice charge was time-barred; 2) the unfair practice charge fails to state a claim upon which relief may be granted; 3) the Association is estopped from ascerting its claim by execution of a 1981-1983 contract; and 4) the Association has waived its rights on these matters by its execution of the 1981-1983 contract.

A Hearing was held on March 13, 1984 at which time the parties examined witnesses, presented evidence and waived oral argument. Both parties submitted post-hearing briefs and the record was closed.

## Position of the Parties

The Association maintains that the issue in dispute predominantly involves the mandatory and negotiable matters of workload and compensation for increases in workload. It argues that the subject is mandatorily negotiable under the applicable test enunciated by the New Jersey Supreme Court in In re I.P.F.T.E. Local 195 v. State of New Jersey, ("Local 195"), 88 N.J. 393, 404-405 (1982). The Association also argues that the increase in the teachers pupil contact time

by more than two and one-half hours on each of three days during the school years 1982-1983 and 1983-1984 intimately and directly affects the work and welfare of employees. Further, the Association claims that the subject is not preempted by any statues and that negotiations concerning increasing teachers' workload would not significantly interfere with governmental policy determination. It cites as support, Board of Education of Woodstown-Pilesgrove Reg. School District v. Woodstown-Pilesgrove Education Association ("Woodstown-Pilesgrove"), 81 N.J. 582, 593-594 (1980); Englewood Board of Education v. Englewood Teachers Association, 64 N.J. 1, 6-7 (1973); In re Maywood Board of Education, 168 N.J. Super 45, 58-59 (App. Div. 1979) ("Maywood"); In re Byram Twp. Board of Education, 152 N.J. Super 12, 26 (1977); In re Bridgewater-Raritan Reg. Board of Education, P.E.R.C. No. 83-102, 9 NJPER 104 (¶ 14057, 1983); In re East Newark Board of Education, P.E.R.C. No. 82-123, 8 NJPER 373 (¶ 13171 1982) ("East Newark") aff'd App. Div. Docket No. A-2060-78 (2/26/80); In re Dover Board of Education, P.E.R.C. No. 81-110, 7 NJPER 161 (¶ 12071 1981) ("Dover").

The Association contends that the change from teaching half-days to teaching full-days on three days during the school year represented a change in the 11-year standing practice. Further, it contends that the Board failed to negotiate over these changes even after the Association's request for negotiations.

In response to the Board's contract-based defenses of waiver and estoppel, the Association argues that Article 12B2, cited by the Board, simply does not apply to the instant dispute in the contract and

that the contract is silent on this matter. Moreover, the Association argues, the Board's actions are not in violation of the contract, therefore, a grievance is not in order. Finally, the Association maintains that the Board's actions represent a unilateral change in terms and conditions of employment, violating of subsections (a)(1) and (5) of the Act.

The Board asserts several arguments supporting its claim that its actions are not in violation of the Act. Initially it maintains that the disputed issue is the Board's right to set the school schedule for 1982-1983 and 1983-1984. It concludes that the establishment of a school calendar and the setting of instructional hours in each school day are non-negotiable managerial prerogatives. In support it cites Local 195; Woodstown-Pilesgrove; Burlington Co. Comm. Faculty Assn. v. Burlington Co. Coll. Bd/Trustees, 64 N.J. 10, 15-16 (1973).

Additionally, it argues that the dispute is covered by Article 12B2 of the parties' 1981-1983 contract; and that the matter was negotiated. Further, it contends that resolution of contract-based disputes should be sought through the grievance procedure, Ridgefield Park, 78 N.J. 144 (1978); and, that therefore the Commission should dismiss the matter pursuant to its deferral to arbitration policy, (citing, Palisades Board and Pallotta, D.U.P. No. 78-1, 3 NJPER 238 (1977) aff'd P.E.R.C. No. 84-148, 10 NJPER ____ (¶_____ 1984); State of N.J. and C.W.A., AFL-CIO, D.U.P. No. 84-11, 9 NJPER 681 (¶ 14299 1983) aff'd P.E.R.C. No. 84-148, 10 NJPER ____ (¶_____ 1984); State of N.J. (OER) and C.W.A., AFL-CIO, D.U.P. No. 84-12, 10 NJPER 3 (¶ 15002 1983); Union City Board of Education and Union City Education Association,

D.U.P. No. 84-17, 10 NJPER 70 (¶ 15038 1984). The Board argues that since the Association failed to file a timely grievance it has waived its rights both under the grievance procedure and before the Commission.

