

P.E.R.C. NO. 81-110

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOVER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-33-105

DOVER EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission, adopting the recommendation of a Hearing Examiner, determines that the Dover Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it unilaterally, without negotiations with the Dover Education Association, increased by 35 minutes of pupil contact per day the workload of teachers represented by the Association. The Commission orders the Board to, within 60 days of the date of the decision, restore the status quo ante and negotiate with the Association regarding any proposed changes in teacher-pupil contact time.

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Appearances:

For the Respondent, Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, of Counsel)

For the Charging Party, Goldberg & Simon, P.A.
(Gerald M. Goldberg, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on August 15, 1979 by the Dover Education Association ("Association") alleging that the Dover Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association alleges that the Board violated N.J.S.A. 34:13A-5.4 (a) (1) and (5) ^{1/} in March, 1979 when it unilaterally, and without prior negotiations with the Association, altered the format of

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."

the Dover Middle School school day from seven periods to eight periods effective in the 1979-80 school year and, additionally, in that the Respondent refused the Association's demand for negotiations regarding the increase in workload of the affected employees.

Pursuant to a Complaint and Notice of Hearing, hearings were held before Commission Hearing Examiner Alan R. Howe on September 9, October 1 and 14, 1980 at which time all parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Following receipt of post-hearing briefs from the parties, the Hearing Examiner issued his recommended Report and Decision on January 12, 1981. H.E. No. 81-23, 7 NJPER ____ (¶ ____ 1981). The case is now before us to consider the Hearing Examiner's report in light of exceptions and cross-exceptions filed by the parties.

The Hearing Examiner found that the Board violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 5.4(a)(1), when it unilaterally and without negotiations with the Association added a fifth teaching period, increasing the number of periods from seven to eight per school day, which resulted in a workload increase of 35 minutes in daily pupil contact time for teachers at the Middle School beginning with the 1979-80 school year. He did not find the assignment of a duty period for all teachers among the Unified Arts Group of teachers to have violated the

Act because he found the assignment did not measurably increase teacher-pupil contact time. The Hearing Examiner found the Association had not waived its right to negotiate the workload increase because the Association requested negotiations on this subject as soon as they received notice of the increase and when this request to negotiate was rejected, the Association promptly filed the instant unfair practice charge.^{2/}

The Hearing Examiner recommended that there be a restoration of the status quo and an order to cease and desist from refusing to negotiate with the Association concerning the increase in workload. He refused the Association's request for an award of monetary compensation or ordering time off with pay based on prior Commission decisions that such an award would be speculative.

The Charging Party filed exceptions challenging the Hearing Examiner's conclusion that the affected Unified Arts Group did not suffer an increase in workload and also excepts to his recommendation that a compensatory remedy is not warranted. The exceptions also request the Commission to award counsel fees as a monetary award that would not be speculative.

The Board excepts to the Hearing Examiner's finding that there was a 35 minute increase in pupil contact time by characterizing assignment of teachers for periods of Individualized Instruction Period ("I.I.P."), as an instructional period replaced

^{2/} The Hearing Examiner found the charge to have been timely filed under the circumstances.

with an instructional period while the Hearing Examiner found it to be a duty period replaced with an instructional period and hence the increase. The Board points out that there was no refusal to bargain this issue because there was no change over which to bargain. The Board objects to the Hearing Examiner's failure to state that the Association made no further contact with the Board after having been advised that the Board rejected the Association's contention that the workday was lengthened and they object that the Hearing Examiner failed to note that teachers' schedules showing the increased number of periods by the Board to the teachers was consistent with their established practice of annual schedules.

Having reviewed the entire record in this matter, including the exceptions and cross-exceptions filed by the parties, we determine that the findings of fact and conclusions of law made by the Hearing Examiner are based on substantial evidence and adopt them.^{3/} We similarly conclude that there was an increase in workload^{4/} and that this increase must be rescinded and that the Board negotiate with the Association concerning terms and conditions of employment affected by this action because awarding compensatory damages would be speculative. We do not find awarding counsel fees to be appropriate in this case. See, In re Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 377 (1977).

