P.E.R.C. NO. 89-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LIVINGSTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-247

LIVINGSTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Livingston Board of Education violated the New Jersey Employer-Employee Relations Act by unilaterally changing the cooperative education coordinator from a 12 month employee to a 10 month employee with summer work subject to annual approval.

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LIVINGSTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Riker, Danzig, Scherer, Hyland & Perretti, Esqs. (Glenn D. Curving, Esq.)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Nancy Iris Oxfeld, Esq.)

DECISION AND ORDER

On March 25, 1988, the Livingston Education Asssociation ("Association") filed an unfair practice charge against the Livingston 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) and (5),[1/] when it unilaterally changed Elliot Lovi, the cooperative education coordinator, from a 12 month employee to a 10 month employee with summer work subject to annual approval.

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."

On April 29, 1988, a Complaint and Notice of Hearing issued. On May 16, the Board filed an Answer. It claims, in part, that Lovi has never held a 12 month position and that it has a managerial prerogative to decide whether to have a summer cooperative education program and to hire a coordinator.

On June 2, 1988, Hearing Examiner Marc F. Stuart conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs and replies by August 25.

On November 23, 1988, the Hearing Examiner issued his report and recommendation. H.E. No. 89-17, 14 NJPER ___ (¶_____ 1988). He found that the Board had violated the Act by failing to negotiate with the Association before changing Lovi's terms and conditions of employment. He recommended an order restoring the status quo ante pending negotiations over any proposed changes.

On December 19, 1988, after an extension of time, the Board filed exceptions. It claims that Lovi has been employed as a regular 10 month employee appointed on a yearly basis to the summer stipend position. It further claims a prerogative to conduct a summer cooperative education program and to hire a program coordinator.

On December 30, 1988, the Association submitted its post-hearing brief as its reply.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate.[2/] We incorporate them here.

Lovi was hired in July 1969. Each summer since, he has been the coordinator of the cooperative marketing education summer program. Each year Lovi would enter into an employment contract which indicated he was either an 11 or 12 month employee.[3/] In 1971, he was informed that his 12 month contract entitled him to one sick day per month totaling 12 and three one-week vacations during the school year and a one-month vacation in the summer.

Each year, the Board would approve appointments. The Board claims that each year it would separately approve Lovi's teaching and his summer coordinator appointments. However, the record does not support that finding. The minutes of the Board's meetings do not reflect two separate appointments. They list Lovi either as an 11 or 12 month employee. For 1987-1988, for example, he was the only teacher listed in the minutes among 12 month personnel.

The former superintendent explained that until 1987, the Board had accepted the Superintendent's recommendation that Lovi be paid as an 11 or 12 month employee. He explained why the practice began:

2/ Lovi's stipend was 10% of his regular salary.

3/ Because Lovi had one month off during the summer, either an 11 or 12 month designation created similar terms and conditions of employment.

> [I]t was something that was done incorrectly...but it was to a convenience of the Payroll Department plus probably felt to be helpful to the employee at the time. ...I guess it was considered unique in that by practice there was a pretty good certainty that the need for such a stipend assignement would continue to exist at least from year to year and that as such it was felt that it was safe to make the recommendation for the position to be paid for in the summer and that Mr. Lovi be continuing it, which is a practice for people in the stipend position, not a practice to pay them over a 12 month period (T81-T82).

After almost 20 years, the Board decided to conform Lovi's employment relationship to what the former Deputy Superintendent testified was the Board's intent all along. Lovi would now be characterized as a 10 month employee with a separate stipend for one month of summer work. On November 3, 1987, the Superintendent notified Lovi that:

> you have been incorrectly paid on a 12-month basis over the last several years. Please be aware that as of the 88-89 school year you will be paid on a 10-month contractual basis....

On March 8, 1988, for the first time, the Board posted a list of open summer school positions including the cooperative education summer coordinator. On March 28, for the first time, the Board sent Lovi a separate appointment notice for his summer coordinator position.

It may have been some Board representative's unstated intent that Lovi be a 10 month employee with a separate summer appointment. However, the Board-developed contracts and its minutes, letters and actions confirm that Lovi was an 11 or 12 month employee.

Under these circumstances, we find that the Board violated the Act when it unilaterally changed Lovi's employment relationship. Length of work year and its inseparable concomitant - compensation - are terms and conditions of employment. Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978). "[C]utting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year...and without prior negotiation...is in violation of both the text and the spirit of the...Act." Id. at 101. Had Lovi been "hired anew each summer," our decision might be different. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440 (App. Div. 1981), aff'g in pert. part P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979). Contrary to the Board's assertion, the facts do not support a finding of separate summer hiring. Customarily and under successive contracts, Lovi was treated as an 11 or 12 month employee.[4/]

ORDER

The Livingston Board of Education shall:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by this

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4/ Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd App. Div. Dkt. No. A-5774-83T7 (6/17/85), is inapplicable. There, the union conceded that under the exigent circumstances of that case the Board had a right to reduce the length of the program. The litigation proceeded on that understanding. Here the program has not been altered, just Lovi's terms and conditions of employment.

