P.E.R.C. NO. 88-135

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-8

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Trenton Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally discontinued morning and afternoon coffee breaks for secretaries assigned to Trenton Central High School and criticized a unit member for seeking Association assistance.

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TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Lemuel H. Blackburn, Jr., P.C.
(Thomas W. Sumners, Jr., of counsel)

For the Charging Party, Selikoff & Cohen, P.A.
(Steven Cohen, of counsel)

DECISION AND ORDER

On July 8, 1987, the Trenton Educational Secretaries Association ("Association") filed an unfair practice charge against the Trenton Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when it (1) unilaterally discontinued morning and

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

afternoon coffee breaks for secretaries assigned to Trenton Central High School and (2) criticized a unit member for seeking Association assistance.

On October 1, 1987, a Complaint and Notice of Hearing issued. On October 15, the Board filed its Answer. It contends that the parties' agreement authorizes it to discontinue coffee breaks. It denies criticizing a unit member for seeking union assistance.

On December 15, 1987 and January 21, 1988, Hearing Examiner Joyce M. Klein conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. On April 22, 1988, the Hearing Examiner issued her report and recommended decision. H.E. No. 88-52, 14 NJPER ___ (¶_____ 1988). She concluded that the Board violated subsections 5.4(a)(1) and (5) of the Act when it unilaterally eliminated coffee breaks. As a remedy, she ordered the Board to restore the breaks and negotiate before changing them. She declined, however, to award compensation or to require the Board to permit secretaries to "tack" their breaks onto their lunch break. She recommended dismissing that portion of the Complaint alleging that eliminating the breaks violated subsection 5.4(a)(3). Finally, she found that the Board violated subsection 5.4(a)(1) when its Director of School Operations criticized a teacher for speaking with the Association president.

On May 2, 1988, the Association filed exceptions. It contends that the Hearing Examiner erred in: (1) not awarding back

pay as a remedy for secretaries losing breaks; (2) recommending that secretaries not be permitted to tack their breaks onto their lunch break, and (3) failing to find that the unilateral elimination of the breaks was in retaliation for filing a grievance.

On May 9, 1988, the Board responded. It contends the Association's exceptions are meritless.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. We adopt and incorporate them here.

We agree with the Hearing Examiner, in the absence of exceptions, that the Board violated subsection 5.4(a)(5) and, derivatively, (a)(1) of the Act when it unilaterally eliminated coffee breaks. This pertains to a mandatory subject of negotiations and the Board failed to establish a clear and unequivocal contract waiver. Compare Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).[2/]

We now consider the remedy. The Hearing Examiner ordered the Board to restore the status quo and to negotiate over proposed changes in break time. The Association objects to the failure to award compensation for the additional time these employees were

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2/ However, we agree that the subsection 5.4(a)(3) allegation was properly dismissed. Even if a grievance triggered the elimination of the breaks, that decision was based on the Board's good faith view (whether contractually correct or not) that it had the right to eliminate coffee breaks under the collective negotiations agreement.

required to work. We find merit to this argument. These employees were forced to work extra time each day without having the statutorily guaranteed opportunity to seek accompanying extra pay. However, awarding a fixed monetary sum would be an inappropriate way of resolving the dispute.[3/] Rather, the more appropriate remedy is to restore the employees' lost duty-free time and grant duty-free time to affected employees equal to the time they lost. Therefore, we modify the recommended remedy.

We also agree that the Board need not reinstate the time of the breaks to coincide with lunch. Although there was testimony that this occurred, it falls short of amounting to a fixed practice established by both parties.

Finally, in the absence of exceptions, we also agree that the Director's comments to Wright violated subsection 5.4(a)(1). They suggested that Wright would be treated differently because she had sought union assistance. N.J. Sports & Exposition Auth., P.E.R.C. No. 80-13, 5 NJPER 550 (¶10285 1979). See also Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981).