3/ The cases discussed in the Hearing Examiner's report at pp. 9-10 support his conclusion that the Board had an obligation to negotiate with respect to the increased instructional time.

4/ We find any increase for the United Arts Group to be de minimis.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Respondent Board:

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, particularly, by unilaterally increasing the workload of employees, such as teachers at the Middle School, whose daily workload was increased by 35 minutes in teacher pupil contact time beginning with the 1979-80 school year, without prior negotiations with the Dover Education Association.

2. Refusing to negotiate in good faith with the said Association concerning the terms and conditions of employment of employees represented by the Association, in particular, by unilaterally increasing the workload of teachers at the Middle School, whose daily teacher pupil contact time was increased by 35 minutes beginning with the 1979-80 school year.

B. Take the following affirmative action:


1. Within sixty (60) days hereof, restore the status quo ante by reducing the daily teacher pupil contact time by 35 minutes for teachers at the Middle School, and negotiate in good faith with the Association regarding any proposed changes in teacher pupil contact time for teachers at the Middle School prior to implementation.

2. Post at 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 the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. 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 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 and Commissioners Parcells, Hartnett and Graves voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
March 10, 1981
ISSUED: March 11, 1981

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

In the matter of

DOVER BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-80-33-105

DOVER EDUCATION 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 without negotiations with the Association increased the workload of its Middle School teachers by adding a fifth teaching period, which resulted in an increase in the number of periods per day from seven to eight and an increase in daily teacher pupil contact time of 35 minutes.

The Hearing Examiner found that the Board in March 1979 first communicated to Team Leaders the possibility of the addition of an eighth period to the school day. The negotiations for the 1979-81 collective negotiations agreement had been completed by March 1979 and there had been no negotiations regarding an increase in teacher workload at the Middle School. When, in July 1979 it appeared that a change in teacher workload was to be implemented in the 1979-80 school year, the Association promptly demanded negotiations. This demand was rejected in four days and the Unfair Practice Charge was filed on August 15, 1979.

The Hearing Examiner was persuaded that the "dominant issue" under the New Jersey Supreme Court's rationale in Bd. of Ed. of the Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association, 81 N.J. 582 (1980) was a negotiable term and condition of employment, i.e., a daily increase in teacher workload. There was ample time to negotiate the proposed change with the Association prior to the commencement of the 1979-80 school year and the Association had not waived its right to negotiate.

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., reduce the daily teacher pupil contact time at the Middle School by 35 minutes, and thereafter negotiate in good faith with the Association regarding any proposed changes in teacher pupil contact time.

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.

STATE OF NEW JERSEY
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DOVER BOARD OF EDUCATION,

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Appearances:

For the Dover Board of Education
Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, Esq.)

For the Dover Education Association
Goldberg & Simon, P.A., Esqs.
(Gerald M. Goldberg, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 15, 1979 by the Dover Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Dover 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 in or about March 1979 unilaterally, and without prior negotiations with the Association, altered the format of the Dover Middle School school day from seven periods to eight periods effective in the 1979-80 school year and, additionally, in that the Respondent refused the Association's demand for negotiations regarding the increase in

workload of the affected employees, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. ^{1/}

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 May 14, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 9, October 1 and 14, 1980 ^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs by January 2, 1981.

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

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

3. The history of collective negotiations between the parties dates back at least to 1968 and the current collective negotiations agreement is effective from

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.

"(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 hearing was originally scheduled to commence July 15, 1980. The delay thereafter was due to conflicting schedules of counsel and the Hearing Examiner.