Further, it maintains that the parties' collective agreement in Article 12B2 authorizes the Board to designate and fix the length of school days. It offers two arbitration awards resolving disputes under Article 12C1 and 2 of the 1981-1983 agreement, as dispositive of this issue.

Finally, it argues that the Association has waived any right to contest the changes in the length of three school days because the Association never complained about schools closing on election day 1982; this closing was clearly a breach of Article 12B2 which established that day as a half-day.

## Issue

The question presented by this dispute is:

> Did the Board violate subsection 5.4(a)(1) and (5) of the Act when it unilaterally increased the pupil-contact time for teachers by changing the hours of instruction from half-days to full-days on three days during the school years of 1982-1983 and 1983-1984 -- specifically, the first instructional day in September and the second and third to last instructional days in June?

## Findings of Fact

Based on the entire record in these proceedings the Hearing Examiner makes the following findings of fact:

1. The Maywood Board of Education is a public employer within the meaning of the Act (T-6-7). 3/

2. The Maywood Education Association is a public employee

representative within the meaning of the Act (T-7).

3. The Association and the Board are the parties to a collective agreement covering the period July 1, 1981 through June 30, 1983 which is the result of a prior memorandum of agreement reached on November 7, 1981 (T-8, J-2).

4. On August 9, 1982, the Board adopted the final school calendar for the school year 1982-1983 (T-40-41; J-5, 7). This calendar provided for a full-day of class instruction for students in the elementary school on the first instructional day in September and the second and third to last school days in June (T-27, 28). Therefore, the teachers and students remained in classes from 8:25 a.m. to 2:50 p.m. on those three days (T-27,28,34,37,42,44-46). 4/

5. For the school year 1983-1984 the school calendar scheduled a full-day of instruction for students on the first instructional day in September and the second and third from last day in June (T-27, 42,45).

6. In the 1982-1983 and the 1983-1984 school years, only the last instructional day of school was a half-day for students (T-34).

7. In 1981-1982 school year, and for 11 years prior, the first instructional day in September and last three instructional days in June provided for a half-day of student class time for each of those days (T-27,28,29,34,37,38,44,46,47,48; J-3, 6). Therefore, these four days each school year were half-days of instruction for students. The students' instructional hours on those days were 8:25 a.m. to 12:30 p.m. (T-27,28,29,34,37,38,44,46-48; J-3, 6).

8. Teachers left for the day at 3:05 p.m. when students were dismissed at 12:30 p.m. (T-27, 29, 48).

9. When teachers remained on duty until 3:05 p.m., approximately two and one-half hours following the early dismissal of students at 12:30 p.m., they performed various duties: clerical, bookkeeping, preparing report cards, and permanent record card (T-30, 39, 48), attending meetings with faculty and staff (T-39) and organizing supplies and books (T-30).

10. On August 2, 1982, upon receiving information that these instructional days had been lengthened for the school year 1982-1983, Barbara Johnson, then president of the Association, sent a letter to Dr. Moran, School Superintendent, requesting a meeting to negotiate over the increased workload (T-31, J-4, 8). She sent a carbon copy of this letter to "all board members" (J-8).

11. On August 5, 1982, commencing at 9:30 a.m., Barbara Johnson and Bernadette Parodi, Association Vice-President, met with Dr. Moran (T-32, 39). These Association officers explained to Dr. Moran that the increased number of instruction hours on three days during school year 1982-1983 represented a unilateral increase in the teachers' workload and was therefore negotiable. Additionally, they said that the subject of additional compensation was also negotiable. Finally, the Association officers explained that the matter was not a violation of the existing contract and was therefore not a grievance (T-31, 32,33,39,40).

