

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLIFTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-79-320-112  
and SN-79-126

CLIFTON CUSTODIAL EMPLOYEES  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission, in an unfair practice and scope proceeding initiated by the Clifton Custodial Employees Association, adopts the Recommended Report and Decision of the Hearing Examiner and finds that the Clifton Board of Education committed an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5) by unilaterally, and without prior negotiations with the Association, changing the work hours of certain custodians effective February 1, 1979. The Commission concluded that hours of work is a mandatory subject of negotiations and that the Board was obligated to negotiate with the Association its decision to change the shift hours of custodians.

The Commission also found that the Association did not waive its right to seek to negotiate the change in hours after it had otherwise ratified a new collective agreement.

The Commission orders that the Board restore the working hours as they were prior to February 1, 1979 and thereafter negotiate in good faith with the Association regarding any proposed change in shift hours for custodians prior to implementation.

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CLIFTON CUSTODIAL EMPLOYEES  
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Lordi & Imperial, Esquires  
(Mr. Patrick C. English)

For the Charging Party, Goldberg & Simon, Esquires  
(Mr. Sheldon H. Pincus)

DECISION AND ORDER

The Clifton Custodial Employees Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission on May 29, 1979 alleging that the Clifton Board of Education (the "Board") had violated cited sections of the New Jersey Employer-Employee Relations Act (the "Act").<sup>1/</sup> It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1979. Hearings were held on September 28 and October 22, 1979 before Commission Hearing Examiner Alan R. Howe, who issued his Recommended Report and Decision<sup>2/</sup> on December 4, 1979.

<sup>1/</sup> The charge alleges violations of N.J.S.A. 34:13A-5.4(a)(1) and (5).

<sup>2/</sup> Hearing Examiner No. 80-24, 5 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1979). A copy of that report is attached hereto and made a part hereof.

The Association alleged that the Board violated the Act by refusing to negotiate concerning a change in the custodial working hours. The facts show that by a posted document dated January 18, 1979, the Board had unilaterally announced a change in custodial hours effective February 1, 1979. On January 22, 1979, the Association requested negotiations on the hours change but the Board, at a negotiating meeting with the Association, refused. The new hours were implemented on February 1, 1979. The Board eventually offered to negotiate the hours change sometime prior to the Association's ratification of the new collective agreement on February 27, 1979 but after the unilateral implementation of the new hours on February 1, 1979.

Subsequent to the Board's ratification of the new agreement, the Association again requested negotiations on the change of hours issue, but the Board refused. The Board argued that since the Association did not accept its offer to negotiate the hours change prior to ratifying the new agreement, the Association had waived its right to subsequently raise that issue and seek to negotiate.

The Hearing Examiner, citing many Court and Commission decisions, found that working hours are a mandatory subject for negotiations and that the Association did not waive its right to negotiate that subject. The Hearing Examiner concluded that there was no clear and convincing evidence of waiver by the Association of its right to negotiate and he therefore recommended that the hours be restored to the status quo ante in effect prior to February 1, 1979 and that the Board thereafter negotiate in good faith with the Association with respect to working hours.

The Board filed exceptions to the Hearing Examiner's Recommended Report and Decision alleging that the Hearing Examiner misapplied the law in this area.<sup>3/</sup> The Board cited several decisions of the National Labor Relations Board to support its contention that by failing to negotiate the hours issue prior to ratifying the agreement the Association waived its right to subsequently negotiate that issue.

After careful consideration of the entire record in this matter, including the exceptions and the cited cases, the Commission accepts the Hearing Examiner's findings of fact and conclusions of law substantially for the reasons set forth in his decision. The Hearing Examiner correctly applied the Commission and Court decision in Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976) affd., 78 N.J. 1 (1978) where the Commission found that the Board violated the Act by unilaterally altering shift hours. The Court upheld the Commission's remedy of restoring the hours to the status quo and awarding back pay.<sup>4/</sup> The instant situation is similar to Galloway, supra, to the extent that the Board herein, by refusing to negotiate the proposed change in hours prior to its implementation on February 1, 1979, unilaterally changed a mandatory subject of negotiations, thereby violating Sections 34:13A-5.4(a)(1)

<sup>3/</sup> The Board also requested oral argument before the Commission. That request is denied. This matter was fully litigated before the Hearing Examiner and both parties filed briefs with the Hearing Examiner.