July 1, 1979 through June 30, 1981. ^{3/}

4. Ronald Armengol became the Principal of the Dover Middle School commencing with the 1974-75 school year. At that time the Middle School had eight periods. Armengol was interested in instituting Team Teaching and also establishing the Individualized Instructional Period (IIP) as a substitute for the Study Hall. ^{4/}

5. Beginning with the 1975-76 school year Team Teaching and the IIP was instituted. Team Teaching involved both teachers of the academic subjects and teachers in the Unified Arts Group. ^{5/} The IIP applied only to the teachers of the academic subjects and not to the teachers in the Unified Arts Group. Also, with the advent of Team Teaching and the IIP in the 1975-76 school year the total number of periods in the school day was reduced from eight periods to seven periods. ^{6/}

6. In October 1977 Richard Kesin became the Principal of the Middle School, at which time there was a seven-period school day schedule including the IIP. Immediately upon becoming Principal, Kesin developed a concern regarding the IIP. This concern was based upon the fact that while IIP was important to Team Teaching it was difficult for teachers, who often had no contact with the IIP students during the balance of the instructional day.

^{3/} The agreement was not received in evidence inasmuch as it contains no provisions germane to the instant dispute. For reasons which will be apparent hereinafter, the Hearing Examiner finds as a fact that the negotiations for the 1979-81 agreement were completed in March 1979 and, further, that there were no negotiated changes with respect to teacher workload. The March date is established by R-4 (p. 3).

^{4/} The IIP involves 25-30 students and one teacher, who routinely excuses up to 10 students for the Library and assists the remaining students in such subjects as reading and math. On the other hand, the Study Hall involved approximately 50 students and two teachers, who merely monitored the students.

^{5/} This Group includes teachers of Home Economics, Physical Education, Music, Art and Industrial Arts.

^{6/} The number of instructional or teaching periods within the school day varied from four periods to five periods. For example, in English the number of instructional periods was four while teachers of other academic subjects taught five periods. In the Unified Arts Group there were five teaching periods.

7. By the end of 1978, after it had become apparent to the administration that the students in the Middle School were not achieving sufficiently, it was decided to recommend discontinuance of the IIP. The discussion on discontinuance had started in November 1978, involving Kesin and the Superintendent, Frank Poulos, and the matter was discussed with the Board in February 1979. Commencing with the 1979-80 school year IIP was formally discontinued but Team Teaching was continued as before.

8. During the 1978-79 school year there had been a seven-period school day which, when broken down, indicated the following: the total day was 430 minutes, of which 180 minutes was devoted to Instruction (four 45-minute periods), 70 minutes to Free Time, 135 minutes to Duty Time and 45 minutes to Prep Time (J-1 and CP-1).

9. The instant dispute arises from certain changes made in the allocation of time within the same 430-minute school day at the beginning of the 1979-80 school year as follows: Instruction Time was increased to 215 minutes (five 43-minute periods); Free Time remained the same at 70 minutes; the Duty Time was decreased to 102 minutes; and the Prep Time was decreased to 43 minutes (J-2 and CP-2). ^{7/}

10. The negotiations for the 1979-81 collective negotiations agreement commenced in October 1978. About one month later, in November 1978, the Association submitted a proposal defining the "Teacher Work Day" (R-2). This proposal included the Middle School, and requested that the "total in-school work day" not exceed 430 minutes and that "classroom" or instructional time be limited to 180 minutes. This proposal (R-2) was withdrawn by the Association prior to the conclusion of the negotiations. ^{8/} It is undisputed that there were no negotiations proposals nor negotiations with respect to the number of instructional periods

^{7/} As noted previously (footnote 6, supra), the Unified Arts Group has had five teaching periods since the 1975-76 school year and this continued in 1979-80. However, in 1979-80 the duty period, which had not previously involved all teachers in the Unified Arts Group, was made mandatory. Thus, the Association seeks remedy for these teachers.

^{8/} R-4 so indicates in para. 8.

taught. As previously found (footnote 3, supra), the negotiations for the 1979-81 agreement were completed in March 1979 and there were no negotiated changes with respect to teacher workload.

11. At some point late in February 1979 or early March 1979 there was a Middle School faculty meeting, at which time Kesin indicated that the instructional time at the Middle School was "far less" than that of other middle schools in neighboring school districts in Morris County.