3/ East Brunswick Bd. of Ed., P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986) and Red Bank Bd. of Ed., H.E. No. 86-68, 12 NJPER 425 (¶17158 1986) did not award compensation for violations. Buena Reg. Sch. Dist., P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985) awarded compensation based upon the contractual rate which the parties had already agreed to for an increased workload.

ORDER

The Trenton Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing secretaries in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with Carol Wright's right to contact Association President Patricia Vogt and suggesting that she contact Director of School Operations Julie Thomas instead of the Association; and by unilaterally eliminating morning and afternoon breaks at Trenton Central High School.

2. Refusing to negotiate in good faith with the Association over the elimination of morning and afternoon breaks at Trenton Central High School.

B. Take the following affirmative action:

1. Rescind Elizabeth Bates' memo, dated February 24, 1987, with respect to high school secretaries' breaks.

2. Restore the duty-free time lost by the elimination of coffee breaks and negotiate over proposed changes in morning and afternoon breaks at Trenton Central High School.

3. Grant duty-free time to affected employees equal to the time they lost.

4. 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 Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988

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 secretaries in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with Carol Wright's right to contact Association President Patricia Vogt and suggesting that she contact Director of School Oprations Julie Thomas instead of the Association; and by unilaterally eliminating morning and afternoon breaks at Trenton Central High School.

WE WILL NOT refuse to negotiate in good faith with the Association over the elimination of morning and afternoon breaks at Trenton Central High School.

WE WILL rescind Elizabeth Bates' memo, dated February 24, 1987, with respect to high school secretaries' breaks.

WE WILL restore the duty free time lost by the elimination of coffee breaks and negotiate over proposed changes in morning and afternoon breaks at Trenton Central High School and grant duty-free time to affected employees equal to the time they lost.

Docket No. CO-H-88-8 TRENTON 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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-52

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-8

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Trenton Board of Education violated subsection 5.4(a)(5) and derivatively 5.4(a)(1) of the New Jersey Employer-Employee Relations Act by unilaterally eliminating secretaries' breaks at Trenton Central High School. The Hearing Examiner finds breaks were a binding past practice and recommends that the Commisssion order the Board to reinstate breaks and to negotiate in good faith over any proposed changes in breaks. The Hearing Examiner recommends the Commission dismiss TESA's allegation that the Board violated subsection 5.4(a)(3) of the Act when it eliminated breaks.

The Hearing Examiner further found that the Board violated subsection 5.4(a)(1) of the Act when the Director of School Operations berated a TESA member for contacting TESA's president and instructed the member to contact her in the future.

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. 88-52

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-8

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Lemuel H. Blackburn, Jr., P.C.
(Thomas W. Sumners, Jr., of counsel)

For the Charging Party, Selikoff & Cohen, P.A.
(Steven Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On July 8, 1987 the Trenton Educational Secretaries Association ("TESA") filed an unfair practice charge against the Trenton Board of Education ("Board"). The charge alleges 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), (3) and (5),[1/] when it unilaterally eliminated secretaries' morning

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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

Footnote Continued on Next Page

and afternoon breaks at Trenton Central High School and when it criticized a TESA member for seeking help from TESA's president in getting to the Board's offices to pick up a letter of intent.

On October 1, 1987 the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 15, 1987, the Board filed an Answer denying that it committed an unfair practice by eliminating breaks because the change was consistent with the parties' contract. It also denies that a TESA member was berated for contacting her TESA president.

I conducted a hearing on December 15, 1987 and January 21, 1988. At the hearing, TESA amended its Charge and the Board amended its Answer to correct typographical errors. The parties

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1/ Footnote Continued From Previous Page

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

waived their right to file post-hearing briefs and I received the transcript by February 17, 1988.[2/].

Based on the record, I make the following:

Findings of Fact

1. TESA represents secretaries employed by the Board (J-1, J-2).[3/] The parties executed an agreement extending from July 1,

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2/ TESA called to request that the record be reopened on March 24, 1988. The arbitrator's award issued on February 12, 1988 and the record closed five days later.