<sup>4/</sup> The back pay was ordered because working hours had been cut back. Here there was only a shift in working hours but no reduction so no back pay will be ordered.

and (5) of the Act. The resulting remedial order recommended by the Hearing Examiner is also consistent with Galloway, supra, and is appropriate for the instant circumstances and is therefore adopted by the Commission.

Moreover, the Commission agrees with the Hearing Examiner that Irvington P.B.A. Local #29 v. Town of Irvington, 170 N.J. Super. 539 (1979), is distinguishable from the instant matter. In Irvington, supra, the Appellate Division found that a shift rotation was non-negotiable if the same would be injurious to the public welfare. However, the Court then went on to say that "...the importance of managing a police department cannot be equated with the need of a board of education to unilaterally fix the working hours of its secretaries" at p. 546. Thus, although we disagree that any unilateral change in hours is permissible,<sup>5/</sup> it is apparent that the Appellate Division believed that the needs of a board of education are not the same as those of a police department.

The Board does not argue that it had the right to unilaterally implement the change in hours, and in fact it admitted that its initial refusal to negotiate on January 22, 1979 was erroneous. The Board does argue, however, that subsequent to implementation but prior to the Association's contract ratification, it manifested its willingness to negotiate the change in hours. The Board concluded that the Association, by failing to negotiate the change in hours prior to contract ratification, waived its right to subsequently request negotiations on that subject.

The Board cited several decisions to support its contention that the Association waived its right to negotiate the change

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<sup>5/</sup> The Commission filed a petition for certification which is pending.

in hours. A review of those cases reveals that they are distinguishable from the instant matter. In Triangle PWC, Inc., 231 NLRB 492, 96 LRRM 1629 (1977), the National Labor Relations Board (the "NLRB") found that the union could not negotiate a pension plan after a settlement was reached on a new agreement. The Board herein argues that the instant situation is the same, but the facts in Triangle, supra, show that the parties had made a prior agreement to negotiate that issue during negotiations.

In Medicenter, Mid-South Hospital, 221 NLRB 670, 90 LRRM 1576 (1975), the NLRB did not permit a union to negotiate the initiation of a polygraph examination after the fact because the employer had given the union notice and offered to negotiate prior to implementation. Moreover, the NLRB found that emergency conditions existed to justify the examination. In the instant matter, the Board may have given notice of its intent to change the hours of custodians, but it also clearly refused the Association's timely offer to negotiate that subject.

Finally, in American Buslines, 164 NLRB 1055, 65 LRRM 1265 (1967), a union failed to accept an employer's invitation to negotiate and was thus barred from raising the issue subsequent to negotiations. In that case, the employer had not failed or refused to negotiate at the appropriate time as the Board did in the instant matter.

The Board's position herein seems to ignore the fact that the Association properly requested negotiations prior to implementation of the change but the request was refused by the Board. Thereafter, once the Board unilaterally implemented the change on February 1, the violation of the Act was committed. The Board could not later correct its earlier illegal action by demonstrating its

willingness to negotiate and by putting the burden on the Association. In fact, the Board's attempt to correct its earlier unlawful action was inadequate. The Board only offered to negotiate and did not return the custodial hours to the status quo ante. By inviting the Association to negotiate after the unlawful implementation, the Board was placing the Association in an unnecessarily disadvantaged position that by no means overcame the Board's unlawful action.

ORDER

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

1. Cease and desist from:

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

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

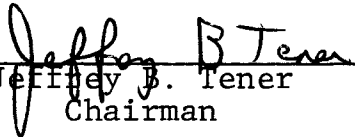
a. Within sixty (60) days hereof, restore the status quo ante as of February 1, 1979 with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of custodians with the Association prior to implementation.

b. Post at a central location copies of the attached notice marked "Appendix A". Copies of said notice, on forms provided by the Commission, shall, after being signed by Respondent's

representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by any other material.