12. At a March 5, 1979 meeting of Team Leaders, Kesin told them that they should begin thinking about an additional teaching period, which would replace the IIP. 9/ Team Leaders were requested by Kesin to report to their teachers and develop feedback for a future Team Leaders' meeting. 10/ Reiners and Hart also testified credibly that a faculty meeting in April or May 1979 Kesin indicated that the teachers were either "locked into" or "boxed in" on an eight-period teaching day. 11/ Finally, Kesin testified credibly that the final faculty meeting in June 1979 included a "rough look" at the schedule for 1979-80, which included five Teaching periods, one Duty period, one Prep period and

9/ Kesin testified credibly that he mentioned specifically that the additional period, which would replace the IIP, would be "Reading in the Content Area." During the 1979-80 school year "Reading in the Content" was scheduled as the fifth and last period of the day. It involved reading in the area of the teacher's academic subject and it required as much time to prepare for as each of the teacher's other four teaching periods. A lesson plan was required and a student's performance would be incorporated into the student's evaluation in the subject area. Kesin testified that the purpose was to provide "additional instruction time in the critical area of reading" (3 Tr. 3) (Emphasis supplied).

10/ Charging Party witnesses Linda Reiners and Elizabeth L. Hart testified credibly that the reaction of the teachers in their teams was negative as to increasing the number of periods from seven to eight per day.

11/ Kesin definitively fixed the date of this meeting as being May 16, 1979.

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a lunch period. 12/

13. Raymond Schwartz, who is a teacher in the High School and the President of the Association, testified credibly that sometime in March 1979 he received word from Reiners 13/ that "some kind of a change" was in process at the Middle School. Reiners next communicated with Schwartz in July 1979 when she told him that she had learned of another teacher's schedule, which indicated that there would be an eight-period school day in the 1979-80 school year. Schwartz on the same day telephoned Kesin and inquired of him what was happening. Although Schwartz testified that he did not completely understand Kesin's response as to precisely what change was taking place, 14/ Schwartz immediately wrote to R. Paul Muni 15/ under date of July 23, 1979, in which, after indicating that the work day was to be increased by one period at the Middle School, he demanded negotiations with respect to the "terms and conditions of employment of affected employees" (J-3).

14. Under date of July 27, 1979 Frank Poulos, the Superintendent, replied by letter, in which he rejected Schwartz' contention that the work day had been increased, adding that: "Teacher-Pupil contact time is identical. The preparation period...has not been shortened. The duty free lunch period remains intact" (J-4).

15. The Master Middle School Schedule for the 1979-80 school year (CP-3), which was distributed to the teachers on the first day of school in September 1979, provided for eight periods as compared to seven periods in the 1978-79 school year (R-3).

12/ Kesin also testified that on May 10 and 17, 1979 there were workshops provided for Middle School teachers on "Reading in the Content Area" (described in footnote 9, supra).

13/ Reiners, in addition to being a Team Leader and English teacher at the Middle School, has been a Vice President of the Association since 1978. This fact is not to suggest that Reiners engaged in any conduct at this time, which would constitute legal notice to the Association of a change in terms and conditions of employment of Middle School teaching personnel.

14/, 15/ See next page.

THE ISSUES

1. Did the Respondent Board violate Subsections (a)(1) and (5) of the Act when, without negotiations with the Charging Party, it unilaterally increased the number of periods per day at the Middle School from seven to eight for the 1979-80 school year, i.e., was this change in terms and conditions mandatorily negotiable? If so, what shall the remedy be?

2. Did the Charging Party waive its right to negotiate any increase in teacher workload at the Middle School, which may have resulted from the increase in the number of periods in the school day from seven to eight?