12. Dr. Moran indicated that he would pass on the Association's concerns to the Board (T-33, 39; J-9, 10).

13. Neither Dr. Moran nor the Board responded further to the Association's request for negotiations (T-33, 40).

14. At the August 9, 1982 Board meeting, the Association letter was merely mentioned as received and reviewed. However, the letter was not read orally at the meeting. The Board characterized the Association's request as its expression of dissatisfaction with the 1982-1983 school calendar (T-33, 40, 41, 42; J-5). No further response was made by the Board to the Association.

15. The parties stipulated that contract negotiations are still in progress for a successor agreement for the contract which expired June 30, 1983 (T-43, 44). Dr. Moran is a member of the Board's negotiating team (T-52); Johnson (T-26), Parodi (T-42), and Harry Lewis, Association President as of April 1983 (T-45), are members of the Association's team. There are no substantive discussions concerning the issue in the instant case (T-58).

16. Article 12B2 of the parties contract for July 1, 1981 through June 30, 1983 reads as follows (J-2):

> On days when students are dismissed early, teachers are required to remain until their regular dismissal time, unless permission is granted by the Superintendent to leave earlier. Such permission shall not be deemed to establish a precedent. Exceptions to the above shall be made on General Election Day, the day preceding Christmas Vacation and the last day of instruction which days shall be half-days on which teachers shall be dismissed fifteen (15) minutes after student dismissal.

The same Article 12 in the July 1, 1979-June 30, 1983 contract reads in total as follows (J-1):

Article 12 - Teaching Hours and Teaching Load

A. 1. All teachers shall have a duty-free lunch period. (This is covered by N.J. Administrative Code 6:3-1.15).

17. The Board offered no evidence concerning the negotiations of Article 12B2 (T-68). The unrebutted testimony of the Association witness supports a finding that this provision was included in November 1981. In the preceeding month of October, the Board dismissed students early on election day; the teachers remained until 3:05 p.m. instead of leaving 15 minutes after the students were dismissed. This issue was discussed during negotiations in November 1981 and resulted in the language of Article 12B2 (T-74-75).

18. The contract grievance procedure ends in advisory arbitration (J-2). Article 2B6b reads as follows:

> The arbitrator shall limit himself to the issues submitted to him and shall consider nothing else. He can add nothing or subtract anything from the agreement between the parties, or any policy of the Board. The recommendations of the arbitrator shall be advisory.

## ANALYSIS

### 1. Negotiability of the Subject Matter

The Board has claimed a non-negotiable management right to set the school calendar covering the students' instructional days and hours. The Association does not contest the right and seeks no negotiations on that subject. Thus the Board's right to set the school calendar is not at issue.

However, the Board does claim the right to refrain from negotiations concerning compensation for any increases in workload or

pupil contact time resulting from the establishment of a school calendar. But the Association claims that compensation for an increased workload is a mandatory negotiable term and condition of employment.

The Commission has repeatedly found that the issue of compensation for increased workload is severable from the issue of the Board's right to establish the school calendar: in Local 195, the New Jersey Supreme Court enunciated the standards to be applied in determining whether a matter is mandatorily negotiable.

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. (At 404-405).

In State of N.J. v. State Supervisory Association, 78 N.J. 54, 67 (1978) ("State"), the Court defined terms and conditions of employment to be "those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy."

In East Newark, the Commission declined to restrain arbitration of the grievance contesting the increase of teaching time of a

kindergarten teacher; this increased time resulted from the Board's decision to reduce the students' art, physical education and music classes. In affirming the Commission, the Appellate Division held:

> ...New Jersey Courts have consistently found that a teacher's workload is a term and condition of employment which is mandatorily negotiable, even though the change in workload was caused by a change in education policy. Id. App. Div. slip op. p. 5. 5/

Recently in In re County of Morris Park Commissioners, Docket No. A-795-82T2, aff'mg P.E.R.C. No. 83-31, 8 NJPER 561, (¶ 13259 1982), pet. for Cert. pending, the Appellate Division affirmed a Commission decision finding a subject mandatorily negotiable under the Local 195 standards. 6/ The Court said, "PERC's accommodation of the managerial and compensation components of the directive was to affirm the right of the County to unilaterally modify its policy but to require it to negotiate with Council #6 'over offsetting compensation for those employees who have lost the economic benefit of using a County vehicle to commute'" (App. Div. slip op. p. 3).