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

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Parcels and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioner Hartnett was not present.

DATED: Trenton, New Jersey  
February 19, 1980  
ISSUED: February 21, 1980



# 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 custodians in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing the shift hours of custodians without prior negotiations with the Clifton Custodial Employees Association.

WE WILL within sixty (60) days hereof restore the status quo ante as of February 1, 1979 with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of custodians with the Association prior to implementation.

CLIFTON BOARD OF EDUCATION

(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

STATE OF NEW JERSEY  
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- and -

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SN-79-126

CLIFTON CUSTODIAL EMPLOYEES 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 work hours of certain custodians effective February 1, 1979. The Hearing Examiner, citing long-standing precedent of the Courts and the Commission, concluded that the Board was obligated to negotiate with the Association its decision to change the shift hours of the custodians. The Hearing Examiner further found that the Association had not waived its right to such negotiations by having ratified and executed a collective negotiations agreement after the date on which the change in shift hours was implemented, February 1, 1979.

By way of remedy, the Hearing Examiner recommended that the Board be ordered to restore the status quo ante within sixty (60) days, i.e., restore the shift hours of the custodians whose hours were changed to those in effect prior to February 1, 1979, and thereafter negotiate in good faith with the Association regarding any proposed change in shift hours for custodians prior to implementation.

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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Appearances:

For the Clifton Board of Education  
Lordi & Imperial, Esqs.  
(Patrick C. English, Esq.)

For the Clifton Custodial Employees Association  
Goldberg & Simon, Esqs.  
(Sheldon H. Pincus, Esq.)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge and a Scope of Negotiations Petition were filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 29, 1979 by the Clifton Custodial Employees Association (hereinafter the "Charging Party" or the "Association") alleging that the Clifton Board of Education (hereinafter the "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 had on January 18, 1979 without prior notice or negotiations unilaterally altered the shift hours of certain custodians and thereafter refused to negotiate with respect to the said change, notwithstanding demands so to do commencing January 22, 1979, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. <sup>1/</sup>

1/ These Subsections prohibit employers, their representatives or agents from:  
"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.  
(continued next page)

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1979. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 28 and October 22, 1979 <sup>2/</sup> in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs by November 29, 1979.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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

2. The Clifton Custodial Employees Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association has been the collective negotiations representative for custodial employees of the Board for five years.

4. The current collective negotiations agreement, effective during the term July 1, 1978 to June 30, 1980, was ratified by the Association on February 27, 1979, approved by the Board on March 21, 1979 and executed on March 22, 1979 (J-9). The current agreement does not contain a provision on the schedule of hours of work. <sup>3/</sup>

1/ (continued)

"(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/ The delay in hearings was due, in the first instance, to the unavailability of witnesses for the Charging Party due to vacations and, thereafter, to accommodating the schedules of counsel for the parties and the Hearing Examiner.

3/ The said agreement does contain a provision on overtime and minimum overtime as well as a night shift differential (see J-9, p. 2).

5. Negotiations for the current agreement commenced in the Summer of 1977. Association negotiator Charles T. Tucker, an N.J.E.A. Consultant, entered the negotiations in September 1978.

6. Under date of January 18, 1979, Ronald Piliere, the Secretary-Business Administrator of the Board, issued a Bulletin to all Principals and Head Custodians, advising that the hours of the custodians in the Board's 14 Elementary Schools were to be changed as of February 1, 1979, as follows: the 1st custodian was to be scheduled from 7:00 a.m. to 4:00 p.m., instead of from 7:00 a.m. to 4:00 p.m. or 7:30 a.m. to 4:30 p.m.; the 2nd custodian was to be scheduled from 9:00 a.m. to 6:00 p.m., instead of from 2:00 p.m. to 11:00 p.m. or 3:00 p.m. to 12 midnight; and the 3rd custodian was to be scheduled from 2:00 p.m. to 11:00 p.m., instead of 11:00 p.m. to 7:00 a.m. or 12 midnight to 8:00 a.m. (see J-7). <sup>4/</sup>