3. Was the instant Unfair Practice Charge timely filed under the Act?

DISCUSSION AND ANALYSIS

The Respondent Board Violated Subsections (a)(1) and (5) of the Act When, Without Negotiations With the Charging Party, It Unilaterally Increased the Number of Periods Per Day at the Middle School From Seven to Eight For the 1979-80 School Year

The Hearing Examiner finds and concludes that the Respondent Board violated Subsections(a)(1) and (5) of the Act when, without negotiations with the Association, it unilaterally increased the school day from seven to eight periods at the Middle School beginning with the 1979-80 school year. A fifth teaching period was added, 16/ which increased teacher pupil contact time by 35 minutes per school day, notwithstanding that there was no change in the

14/ Kesin testified that he spoke to Schwartz by telephone in mid-August 1979 and informed him of the eight-period day and "Reading in the Content." The Hearing Examiner credits Schwartz' testimony that the call to Kesin was made in July in view of J-3, infra.

15/ Schwartz identified Muni as Board Secretary. The letterhead of J-4, infra, indicates that Muni is "Assistant Superintendent-Business."

16/ The fifth teaching period consisted of "Reading in the Content Area" (See footnote 9, supra).

length of the total school day, which remained at 430 minutes. (See Findings of Fact Nos. 8 and 9, supra). 17/

The mandatory obligation of a public employer to negotiate is limited to "terms and conditions of employment," which the New Jersey Supreme Court has definitively stated are:

"...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 management prerogatives pertaining to the determination of governmental policy..."

State v. State Supervisory Employees Association, 78 N.J. 54, 67 (1978)

See also, Bd. of Ed. of Englewood v. Englewood Teachers, Ass'n., 64 N.J. 1, 7 (1973)

The Supreme Court's most recent pronouncement on the scope of the obligation to negotiate terms and conditions of employment is found in Bd. of Ed. of the Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association, 81 N.J. 582 where the Court said:

"...The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration..." (81 N.J. at 591)(Emphasis supplied).

It thus remains to consider and determine whether or not the "dominant issue" in the instant case "is an educational goal" which, if it is, negates any obligation on the part of the Board to negotiate the subject matter, or its impact, with the Association.

Curiously, the cases cited by both the Respondent and the Charging Party support the finding and conclusion of the Hearing Examiner that the

17/ However, the Hearing Examiner is not persuaded that the Respondent violated the Act by having made the Duty period mandatory for teachers in the Unified Arts Group in the 1979-80 school year. Clearly, this did not measurably increase teacher pupil contact time as in the case of the teachers who were assigned "Reading in the Content Area" as a fifth teaching period.

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Respondent Board has violated the Act by its conduct herein. Thus, for example, the Respondent cites Bridgewater-Raritan Regional Bd. of Ed., P.E.R.C. No. 81-35, 6 NJPER 449 (1980) and Ramapo-Indian Hills High School District Bd. of Ed., P.E.R.C. No. 80-9, 5 NJPER 302 (1979), aff'd. 176 N.J. Super. 35 (1980) while the Charging cites Newark Bd. of Ed. v. Newark Teachers' Union, Local 481, P.E.R.C. No. 79-24, 4 NJPER 486 (1979), P.E.R.C. No. 79-38, 5 NJPER 41 (1979), aff'd. App. Div. Docket No. A-2060-78 (1980); Buena Regional Board of Education, P.E.R.C. No. 79-63, 5 NJPER 123 (1979); and Holland Township Bd. of Ed., P.E.R.C. No. 79-91, 5 NJPER 230 (1979).

In Bridgewater-Raritan, supra, arbitration was permitted, inter alia, of a grievance seeking increased compensation or equivalent released time for the increase in pupil contact time resulting from the Board's decision there to divide the school day into eight rather than seven periods. The Commission applied the Woodstown-Pilesgrove directive that there be a "weighing or balancing" as to whether or not the "dominant issue is an education goal." The Commission cited the Appellate Division decision in Newark Bd. of Ed., supra, where the Court said 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 educational policy ...(citations omitted)..."

In Ramapo-Indian Hills, supra, the Commission refused to restrain arbitration of that portion of a grievance, which presented an issue of compensation resulting from the assignment of extra-curricular activities, and which resulted in an increase in hours. The Commission made it clear that the decision to assign an individual to perform the extra-curricular duties with a concomitant increase in hours was a managerial prerogative: "...There is no interference with that ability arising from requiring an employer to negotiate the compensa-

tion for the extra-curricular duties as well as the concomitant workload to the extent that it is severable from hours..." (5 NJPER at 302).