On April 6, 1988, it filed a motion to reopen the record to include a copy of the arbitration award concerning breaks. TESA argues that its attorney did not receive a copy of the arbitration award until March 25, 1988. It asserts the arbitration award is relevant because it addressed disputes similar to those at issue here.

On April 19, 1988 the Board responded, arguing the motion is late and the award is irrelevant.

Although both the arbitration award and my decision involve the issue of breaks, the practice varies among schools in the district. I do not need the award to resolve the issues presented in TESA's complaint. I conclude that it is irrelevant. I deny TESA's motion.

3/ TA refers to the transcript of December 15, 1987; TB refers to the transcript of January 21, 1988; J refers to joint exhibits and CP refers to charging party's exhibits.

1986 through June 30, 1989.[4/] Article 18 provides in part:

> A. The regular work day for secretaries shall consist of a 7 hour work day year-round exclusive of a duty free lunch.
>
> B. Secretaries employed in the Administration Building and School Buildings will begin work at 8:00 a.m.
>
> C. All work time over the regular 7 hour work day shall be compensated at time and one-half (J-1).

The contract also requires that the Board (1) give TESA notice of policy changes affecting terms and conditions of employment; (2) not change policies affecting terms and conditions of employment; and (3) negotiate over policy changes affecting terms and conditions of employment (J-1, Article 2A).

2. The Board has allowed secretaries morning and afternoon coffee breaks for several years (CP-1, no.4, CP-2). The location and duration of breaks varies from school to school (TB7-TB11).

3. On October 13, 1986, Fanny Colley, a secretary, transferred to Columbus School. On her first day, Samuel Scrivens, the principal, gave her a list of her duties and responsibilities which stated:

> Your work hours are 8:00 A.M. to 3:30 P.M. with one half (1/2) hour for lunch.
>
> No coffee or soft drinks are permitted at your desk. There are no coffee breaks. (CP-5)

4/ On September 10, 1987, the parties signed a successor agreement extending their 1984-1986 contract until June 30, 1989. Article 18 was not changed.

Colley contacted TESA president, Patricia Vogt. Vogt contacted Dr. Copeland, the superintendent, and, tried amicably to resolve the problem (CP-6, CP-7). On October 28, 1986, Vogt filed a grievance on Colley's behalf (CP-8, TA33). Before the second step grievance hearing before Dr. Copeland, other secretaries breaks were not effected (TA36). Julie Thomas, Director of School Operations attended the second step grievance hearing on November 25, 1986 (CP-10).

4. On November 26, 1986, Elizabeth Bates, principal of Trenton Central High School sent a memo to Thomas requesting overtime for Barbara Sklute, a secretary at the high school and TESA's vice president and grievance chairperson. Thomas replied to the memo as follows:

> The Executive Director of School Operations reminds the principal that overtime is not permitted. With twenty-five secretaries for less than twenty-five hundred students, there is ample help available at Trenton High School. Look at breaks, which are not in any contract. Perhaps you have the time of "one" secretary per week taken up in this manner. Check please. (10 min in AM/10 min in PM = 20 min per day per sec x 25 secs =__ min __ hrs per week) (CP-11).

Thomas initially testified that she meant the memo to illustrate the fact that two ten minute breaks a day, each day for 25 secretaries equals the work week of one secretary (TA128-129). Thomas had recently spent five weeks at the high school and had observed the secretaries (TA137). She and Bates discussed "time on task" several times. "Time on task," or increased efficiency and job performance was a high priority for the Board. Thomas claimed

the memo suggested how to improve efficiency. On cross examination, Thomas testified that she did not know secretaries at the high school were taking breaks (TA148). She then testified that she meant that Bates should use time spent on breaks in lieu of overtime (TA150-151).[5/]

5. The Colley grievance was heard at the third step on February 24, 1987. Thomas attended the hearing and the grievance was denied (CP-16). That same day, Bates issued the following notice to high school employees:

> Because of the size of our school and staff, we are very much visible. If only a few people take extended lunches, or leave early, it gives all of us a bad name!
>
> I must caution all employees that we will expect you to adhere to the CONTRACT TERMS specifically as follows:
>
> 1. ALL EMPLOYEES.....NO OFFICIAL MORNING OR AFTERNOON BREAKS
>
> 2. ADMINISTRATORS.....ONE-HOUR LUNCH
> DEPARTURE AT 4:00 P.M.
>
> 3. TEACHERS.....DEPARTURE AT 3:00 P.M.
> LUNCH--ONE REGULAR CLASS PERIOD
>
> 4. SECRETARIES.....HALF-HOUR LUNCH
> NO FORMAL MORNING OR AFTERNOON BREAKS

5/ I do not credit Thomas' testimony that she was not aware high school secretaries were taking breaks. Thomas spent five weeks observing secretaries at the high school. She admitted knowledge of breaks when she testified that she meant Bates should use time spent on breaks in lieu of overtime.

> We understand the reason to attend to personal need and possible other emergencies, which take personnel away form their work for short periods of time.

EFFECTIVE DATE FOR ALL EMPLOYEES.....MONDAY, MARCH 2, 1987.

(CP-15)

Bates issued this memo in response to Thomas' note denying Sklute's overtime request (TA107-108). Bates knew that teachers did not have breaks when she wrote the memo (TA115). She had not previously issued a memo detailing hours of work (TA116).[6/] Bates asserted that her memo allowed informal breaks--a practice that had continued for several years. She defined an informal break as the secretaries "went and got coffee or tea or whatever and returned to their desks." (TA119).

6/ TESA submitted a memo from Bates dated June 21, 1985, concerning the summer work schedule. That memo included the following language, "Breaks should be limited to 15 minutes in the morning and 15 minutes in the afternoon." (CP-3). Bates denies sending the memo and asserts that it was not typed in her office. She testified that she initials all of her memos and that this memo was not initialed (TA104-105). She admitted that the remainder of the memo describing the significance of sign ins, obeying the dress code and keeping the central office open are consistent with her policies (TA105). The type face used in CP-3 is different than that used in more recent memos, and the only other memo from Bates in evidence is initialed. However, since the memo is two years old and the remainder of it is correct, I hesitate to discredit the memo. Rather, I use independent evidence to justify my findings with respect to breaks.

6. Before February 24, 1987 secretaries at the high school took a fifteen minute break in the morning and another in the afternoon. Customarily, the secretaries added the break time to their lunch periods, giving them an hour for lunch (TA46, TA50, TA92, TA98). Secretaries at the high school work from 8 a.m. to 3:30 p.m. (TA71).

Secretaries in the other schools work from 8:00 a.m to 3:30 p.m., or 7:30 a.m. to 3:00 p.m., or 8:30 a.m. to 4:00 p.m., for a total of seven and a half hours including a half hour of duty free lunch. Secretaries in the administration building work from 8:00 a.m. to 4:00 p.m. with an hour of duty free lunch.(TA50)

Barbara Sklute has been a secretary at the high school for 19 years and has consistently received two fifteen minute breaks. She took those breaks with lunch, giving her one hour for breaks and lunch (TA92, TA98). All other secretaries at the high school followed the same practice (TA46).

Carl Vizzoni has been the vice principal of the Vocational School at Trenton Central High School for the last two and a half years. He supervises two secretaries, including Barbara Sklute. His secretaries go to the cafeteria for coffee and drink it at their desks (TA163). Before February 24, 1987 his secretaries took an hour lunch (TA164, TA166). Vizzoni assumed they were entitled to an hour because he was not told otherwise (TA165). Since the Bates memo they have taken only a half hour for lunch.