7. At a negotiations meeting between the parties on January 22, 1979 Mr. Tucker raised the proposed hours change with Edward Neumann, the Chairman of the Board's negotiating team, and according to Mr. Tucker, Mr. Neumann said that the Board would not negotiate the proposed hours change. <sup>5/</sup>

8. The Board did not approve the Memorandum of Agreement at a special meeting of the Board on February 28, 1979, notwithstanding that Mr. Neumann had recommended ratification. The reason for the Board's inaction was an open issue on the wages for a certain janitress. As noted previously, the Association had ratified the Memorandum of Agreement on February 27, 1979.

9. On March 6, 1979 Mr. Neumann returned a telephone call to Mr. Tucker, in which the matter of the wages for the janitress was discussed and Mr. Tucker said that it was "resolved." According to Mr. Neumann, whom the Hearing Examiner credits, Mr. Tucker then said that he wanted to get the contract signed first and then discuss the question of hours. Mr. Neumann declined, stating that the Board

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<sup>4/</sup> A clarifying Bulletin was issued by Mr. Piliere under date of January 25, 1979, the content of which does not substantially modify what has been stated heretofore (J-8). This hours change was implemented on February 1st.

<sup>5/</sup> There is no dispute but that the Board's negotiating team took the position that the proposed hours change was not negotiable January 22, 1979. However, the Hearing Examiner credits Respondent's witnesses, Mr. Neumann and Kay Szott, the second member of the Board's negotiating team, that after the Board's attorney, Mr. English, advised the Board to negotiate, the Board's negotiating team thereafter offered to negotiate the question of a proposed change in hours for custodians at least during one negotiating meeting in February 1979, which occurred prior to the Association's ratification of the Memorandum of Agreement on February 27, 1979.

did not want a "grievance" after the signing of the contract. <sup>6/</sup>

10. William J. Flynn, an N.J.E.A. Field Representative and Mr. Tucker's superior in negotiations, wrote to Mr. Tucker on March 7, 1979, in which he advised that he had spoken with Mr. English, the Board's attorney, that day and Mr. English assured him that the Board was willing to "discuss" <sup>7/</sup> the proposed change in hours for custodians (J-2). Notwithstanding this communication on March 7, the Association's President, Arthur DeLotto, executed a Memorandum of Agreement with the President of the Board, Richard Stockinger, on March 22, 1979 (J-9) without the matter of the hours for custodians having been negotiated.

11. Under date of March 29, 1979 Mr. Tucker wrote to Mr. Neumann requesting that negotiations commence on the recent changes in the hours of custodians and requested that, "...the changes in work hours...be rolled back until negotiations are concluded." (J-3). This was followed up by Mr. Tucker on April 25, 1979 when he wrote to Mr. Stockinger, the President of the Board, reciting the fact that he had written to Mr. Neumann on March 29 but had received no response (see J-4). Mr. English, the attorney for the Board, responded to Mr. Tucker on June 1, 1979 (J-5), essentially stating that Mr. Tucker's offer to negotiate came too late, the Memorandum of Agreement having been approved by the Board on March 21, 1979 and executed by the parties on March 22, 1979.

12. Mr. Tucker testified that at the final negotiations meeting, February 23, 1979, he said at one point "...we'll have to appeal to P.E.R.C. to see if it is negotiable" (1 Tr. 45) after the Board's negotiators allegedly stated that the hours change was non-negotiable. The Hearing Examiner does not credit Mr. Tucker's testimony that the Board's negotiators refused to negotiate on the subject of the hours change for custodians at this meeting in view of his prior finding that at least one negotiating meeting in February 1979 the Board's negotiators, Mr. Neumann

<sup>6/</sup> Mr. Tucker acknowledged that he received a telephone call from Mr. Neumann sometime after February 28, 1979. Mr. Tucker acknowledged that the wages of the janitress were discussed but he denied that the question of a change of hours for custodians was discussed. As noted previously, the Hearing Examiner credits Mr. Neumann's and Mrs. Szott's testimony that the matter of hours was discussed along the lines of their testimony (footnote 5, supra).