In Buena, supra, the Commission, citing its decision in Newark Bd. of Ed., supra, held that the Board's decision "...to change a non-teaching supervisory duty period to an additional teaching period is a required subject for collective negotiations as it directly relates to workload..." In rejecting the Board's argument that a managerial prerogative pertaining to basic educational policy was involved, the Commission stated that once the Board decided to implement a decision increasing the number of classroom teaching periods per day "...there is a change in workload which is mandatorily negotiable..." (5 NJPER at 124).

Finally, in Holland Township, supra, the Commission held that the Board's requirement that teachers schedule parent/teacher conferences, where the Board had performed the scheduling function in the past, involved an issue of teacher workload, notwithstanding that there had been no change in the length of the workday. The Commission cited numerous prior Commission and Court decisions holding that workload is a term and condition of employment, which is mandatorily negotiable. ^{18/}

On the facts in the instant case, it is clear that when the Respondent Board unilaterally changed its Middle School teachers from the non-teaching duty of IIP to a fifth instructional period of "Reading in the Content Area" there was a workload increase to the extent of an additional 35 minutes per day in teacher pupil contact time. The IIP was not an instructional period: there were no lesson plans, curriculum guides, recordkeeping or continuity of student work (1 Tr. 15-17, 38; 2 Tr. 84).

^{18/} The most recent Commission decision involving an increase in "pupil contact time" is Pascack Valley Regional High School District Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (1980) where, ultimately, no violation was found because the contract between the parties permitted the increase in teacher pupil contact time. However, the decision affirmed the negotiability of any change in teacher pupil contact time.

It will be recalled that Kesin testified clearly that the purpose of instituting "Reading in the Content Area" was to provide "additional instruction time in the critical area of reading" (see footnote 9, supra). This involved reading in the area of the teacher's academic subject and it required as much time to prepare for as each of the teacher's other four teaching periods. A lesson plan was required and a student's performance would be incorporated into the student's evaluation in the subject area.

Assuming arguendo that the conduct of the Respondent was undertaken in good faith, it has still violated the Act. As the Commission stated in City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (1978):

"Moreover, good faith is not a defense to a charge of unilateral change in a term and condition of employment. Such conduct of an employer constitutes a per se violation of the duty to negotiate in good faith, irrespective of the employer's subjective motivation." (4 NJPER at 421).

Finally, as the foregoing Findings of Fact make clear, the Respondent Board and the Association never engaged in collective negotiations with respect to the impact of the Board's decision to increase the number of periods per day from seven to eight by the addition of "Reading in the Content Area." The negotiations for the 1979-81 collective negotiations agreement were concluded in March 1979 and there were no negotiated changes with respect to teacher workload (see footnote 3 and Finding of Fact No. 10, supra). Kesin first raised the matter of an additional teaching period on March 5, 1979 at a meeting of Team Leaders. The final faculty meeting in June 1979 included only a "rough look" at the schedule for 1979-80, which was to involve five teaching periods (see Finding of Fact. No. 12, supra). It was not until July 1979 that Reiners advised Schwartz that she had learned of another teacher's schedule, which indicated that there would be an eight-period school day in the 1979-80 school year. Schwartz

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demand negotiations under date of July 23, 1979, which demand was rejected on July 27, 1979 by the Superintendent, Frank Poulos (see Findings of Fact Nos. 13 and 14, supra). The instant Unfair Practice Charge was filed on August 15, 1979 (C-1). 19/

Based on all of the foregoing, it is plain as a pikestaff that the Respondent Board violated Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), by its unilateral conduct herein and the Hearing Examiner will recommend an appropriate remedy.

The Association Has Not Waived Its Right to Negotiate The Workload Increase For Teachers At the Middle School.