7. Vogt negotiates for TESA (TA22). Breaks have never been discussed at negotiations (TA78).

Carol Wright

8. Carol Wright is a secretary in the Trenton Adult Learning Center located in the Broad Street Bank Building. She has worked as secretary for the Board for eighteen years. Each year she signs a letter of intent to return to the Board the next year. She was never required to go to the Board offices to sign the letter. Each year Mr. Graham, her immediate supervisor brought the letter from the administration building. Wright signed it and Graham returned it.

In May 1987, Wright asked Graham to bring her the letter of intent. Graham initially agreed, then called Wright and told her all secretaries had to report to Thomas' office to sign for their letter. Fearing the loss of her parking space, Wright did not want to go to the Board office to sign for the letter. She asked for Vogt's help. Vogt discussed the problem with Thomas' secretary who spoke with Thomas and made arrangements for Wright to be picked up and brought to the Board offices (TA54).

After some confusion over who was to pick up Wright, she was brought to the Board offices by a driver in a district van.[7/] Wright testified about her meeting with Thomas as follows:

> Well, I -- when I went in, Mrs. Thomas said to me, "So you're Carol Wright." and I said, "Yes, I am." and she said to me, "I want to know why you

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7/ The confusion resulted when Wright was not sure who was to pick her up and was reluctant to get into a van with a man she did not know. Wright described herself as shaken by the incident (TA88).

> found it necessary to call your Union Rep. if you have a problem you are to call me. And once your Union Rep. came up here, I was determined that you were coming to my office and anyone can tell you what my reputation is on that." (TA85)8/

Wright signed for her letter of intent and returned to work. She stated that she felt "belittled and intimidated" (TA89).

When asked whether she discussed union involvement with Wright, Thomas replied:

> I don't remember, but its possible I said to her, you know, why did you call someone? Why didn't you call to find out if there is a problem? But I don't know if those were my exact words or not (TA140).9/

Thomas required all of the secretaries who work in the Adult Learning Center to get their letter of intent from her office. Thomas called Wright to her office to pick up the letter because she wanted to explain to Wright that she was a member of the school operations staff.

Analysis

The principal issue is whether the Board violated its obligation to negotiate when it unilaterally eliminated morning and

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8/ The Board argues that Wright's memory of her visit to Thomas' office is skewed by her agitation resulting from her confusion about the van. Wright remembers the details of the conversation. Her testimony was clear and uncontroverted. I credit her testimony.

9/ During discovery, TESA asked the Board: "State whether Julie Thomas made any statements to Carol Wright which referred directly or indirectly to TESA President Vogt. If so, set forth in full and complete details the statements made." Thomas' response was "I do not recall." (TA146).

afternoon breaks, which the high school secretaries tacked on to their lunch period.

Terms and conditions of employment may arise from a past practice not contained in the parties' collective negotiations agreement. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1977) mot. for reconsid. den., 4 NJPER 56 (¶4073 1978). If the agreement is silent or ambiguous about the issue, past practice controls. Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). A past practice should demonstrate "a pattern of conduct and some kind of mutual understanding, either expressed or implied." United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970).

> Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute (Id. at 2597).

The Commission relies on Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973), to define a past practice as a course of events, "...which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Somerville Boro., P.E.R.C. No. 84-90, 10 NJPER 125, 126 (¶15064 1984).

The practice at the high school was to allow secretaries to add their fifteen minute breaks from the morning and afternoon to their half hour lunch period, creating hour long lunch periods. Bates testified that she allowed the secretaries to take informal breaks to go to the cafeteria and return to their desks with coffee or to go to the rest room. While Bates asserted no formal breaks were allowed, her February 24, 1987 memo requiring high school employees to "adhere to the contract terms" was not effective immediately, but rather the following week. If Bates did not believe that breaks were taken, she would have made the memo effective immediately, rather than a week later.