<sup>7/</sup> The Hearing Examiner construes this to mean "negotiate" in view of the Board's stated willingness to "negotiate" the matter of custodian's hours at at least one meeting in February 1979 (see footnote 5, supra).

and Mrs. Szott, indicated their willingness to negotiate. <sup>8/</sup> The Hearing Examiner does credit Mr. Tucker's testimony to the extent that at least one negotiations meeting he stated that if the Board refused to negotiate on the subject then "we'll have to appeal to P.E.R.C." <sup>9/</sup>

13. Although the Charging Party's evidence made at least one reference to a shift differential being denied certain custodians (1 Tr. 10) there was insufficient evidence adduced for the Hearing Examiner to fashion a monetary remedy in the event that the unfair practice charge is sustained.

#### THE ISSUE

1. Did the Respondent violate Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), when it unilaterally implemented a change in the hours of certain custodians on February 1, 1979 without prior negotiations with the Charging Party?

2. Did the Charging Party waive its right to negotiations on the hours change when it executed the current collective negotiations agreement on March 22, 1979 without first obtaining an agreement by the Respondent that the matter of negotiations on the hours change was still open and unresolved?

#### DISCUSSION AND ANALYSIS

The Respondent Board Violated Subsection (a)(5) Of The Act, And Derivatively Subsection (a)(1), When It Unilaterally Implemented a Change In Hours For Certain Custodians On February 1, 1979 Without First Negotiating With The Charging Party

At this point in time it is clear beyond doubt that working hours (shifts, starting times, etc.) are a term and condition of employment.

The Supreme Court of New Jersey in Board of Education of Englewood v. Englewood Teachers Ass'n., 64 N.J. 1 (1973) said: "Surely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act. Those matters...would appear to be the items

<sup>8/</sup> See footnote 5, supra.

<sup>9/</sup> It is noted that Mr. Tucker made further reference to "P.E.R.C." in his letter to Mr. Stockinger, the Board President, under date of April 25, 1979 (J-4).

most evidently in the legislative mind..." (64 N.J. at 6, 7) (Emphasis supplied).

Thereafter the Commission in Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975) considered a dispute concerning a change in work hours, without an increase in total working time, and said:

"The Commission finds that this issue...is controlled by Englewood...and is within the scope of collective negotiations...(I)t cannot be disputed that, as the new schedule alters the hours of their employment... it is a term and condition of employment." (1 NJPER at 57).

The Commission next considered the matter of a change of hours in Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976) where it found that a unilateral alteration of shift hours related to terms and conditions of employment and that the Board there violated Subsections (a)(1) and (5) of the Act when it failed to negotiate the changes in hours. On appeal, the Appellate Division affirmed the Commission's remedial order, which had restored the status quo with respect to shift hours, stating:

"Unquestionably, the alteration of two secretaries' working hours and the reduction in four other secretaries' total working day effected changes in the terms and conditions of their employment. We affirm the determination that both the announcement at the time made and the implementation of the changes had a chilling effect on the right of collective negotiations and amounted to a refusal to negotiate in good faith." (149 N.J. Super. 346, 351) <sup>10/</sup> (Emphasis supplied).

Based on the foregoing authorities the Hearing Examiner finds and concludes that the Respondent violated Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), <sup>11/</sup> when it unilaterally, and without prior negotiations,

<sup>10/</sup> Although there was no appeal to the Supreme Court from this aspect of the decision of the Appellate Division, the Supreme Court nevertheless noted its agreement with the resolution of this issue below: 78 N.J. 1, 8. See also, the Commission's decisions in Board of Education of the Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 369 (1977), appeal dismissed by stipulation, App. Div., Docket No. A-1035-77 (1978) and North Brunswick Township Board of Education, P.E.R.C. 79-14, 4 NJPER 451 (1978), aff'd. App. Div., Docket No. A-698-78 (1979).