In cases before the Commission the issue of waiver has arisen primarily in the context of contractual provisions in collective negotiations agreements or related types of documents. Thus, an agreement might contain a stringently worded "zipper" clause wherein the parties sought to foreclose one another from negotiating on any matter whatsoever during the term of the agreement.

Since the instant case does not involve an alleged waiver in documentary form, but rather an alleged waiver by the course of conduct of the Association through its representatives, the Hearing Examiner does not intend to cite past Commission decisions herein. It is sufficient to refer briefly to the cases cited by the Charging Party in its Main Brief (pp. 22-24) inasmuch as the principle of waiver, whether in writing or by conduct, seems to the Hearing Examiner to be identical.

Thus, the New Jersey Supreme Court in Red Bank Regional Education Association v. Red Bank Regional High School Bd. of Ed., 78 N.J. 122 (1978), relying upon the law of private sector labor relations, said:

19/ The issue of "waiver" and the timeliness of the filing of the Charge will be dealt with further infra.

"...The propriety of a contractual waiver of statutory rights is well-established in the private sector..To be given effect, any such waiver must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively. United Steelworkers v. National Labor Relations Board, 536 F. 2d 550, 555 (3 Cir. 1976)." (78 N.J. at 140).

Applying the foregoing test to the conduct of the Association's representatives in the instant case, the Hearing Examiner finds and concludes that the Association has not waived its right to negotiate the workload increase for the teachers at the Middle School beginning with the 1979-80 school year. As indicated previously, the 1979-81 collective negotiations agreement was fully negotiated by March 1979 without any reference to an increase in teacher workload as a result of a change from seven periods to eight periods per school day.

The first indication of a change was on March 5, 1979 at a meeting of Team Leaders. One of the Team Leaders, Linda Reiners, at that time happened to be an Association Vice President. However, there was no evidence introduced to support a finding that Kesin's remarks on March 5, 1979 constituted legal notice to the Association. (See Finding of Fact No. 12 and, footnote 13, supra). ^{20/}

It is apparent to the Hearing Examiner it was not until July 1979 that Schwartz received any firm information with respect to a schedule change, as to which he was legally bound to act. This came in the form of a further communication from Reiners regarding another teacher's schedule, which indicated that there would be an eight-period school day in the 1979-80 school year. Schwartz acted immediately by calling Kesin and by promptly writing to Muni on July 23, 1979 (J-3). When Poulos rejected Schwartz' contention that the workday had been increased under date of July 27, 1979 (J-4), the Association promptly filed the instant Unfair Practice Charge on August 15, 1979.

In conclusion, the Hearing Examiner holds that the Respondent Board has failed to adduce any clear and unmistakable evidence of a waiver by course

^{20/} It is noted here that Schwartz, the President of the Association, testified credibly that Reiners told him in March only that "some kind of a change" was in process at the Middle School (see Finding of Fact No. 13, supra).

of conduct on the part of the Association in the instant case. The Association is, therefore, not precluded from making a binding demand upon the Board to negotiate with respect to the Board's unilateral change in the school day at the Middle School for the school year beginning 1979-80.

The Instant Unfair Practice Charge
Was Timely Filed Under The Act.

Section 5.4 (c) of the Act provides for a six-month limitation on the filing of Unfair Practice Charges. The Hearing Examiner will not belabor further the fact of having previously found that the operative events triggering the filing of the instant charge of unfair practices on August 15, 1979 occurred during the month of July 1979. Thus, the Association reacted within approximately one month by its filing with the Commission. Kesin's meeting with the Team Leaders on March 5, 1979 in no way changes the Hearing Examiner's rejection of the Respondent Board's defense that the Association made an untimely filing of the Unfair Practice Charge in this case.

THE APPROPRIATE REMEDY

The Charging Party in its Main Brief devotes seven pages to "Remedies," which it deems appropriate to the instant case.

The Charging Party first urges that there be a restoration of the status quo and an order to cease and desist. With this the Hearing Examiner agrees and will so recommend to the Commission.