Act, particularly by failing to negotiate with the Association before changing Elliot Lovi's terms and conditions of employment.

2. Refusing to negotiate in good faith with the Livingston Education Association concerning Elliot Lovi's terms and conditions of employment.

B. Take the following affirmative action:

1. Restore the status quo ante by restoring Elliot Lovi's position to a twelve month status.

2. Negotiate with the Association over any change in Lovi's terms and conditions of employment.

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, Commissioners Johnson, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained. Commissioner Wenzler was not present.

DATED: Trenton, New Jersey
February 10, 1989
ISSUED: February 14, 1989

H.E. NO. 89-17

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

In the Matter of

LIVINGSTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-247

LIVINGSTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Riker, Danzig, Scherer, Hyland & Perretti, Esqs. (Glenn D. Curving, Esq.)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Nancy Iris Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On March 25, 1988, the Livingston Education Association ("Association") filed an Unfair Practice Charge against the Livingston 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) and (5)[1/] when it unilaterally notified Elliot Lovi, the long time

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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: (5) Refusing to

Footnote Continued on Next Page

Cooperative Education Coordinator, that as of the 1988-89 school year he (Lovi) would be paid on a ten-month contractual basis for the position of Distributive Education Coordinator,[2/] and not on a twelve-month basis as was previously done. The Board informed Lovi that summer work was not a fixed condition of his employment and would have to be approved annually (C-1). The Association further charged that in March, 1988, the Board posted, as available for summer, 1988, the position of Cooperative Education Summer Coordinator; and, that this posting constitutes a unilateral change in terms and conditions of employment without negotiation, and a refusal to negotiate in good faith concerning the terms and conditions of employment of employees in the unit represented by the Association.

On April 29, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1).

1/ Footnote Continued From Previous Page

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/ There is some confusion in the record between the designations Cooperative Education Coordinator and Distributive Education Coordinator. At certain times, the parties appear to use the terms interchangeably. See, CP-1 and CP-4. At other times the record speaks of two distinct programs. Lovi's position has been designated as one or the other of these, and sometimes as both. To the extent that I am able, I will attempt to use the proper designation at the proper time.

The Board filed an Answer on May 16, 1988, in which it denied that the position of Cooperative Education Coordinator is or was ever a twelve-month position. The Board denied that Lovi has ever fulfilled the contractual responsibilities or obligations of a twelve-month employee, but rather has always been a ten-month employee who historically has been appointed to the position of Cooperative Education Summer Coordinator, which was and is a determination lying within management's exclusive prerogative. Accordingly, the Board denied unilaterally changing any term and condition of Lovi's employment. It stated that Lovi's position was subject to a lawful and proper reduction in force, but that Lovi has suffered no compensable damages as a direct and approximate result thereof (C-2).

On June 2, 1988, I conducted a hearing. The parties waived oral argument, but filed post-hearing briefs and reply briefs by August 25, 1988. Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Livingston Board of Education is a public employer within the meaning of the Act, and is the employer of Elliot Lovi, the employee who is the subject of this proceeding (T12, 13).3/

2. The Livingston Education Association is a public employee representative within the meaning of the Act, and is the majority representative of the employee described in this charge (T12-13).

3/ "T" refers to the transcript dated June 2, 1988.

3. Lovi was first employed by the Board in 1969-70 as Teacher/Coordinator of Distributive Education (T17; CP-20). Subsequently, his position became Teacher/Coordinator of Cooperative Marketing Education as a result of the Board's decision to change the program's name in order to give it a better image (T17-18). Lovi has performed the function of Summer Coordinator since the inception of his employment (T64). Lovi's terms and conditions of employment have historically conformed to those of the standard twelve-month employee in certain but not in all respects (T58). His vacation benefits did not conform to the twelve-month schedule; however, his sick benefits did conform (T58).

The Board views the Summer Coordinator position that Lovi has always held as a separate stipend position and not a component of his regular employment (T61, T63; CP-7 - CP-14). At least with regard to the 1987-88 school year, the Board demonstrated that it was its practice to offer the Summer Coordinator position based on a determination of adequate student enrollment. Such a determination necessarily had to be made on a year-by-year basis (T61).