Additionally, Vizzoni testified that from the time he began supervising Sklute and another secretary until the February 24th memo, they took an hour lunch. He had believed they were allowed an hour for lunch. Vizzoni's testimony demonstrates that this practice existed and continued for at least two and a half years before it was eliminated. Sklute's testimony indicates that the practice existed for many years before that. The Board condoned the practice.

The Board argues that breaks were not provided by the contract and the Bates memo simply required the secretaries to follow the contract. An employer meets its negotiations obligation when it makes a change that is permitted under the collective negotiations agreement. Sussex-Wantage Regional Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd.

of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980). Past practices which are construed contrary to the express provisions of a collective agreement cannot be relied upon to change the clear meaning of the agreement, Randolph Twp. Bd. of Ed. The contract provides a defense to a unilateral change in a past practice only where it specifically and expressly authorizes the change, Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The contract provides a seven hour work day exclusive of a duty free lunch. The intent of the language was to remove lunch from the seven hours of work. The Board argues that thirty minutes of break time in a seven hour day results in a six and one half hour work day. The contract is silent about breaks and the length of the lunch period. The secretaries at the high school are allowed a half hour lunch break. They also have been allowed two fifteen minute breaks. Until the Bates memo, no one prohibited secretaries from tacking breaks on to lunch. The contract is silent on whether the breaks are included in the seven hour work day. If a contract is silent, it can not be construed as waiver. Sussex Cty. Therefore I can not interpret the contract to permit the elimination of breaks.

I find the Board violated subsections 5.4(a)(5) and derivatively (a)(1) when it unilaterally eliminated breaks without negotiations. Therefore, I recommend that Bates' February 24, 1987

memo be rescinded with respect to the secretaries' breaks and the practice of allowing two fifteen minute breaks be restored.10/ I further recommend the parties negotiate over the continuation of two fifteen minute breaks. I do not, however recommend back pay for the lost half hour per day. To award back pay would allow the secretaries to earn more than they were entitled to since the increase in work time resulting from the elimination of breaks did not reduce their total compensation, Galloway Tp. Bd. of Ed., 157 N.J. Super. 74, 84 (App. Div. 1978).

TESA argues the Board's elimination of breaks was in retaliation for filing the Colley grievance. Whether an employer illegally discriminates in retaliation for union activity requires a charging party prove that protected activity was a substantial or motivating factor for the employment action, In re Bridgewater Tp., 95 N.J. 235, 244 (1984). Ordinarily, the charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise of protected

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10/ Requiring the Board to reinstate break time to coincide with secretaries' lunch periods would effectively allow the secretaries an hour lunch period. The intent of a break period is to allow employees time away from their work to relax so that they will be more productive during work time. Adding breaks to lunch does not achieve that purpose. Accordingly, I recommend that the Board be permitted to schedule fifteen minute morning and afternoon breaks for high school secretaries in a manner that allows it to meet its staffing needs throughout the day pending negotiations with TESA.

rights. If the charging party proves that hostility toward exercise of protected rights was a substantial or motivating factor in the employer's action, the burden shifts to the employer to show the action would have occurred absent protected activity. The employer's affirmative defenses need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the action.

TESA filed a grievance over the denial of Colley's break on October 26, 1986. Filing a grievance is a fundamental example of protected activity, Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶19259 1986).

Although the Board knew about the grievance concerning elementary school breaks, there is no direct evidence that Bates, who issued the memo eliminating breaks at the high school knew about it. Thomas and Bates had several discussions about improving efficiency. Thomas responded to Bates' request for Sklute's overtime by discussing breaks. Therefore I infer that Bates learned of the Colley grievance from her discussions with Thomas.

TESA must prove that the Board's hostility toward TESA for filing the Colley grievance was a substantial or motivating factor in its decision to eliminate breaks at the high school. Timing may be circumstantial evidence of a hostile motive. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1986), and is suspect here. On November 25, 1986, Thomas attended the second step hearing held before the superintendent. The next day Bates requested

overtime for Sklute. Denying the request, Thomas suggested that Bates use time spent on breaks rather than overtime.