The Charging Party next urges that there be an award of monetary compensation, citing, Galloway Township Bd. of Ed. v. Galloway Township Association of Educational Secretaries, 78 N.J. 1, 16 (1978). The Hearing Examiner does not agree. The quoted language from Galloway (78 N.J. at 16) stresses that the Commission possesses authority to "...make the affected employees whole for their actual losses sustained by reason of the commission of an unfair practice...through the

payment of back pay." (Emphasis supplied). The Hearing Examiner is of the opinion there is no precise basis, unlike Galloway, supra, for the computation and payment to the affected teachers of the Middle School monies representing "actual losses." The Charging Party has not suggested any basis for calculation of such losses and the Hearing Examiner, consistent with past Commission precedent, finds and concludes that an award of monetary compensation would be speculative. ^{21/}

The Charging Party next urges that the affected teachers be granted time off with pay for an amount of time equal to "...35 minutes per day of illegal work required..." (Main Brief, p. 32). As appealing as this contention appears, the Hearing Examiner declines to recommend such a remedy on the ground that it too is speculative. The Hearing Examiner might well be persuaded to the contrary if the length of the school day had been extended by 35 minutes. In fact, if such were the case, an award of monetary compensation; discussed above, might well be appropriate.

Finally, the Charging Party urges the grant of interest. This is of course predicated upon the prior grant of a monetary award, which the Hearing Examiner has declined to recommend.

* * * *

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)(5), and derivatively 5.4 (a)(1), when it unilaterally and without negotiations with the Associa-

^{21/} See Jackson Township Bd. of Ed., P.E.R.C. No. 80-48, 5 NJPER 484 (1979) where the Commission denied money damages as speculative, stating, "...the proper remedy is a return to the status quo ante and an order to negotiate." The Commission decisions cited by the Charging Party in its Main Brief (p. 29) represent instances where the facts afforded a demonstrable and reasonably precise basis for calculating actual losses.

tion added a fifth teaching period, increasing the number of periods from seven to eight per school day, which resulted in a workload increase of 35 minutes in daily teacher pupil contact time for the teachers at the Middle School beginning with the 1979-80 school year.

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 employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally increasing the workload of employees, such as teachers at the Middle School, whose daily workload was increased by 35 minutes in teacher pupil contact time beginning with the 1979-80 school year, without prior negotiations with the Dover Education Association.
2. Refusing to negotiate in good faith with the said Association concerning the terms and conditions of employment of employees represented by the Association, in particular, by unilaterally increasing the workload of teachers at the Middle School, whose daily teacher pupil contact time was increased by 35 minutes beginning with the 1979-80 school year.

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

1. Within sixty (60) days hereof, restore the status quo ante by reducing the daily teacher pupil contact time by 35 minutes for teachers at the Middle School, and thereafter negotiate in good faith with the Association regarding any proposed changes in teacher pupil contact time for teachers at the Middle School prior to implementation.
2. Post at all places where notices to employees are customarily posted, copies of the notice marked Appendix "A." Copies of such notice,

on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. 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 Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Dated: January 12, 1981
Trenton, New Jersey



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 employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally increasing the workload of employees, such as teachers at the Middle School, whose daily workload was increased by 35 minutes in teacher pupil contact time beginning with the 1979-80 school year, without prior negotiations with the Dover Education Association.

WE WILL NOT refuse to negotiate in good faith with the said Association concerning the terms and conditions of employment of employees represented by the Association, in particular, by unilaterally increasing the workload of teachers at the Middle School, whose daily teacher pupil contact time was increased by 35 minutes beginning with the 1979-80 school year.

WE WILL, within sixty (60) days hereof, restore the status quo ante by reducing the daily teacher pupil contact time by 35 minutes for teachers at the Middle School, and thereafter negotiate in good faith with the Association regarding any proposed changes in teacher pupil contact time for teachers at the Middle School prior to implementation.

DOVER BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with
Chairman, Public Employment Relations Commission,
P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780