There have been other teachers in Livingston with stipend positions who have had different types of employment contracts which were more specific in their designation of the stipend position as being separate and apart from their primary position (T77). These contracts reflected regular ten-month employment and separate summer employment (T77). However, in Lovi's case, historically, by the time the Board was prepared to offer him his employment contract, he

had already been offered and accepted the summer position. Accordingly, the Board was able to include the stipend position as a part of his regular employment and combine them into one employment contract and salary for the entire fiscal year (T81).

4. On November 3, 1987, the Board notified Lovi that it had come to its (the Board's) attention that he had been "incorrectly paid on a twelve-month basis over the last several years" (CP-1). The Board indicated that as of the 1988-89 school year, he would be paid on a ten-month contractual basis with summer work performed as Distributive Education Coordinator to continue to be paid "prorated" against annual salary (CP-1). The Board indicated that the reason for this change was that "the summer work must be approved annually and is not a fixed condition of your assignment" (CP-1). The Board further indicated that "based on considerations of the financial condition of the district, the number of youngsters you work with each summer, and the activities with which you are involved, it is our intention to maintain your level of employment" (CP-1).

On December 3, 1987, the NJEA responded to the Board's November 3, 1987, correspondence to Lovi indicating that Lovi has been "a twelve-month employee of the Livingston Board of Education since the 1971-72 school year" (CP-2). The Association stated that, therefore, Lovi's terms and conditions of employment could not be changed without prior negotiations with the majority representative; and, the Association had received no request from the Board to reopen negotiations (CP-2).

The Board responded to the Association on December 10, 1987, indicating that its intent was simply "to make it clear that the Board reserves the right to eliminate the summer segment of the Distributive Education Program based on a lack of enrollment and/or budget consideration"; and, should such a thing occur, "Lovi would not receive summer pay because there would be no program for him to supervise. The summer program is subject to annual review and approval by the Board of Education as are all programs" (CP-3). Thereafter, on March 8, 1988, the Board promulgated a posted list of positions open for summer school 1988 including the position Cooperative Education Summer Coordinator (CP-4). The posting indicated that applicants were to contact the appropriate party by March 15, 1988, in the event they wished to apply for a summer position (CP-4).

On March 10, 1988, Lovi submitted a written application for the position of Cooperative Education Summer Coordinator with the admonition that his application not be construed to prejudice his claim that he has historically been hired as a certified twelve-month employee and is entitled to be paid for this position pursuant to the collective negotiations agreement between the Board and the Association (CP-5). On March 28, 1988, the Board notified Lovi that on April 4, 1988, it intended to approve his appointment as Cooperative Education Coordinator for the summer of 1988 at a stipend of .1% of his yearly salary (CP-6).

5. The contracts between the Board and the Association for the periods 1980-81, 1981-82, 1982-83 and 1983-85 all include the title Department Head Distributive Education carrying an additional salary of ".1 of salary" (CP-9, CP-10, CP-11, CP-12). The contracts between the Board and the Association for 1985-87 and 1987-89 include the position Coordinator of Cooperative Education Summer Coordinator carrying the same designation ".1 salary" (CP-13, CP-14).

6. On July 3, 1969, the Board appointed Lovi to the position of Business Education Teacher on an eleven-month basis (CP-20).

Lovi's employment contract for 1970-71 specifically provided for eleven-month employment (CP-20).

Lovi's contract covering 1971-72 expressly provided for twelve-month employment (CP-20). By letter of June 10, 1971, the Board advised Lovi that his twelve-month contract for 1971-72 entitled him to one sick day per month totaling twelve sick days (CP-20). The Board's letter also provided that Lovi was entitled to three one-week vacations during the school year and a one-month vacation in the summer (CP-20).

Neither Lovi's 1972-73 employment contract, nor the Board's letter of transmittal, nor the Board's notice of salary for 1972-73 made any specific reference to Lovi's length of work year or level of benefits as a function of his work year (CP-20).

In an April 10, 1973 letter entitled "MEMORANDUM TO PERSONNEL ON TENURE," Lovi's salary was specifically designated as a "12-month salary" (CP-20).

A twelve-month contract accompanied the Board's June 11, 1974, MEMORANDUM TO PERSONNEL ON TENURE (CP-20).

Similarly, the Board's May 13, 1975 "MEMORANDUM TO PERSONNEL ON TENURE" designated Lovi's salary for 1975-76 as being a twelve-month salary (CP-20).

In the minutes of the Board's meeting of April 12, 1976, listing the appointments for the 1976-77 school year, the Board designated Lovi as a twelve-month employee (CP-15). The Board's April 13, 1976, "MEMORANDUM TO PERSONNEL ON TENURE" included the same twelve-month designation (CP-20).

The Board's May 10, 1977, "MEMORANDUM TO PERSONNEL ON TENURE" designated Lovi's salary for the 1977-78 school year as a twelve-month salary (CP-20).