On February 24, 1987, Thomas attended the third step grievance hearing which was held before the Board. In a memo dated the same day, Bates directed that there be no "formal" morning or afternoon breaks effective the following Monday.

The Colley grievance and the discussions surrounding it fixed Thomas' attention on breaks. She discussed with Bates improving efficiency in the high school. Although the elimination of breaks closely follows the processing of the Colley grievance, no other evidence supports a conclusion that Thomas was hostile toward TESA. While TESA established a connection between the elimination of breaks at the high school and the Colley grievance, it failed to prove that breaks were eliminated at the high school because Thomas, or anyone else, wanted to retaliate against TESA for filing and pursuing the Colley grievance. The Colley grievance may have promoted Thomas' goal of enhanced efficiency. If Thomas wanted to retaliate, she might have eliminated breaks for secretaries at all of the schools and the Board offices. Since TESA did not show that hostility motivated the elimination of breaks, I need not consider whether the Board's efforts to increase efficiency constitute a legitimate business justification.

Carol Wright

The standard to determine whether an employer commits an independent 5.4 (a)(1) violation was stated in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1]

It is immaterial that an employer's conduct did not actually coerce an employee or was not illegally motivated. The tendency of the employer's conduct, not its result or motivation is at issue. Commercial Township, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982); Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984). The Act also grants public employers the right to express opinions about unionism provided such statements are noncoercive, Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981).

Thomas requested Wright to come to her office. Faced with the resulting parking problem, Wright could have called Thomas directly. She instead consulted TESA's president, Vogt. After Vogt arranged transportation, Wright complied with Thomas' request. When Thomas and Wright met, Thomas (1) asked Wright why she called Vogt; (2) told her to call Thomas if she had a problem; and (3) told her that after Vogt came to Thomas' office to arrange Wright's transportation Thomas "was determined that you were coming to my office and anyone can tell you what my reputation is on that."

Thomas' suggestion that Wright contact her rather than TESA with future problems and her suggestion that after Vogt contacted

Thomas' office for Wright, Thomas' request became a requirement that Wright come to her office for the letter tended to interfere with Wright's right to request assistance from TESA and with TESA's duty to represent Wright.

Thomas wanted to meet Wright and tell her that she was a member of the school operations division. Those are legitimate reasons to require Wright to come to her office, but do not justify Thomas' comments. There was no legitimate business reason for those comments. Accordingly, I find Thomas' comments violated subsection 5.4(a)(1). TESA has not alleged any facts which would constitute a violation of subsections 5.4(a)(3) and (5) with respect to Wright, so I dismiss those allegations.

Recommended Order

I recommend that the Trenton Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing secretaries in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with Carol Wright's right to contact TESA president Patricia Vogt and suggesting that she contact Director of School Operations, Julie Thomas instead of TESA.

2. Refusing to negotiate in good faith with TESA over the elimination of morning and afternoon breaks at Trenton Central High School.

II. Take the following affirmative actions:

A. Rescind Elizabeth Bates' memo dated February 24, 1987, with respect to high school secretaries' breaks.

B. Negotiate in good faith with TESA over proposed changes in morning and afternoon breaks at Trenton Central High School.

C. 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 and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Joyce M. Klein
Hearing Examiner

Dated: April 22, 1988
Trenton, New Jersey

Appendix "A"

RECOMMENDED

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 cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act, particularly by interfering with Carol Wright's right to contact TESA president Patricia Vogt and suggesting that she contact Director of School Operations, Julie Thomas instead of TESA.

WE WILL cease and desist from refusing to negotiate in good faith with TESA over the elimination of morning and afternoon breaks at Trenton Central High School.

WE WILL rescind Elizabeth Bates' memo dated February 24, 1987, with respect to high school secretaries' breaks.

WE WILL negotiate in good faith with TESA over proposed changes in morning and afternoon breaks at Trenton Central High School.

Docket No. CO-H-88-8 TRENTON 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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.