Additionally, in County of Morris, the Court held:

> Clearly, questions of compensation initimately and directly affect the welfare of public employees. No state statute or regulation is here involved. Nor will the ordered negotiation over compensation for the lost economic benefit significantly affect the County's exercise of its management prerogative to dispose of its vehicle fleet as it deems appropriate. The PERC order for negotiation therefore constituted an appropriate exercise of its remedial discretion. [Citations omitted]. (Slip Op. p. 5).

Similarly, in the instant dispute, the question of compensation clearly "intimately and directly affects the welfare of public employees"; no statute preempts the subject matter.

It remains to be determined whether negotiations over compensation for increased workload would "significantly interfere with the determinations of governmental policy." In the instant dispute, the Association concedes the management's right to set the school calendar, including the days and hours of student instruction. However, negotiation over compensation to teachers for these instructional hours does not affect the Board's exercise of its power to determine educational policy. In any negotiated agreement, the parties negotiate over compensation for hours of work and workload. The Commission and the Courts have repeatedly determined that the teachers' workload is measured not only in hours, but also in the amount of pupil-contact time. East Newark; Dover; Maywood.

Therefore, I find that the issue of compensation for increase in pupil-contact time is a mandatorily negotiable subject.

2. The Board's Obligation to Negotiate

Section 5.3 of the Act requires that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

Terms and conditions of employment may arise from sources other than the party's contract; they may be found from the circumstances and conduct of the parties. Galloway Twp. Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254 (1976) mot. for recon. granted P.E.R.C. No. 77-8, 2 NJPER 284, dec. on recon. P.E.R.C. No. 77-18, 2 NJPER 295 (1976)

affm'd 157 N.J. Super 74 (1977) (App. Div. Docket No. A-483-76 (1978)); In re Burlington Cty. Board of Education, P.E.R.C. No. 77-4, 2 NJPER 256 (1976) (App. dismissed by stipulation App. Div. Docket No. A-22-76 5/17/77).

In In re Wharton Board of Education, PERC 83-35, 8 NJPER 570 (¶ 13263 1982), ("Wharton"), the Commission, adopting the Hearing Examiner's findings of fact, determined that a past practice existed allowing certain teachers duty-free time during homeroom. The Board was not free to change this practice by imposing homeroom duties on those teachers and thus increasing the workload and pupil-contact time. Slip op. p. 4. 7/ Additionally, the Commission determined that negotiations over the elimination of the teachers' prep time "would not have significantly interfered with the (Board's) ability to provide educational skills." Id. Slip op. p. 5. Moreover, the Commission emphasized "that the crucial fact is what the past practice was, and not whether the parties formally agreed to it." Id. Slip op. p. 6.

In fact, in Wharton, the Commission found a violation of section 5.3 when the Board "modified an existing working condition: the prep time Allied Team teachers has previously enjoyed during homeroom period." Slip op. p. 6.

More recently, in County of Morris, the Appellate Court considered whether the employer had an obligation to negotiate over a change in its long-standing policy governing the use of county vehicles. The Court determined that the Commission "found that the prior policy was a practice well established over the course of many years, was mutually recognized, and was regularly adhered to. It therefore held that although the commutation use of the vehicles had never been the subject of negotiation and had never been expressly referred to in any

collective negotiation agreement, it nevertheless constituted an existing regulation governing working conditions whose modification required prior negotiation pursuant to N.J.S.A. 34:13A-5.3." Id. Slip op. p. 3.

In the instant case, the Association argues that the Board's change in the school calendar altered a long-standing past practice -- that the first instructional day in September and last three instructional days in June would be half-days. These changes by the Board increased teachers' pupil-contact time and thus the Board is required to negotiate about the increase before it is implemented.

"Where, during the term of an agreement, the public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement through a 'maintenance of benefits' or other similar provision, the employer must first negotiate such proposed change with the employees' representative prior to its implementation." In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶ 3030 1978). Furthermore, it is the employer's burden to initiate negotiations. Id. at p. 85.