<sup>11/</sup> See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).



notified its custodians of a change in their shift hours and then implemented the unilateral decision on February 1, 1979. <sup>12/</sup>

The Charging Party Has Not Waived Its Right To Negotiations With Respect To The Respondent's Unilateral Decision To Change The Hours Of Certain Custodians Effective February 1, 1979

The Hearing Examiner finds and concludes that the Charging Party cannot be deprived of its right to negotiate the shift hours change under the doctrine of waiver. Admittedly, the Association complicated the matter by having ratified and executed the current collective negotiations agreement without specific provision for or reservation of its right to negotiate the matter subsequent to March 22, 1979, the date of execution of the agreement.

In so concluding, the Hearing Examiner notes that Mr. Tucker on at least one occasion in negotiations indicated to the Board's negotiators that an "appeal to P.E.R.C." would be necessary if the Board refused to negotiate on the shift hours change. Further, Mr. Tucker made reference to "P.E.R.C." in his letter to the Board President on April 25, 1979 (J-4). Also, the filing of the instant Charge on May 29, 1979 preceded the letter from the Board's attorney, dated June 1, 1979 (J-5), in which he stated that the Board "...was under no obligation to reopen negotiations" after the ratification of the current agreement by the Board.

The Hearing Examiner takes especial note of the fact that the Commission has been most sparing in applying the doctrine of waiver by a party of its right to negotiate unilateral changes in terms and conditions of employment. <sup>13/</sup> In the absence herein of clear, convincing, unmistakable and unequivocal evidence of a waiver by the instant Charging Party of its statutory right to negotiate, the Hearing Examiner is unwilling to apply the doctrine of waiver based on the instant

<sup>12/</sup> The Hearing Examiner distinguishes the recent Appellate Division decision in Irvington P.B.A. v. Town of Irvington, Docket No. A-5223-77 on the basis of the Court's statement with respect to Galloway, supra, that: "...the importance of managing a police department cannot be equated with the need of a board of education to unilaterally fix the working hours of its secretaries." Also, the Board herein is not insulated from the finding of a violation by the fact that its negotiators offered to negotiate the hours change at least once in February 1979. This offer to negotiate came after the fait accompli of implementation on February 1, 1979. An appropriate remedy will be recommended to offset the unfair advantage inuring to the Board by its unilateral implementation of the change in hours before the offer to negotiate.

<sup>13/</sup> See, for example, North Brunswick Township Board of Education, supra, and New Jersey Institute of Technology, P.E.R.C. No. 80-54, 5 NJPER (1979). Compare Township of West Windsor, P.E.R.C. No. 79-79, 5 NJPER 193 (1979).

record. 14/

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

CONCLUSIONS OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally, and without prior negotiations with the Association, changed the shift hours of certain custodians effective February 1, 1979.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

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

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

B. That the Respondent Board take the following affirmative action:

1. Within sixty (60) days hereof, restore the status quo ante as of February 1, 1979 with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of custodians with the Association prior to implementation.

2. 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

14/ The Hearing Examiner also cites the following NLRB decisions on the issue of waiver: C & C Plywood Corp., 148 NLRB No. 46, 57 LRRM 1015 (1964), aff'd. 385 U.S. 421, 64 LRRM 2065 (1967); Proctor Mfg. Corp., 131 NLRB No. 142, 48 LRRM 1222 (1961); and Press Co., Inc., 121 NLRB No. 116, 42 LRRM 1493 (1958).

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.

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

Dated: December 4, 1979  
Trenton, New Jersey



Alan R. Howe  
Alan R. Howe  
Hearing Examiner

# 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 custodians in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally changing the shift hours of custodians without prior negotiations with the Clifton Custodial Employees Association.

WE WILL within sixty (60) days hereof restore the status quo ante as of February 1, 1979 with respect to the shift hours of those custodians whose hours were changed and thereafter, upon demand, negotiate in good faith any proposed changes in the shift hours of custodians with the Association prior to implementation.

CLIFTON 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