In this case, the record evidence supports a finding that for approximately 11 years prior to the 1982-83 school year, teachers were scheduled for only a half-day of classes on the first day and each of the last three days of the school year. In fact, for the school year 1981-82 during which the 1981-83 contract was finalized, teachers had half-day schedules on those specified days. However, in 1982 the Board unilaterally increased the teachers' pupil-contact time by adding three half-days of class time during that school year; it did the same for the next school year -- 1983-84. Therefore, the Board unilaterally

changed an existing term and condition of employment about which it was obligated to negotiate, pursuant to 5.3 of the Act. In August 1982, the Association attempted to meet with the Board to discuss the increased workooad. The Board failed to respond. However, it is the obligation of the Board to negotiate prior to making changes in terms and conditions of employment, which it failed to do.

3. The Board's Contract Defenses: Waiver and Arbitration Deferral

A. The Board argues that it did negotiate with the Association concerning the disputed subject matter and reached an agreement -- Article 12B2 of the parties' contract. Therefore, the Association has waived its rights to further negotiations.

The Board contends that the Association conceded to the Board the authority to determine days on which students and therefore teachers would be dismissed early. According to the Board, the relevant part of Article 12B2 reads: "[on] days where students were dismissed early...." and "providing for only three specifically designated days which 'shall be half-days'". The Board contends that this language is clear and that no further evidence of the parties intent is relevant.[8/] The Board argues that it is clear that, under this provision teachers would not be dismissed early except on the days listed and when the Board otherwise designated. Further it argues, it is irrelevant that during the first year of the 1981-83 agreement, the Board in fact exercised its power and authorized three additional half-days for students -- thus giving teachers the benefit of decreased pupil-contact time.

In determining whether the Board met its obligation to negotiate, we must consider "all the circumstances of this particular case." In re

Twp. of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶ 14283 1983); In re Sayreville Board of Education, P.E.R.C. No. 84-74, 10 NJPER 37 (¶ 15021 1983). The contract language concerning the subject matter must be clear in order to constitute a waiver of the Association's right to negotiations over changes.

In the instant case, the parties negotiated Article 12B2, a provision for early dismissal of teachers when students are dismissed early. This provision atuhorizes the Superintendent to grant teachers early dismissal. The first sentence of Article 12B2 says "On days when students are dismissed early teachers are required to remain until their regular dismissal time, unless permission is granted by the Superintendent to leave early."

However, Article 12B2 does not address the following:

1. all projected early-dismissal dates for students (only three days are specified);

2. all in-school, non-teaching days for teachers (none are specified);

3. increases in pupil-contact time for teachers, due to changes in students' early dismissals.

Therefore, Article 12B2 cannot be read as a complete statement of pupil-contact time for teachers. Neither does it address the issue of compensation for increased teacher workload.

In this case, the teachers are not requesting a decrease in pupil-contact time. They are, however, requresting negotiations for compensation for their increased pupil-contact time.

Because the provision in Article 12B2 does not address this specific situation, it cannot be said to constitute a waiver of the

teachers' statutory rights to negotiate over changes in workload.

B. Regarding arbitration deferral, the Board argues that the instant dispute involves differing interpretations of Article 12B2 and that a grievance was the appropriate recourse (assuming the substantive matter was found negotiable). Therefore, the Board maintains that the Commission should have applied its arbitration deferral policy and declined to issue a complaint. The Board also contends that the Association has waived its rights for advisory arbitration under the contract grievance procedure since it failed to file a timely grievance. Because of this, the Board states that the Association has waived its rights to unfair practice proceedings before the Commission as well.

In numerous cases, the Commission has reiterated its policy that it "will defer only in those cases where it is apparent that arbitration will provide an adequate forum for the resolution of the dispute." [9/] Thus, the Commission's deferral policy applies in cases were it is reasonably probable that the dispute underlying the unfair practice charge will be resolved in the parties' contractual binding arbitration mechanism. Board of Education of East Windsor and Hightstown Education Association, E.D. No. 76-6, 1 NJPER 59 (1975). [10/] In the instant case, there are two reasons that the Commission's deferral policy does not apply: 1) the parties' agreement does not provide for final binding arbitration of grievances; 2) Article 12B2 does not apply to this dispute.

## Conclusion of Law

Based upon the entire record the Hearing Examiner concludes that the Board violated N.J.S.A. 34:13A-5.4(a)(5) and derivatively subsection 5.4(a)(1), by unilaterally increasing teachers' pupil-contact time.

## Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

A. That the Township cease from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, and refusing to negotiate in good faith with the Association concerning terms and conditions of employment of Association unit members, particularly increased workload.

B. That the Township take the following affirmative action.

1. Engage in good faith negotiations with the Association regarding compensation for the increase in the teachers' workload.

2. Compensate teachers for the additional pupil-contact time retroactive to September 1982.

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 Township's authorized representative shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Township 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 what steps the Township has taken to comply herewith.

Judith E. Mollinger
Hearing Examiner

DATED: July 12, 1984
Trenton, New Jersey

## Footnotes

1/ N.J.S.A. 34:13A-5.4(a) prohibits public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. ... (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Commission exhibits will be designated as "C", Joint exhibits as "J".

3/ References to the Transcript of Proceedings for March 13, 1984 are "T-".

4/ All the witnesses concurred on the teaching schedule provided in the school calendars for 1982-83 and 1983-84.

5/ The Appellate Division applied the definition for "terms and conditions of employment" enunciated by the N.J. Supreme Court in State. This definition is in relevant part essentially the same as parts 1 and 2 of the definition set out in Local 195.

6/ Accord. Hope Twp. Board of Education and Hope Twp. Education Association, P.E.R.C. No. 83-126, 9 NJPER 217 (¶ 14102 1983) (Compensation for extra lunchroom duty severable from issue of assignment). In re Dover Board of Education, P.E.R.C. No. 81-110, 7 NJPER 101 (¶ 12027 1981) ("Dover") (a unilateral increase of 35 minutes per day in teacher pupil-contact time amounts to an increase in workloads; that increased workload was mandatorily negotiable.); In re Maywood Board of Education, 168 N.J. Super 45 (App. Div. 1979) ("Maywood"); In re Byram Twp. Board of Education, 152 N.J. Super 12 (1977). Board of Education of Borough of Fair Lawn, P.E.R.C. No. 79-44, 5 NJPER 68 (¶ 10032 1979) aff'd App. Div. Docket No. A-2054-78 (December 10, 1979); In re Wanaque Boro Dist. Board of Education, P.E.R.C. No. 82-54, 8 NJPER 26 (¶ 13011 1981). Cf. Caldwell-West Caldwell Education Association v. Caldwell-West Caldwell Board of Education, 180 N.J. Super 440 App. Div. 1981 ("Caldwell-West Caldwell") (increase in working time is de minimis and therefore the Board need not compensate teachers for additional duties).

7/ The Hearing Examiner said "On the basis of the testimony here I am satisfied that a valid past practice was in effect at the time the Board unilaterally and without negotiations assigned Allied Teachers homeroom duty. A past practice is not dependent on any written contract provision and is determined by the conduct of the parties and is a mandatorily negotiated term and condition of employment.

In re New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (¶ 4040 1978). And here the underlying issue is mandatorily negotiable for it involves student contact time and a change in teacher workload. In re Byram Twp. Board of Education, 152 N.J. Super 12, 21 (App. Div. 1977); Jamesburg Board of Education, P.E.R.C. No. 81-75, 7 NJPER 26, 27 (¶ 12011 1981).

8/ The Board offered two Arbitration Awards interpreting Article 12 C 1 of the 1981-1983 contract (providing for prep time). I find these awards are of no assistance in interpreting Article 12 B 2, concerning early dismissal for teachers.

9/ In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975); In re East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975); In re Hunterdon County Board of Chosen Freeholders, E.D. No. 76-29, 2 NJPER 97 (1976); In re Borough of Glassboro Board of Education, P.E.R.C. No. 77-12, 2 NJPER 355 (1976); In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977).

10/ Accord. City of Trenton; State of New Jersey (Stockton State College).

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 NOT refuse or fail to negotiate in good faith with the Association concerning the terms and conditions of employment of Association unit members, particularly, by failing to negotiate over compensation for additional pupil-contact time retroactive to September 1982.

WE WILL compensate teachers for the additional pupil-contact time worked on the first day of the school year in September and the second and third from the last days of June for the school years 1982-1983 and 1983-1984 retroactive to September 1982.

MAYWOOD BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State St., Trenton, New Jersey 08625 Telephone (609) 292-9830.