On June 22, 1979, the Board issued a "SALARY NOTIFICATION FOR ALL 12-MONTH PERSONNEL" to Elliot Lovi approving a twelve-month salary (CP-20). In its "MEMORANDUM TO PERSONNEL ON TENURE" stating his annual salary for the 1979-80 school year, it was noted that this salary included an "additional month's salary for summer" (CP-20).

In its April 15, 1980, "MEMORANDUM TO PERSONNEL ON TENURE" Lovi's salary was designated as a twelve-month salary (CP-20).

Similarly, in a memorandum designed "PERSONNEL ON TENURE" Lovi's salary for 1981-82 carried the designation "twelve months" (CP-20).

In a memo to Lovi regarding his 1982-83 Step and Salary, Lovi's salary included the designation "Includes eleven months' salary" (CP-20).

A similar memo covering 1983-84 carried no special designations (CP-20); however, in its Board meeting minutes of May 9, 1983, the Board appointed Lovi as a twelve-month employee (CP-16).

In a May 15, 1984, memo to Lovi indicating his 1984-85 salary, the Board included the notation "twelve months" (CP-20). The Board also listed Lovi as a twelve-month employee in its Board meeting minutes of May 14, 1984 (CP-17).

On April 22, 1985, the Board notified Lovi that due to a reduction in enrollment in the Cooperative Education Program, the Board was reducing the staffing of the summer supervision of students from three staff members to one, and recommending that Lovi "be the person to handle that responsibility" (R-1).

The Board's July 16, 1985, "MEMORANDUM TO PERSONNEL ON TENURE" included no designation of Lovi's term of employment; however, in the Board meeting minutes of July 1, 1985, Lovi's appointment as Coordinator of Distributive Education (eleven months) was moved and approved (CP-18).

By letter to Lovi dated May 30, 1986, he was notified of his salary for the 1986-87 school year. The letter also designated his salary as being on an eleven-month basis (CP-20).

A November 3, 1987, memorandum to Lovi indicating his salary for the 1987-88 school year carried no designation as to his term of employment (CP-20). However, the Board minutes of June 17, 1987, listed Lovi's appointment to the position of "Coord-Coop. D E/Mktg." under a heading titled "1987-88 SALARIES 12-MONTH PERSONNEL" (CP-19).

Finally, in a memo dated April 27, 1988, the Board approved Lovi's 1988-89 salary without any ten, eleven or twelve-month designation (CP-20).

LEGAL ANALYSIS

In Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978), the court rejected the Board's argument that economic necessity justified the unilateral reduction in the length of the work year for elementary school Vice Principals from twelve to ten months with an attendant decrease in salary and fringe benefits. The court stated:

> ...there can not be the slightest doubt that cutting the work year with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act. Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., ___ N.J. ___ (8-1-78), 4 NJPER 334 (para 4163, 1978), (slip opinion pp. 29-31). [5 NJPER at 7]

In Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440 (App. Div. 1981), the court affirmed the Commission in

distinguishing the Caldwell-West Caldwell facts from those in Piscataway, supra. In Caldwell, the board unilaterally reduced the length of the summer work offered to the CIE Coordinator. This reduction was prompted by a decline in enrollment for the summer program. The court held:

> The CIE Coordinator 'was hired anew each summer[4/] for the program,' and...decisions as to the 'extent of the program and determinations as to hiring are totally for management and non-negotiable.' ... To say the teacher must be hired for four weeks in the summer when his work could be done in two weeks because of the reduction in participating students would frustrate the essential duty of school boards to spend public funds wisely. [7 NJPER at 480]

In Rutgers, The State University, P.E.R.C. No. 79-89, 5 NJPER 226 (¶ 10125 1979), the Commission held that the college did not unilaterally change an established practice when it offered a co-adjutant faculty position to a non-union teacher before it offered positions to two union members with more seniority. The Commission found that the practice had not been to offer the positions to co-adjutant faculty with the most seniority but rather to offer the positions to the best qualified people. Additionally, the Commission held that the college did not commit an unfair labor practice by unilaterally cancelling the course for budgetary reasons; but, rather that cancellation of the course for the academic year was management's prerogative which could be unilaterally implemented without prior negotiation.

4/ Neither the Appellate Division's decision nor the Commission's decision nor the Hearing Examiner's decision describes the facts leading to the conclusion that the CIE Coordinator was hired anew each summer.

In reaching its determination the Commission held:

> The Hearing Examiner based his finding, in part, on his legal conclusion that co-adjutant faculty were hired anew each semester, and the determinations as to hiring, as opposed to reemployment or continued employment, are totally for management and non-negotiable. Thus no term and condition of employment was involved regardless of what the prior practice was. The Association characterized the situation as a continuation of employment, or a reemployment situation analogous to job security, and argued that assuming all people are qualified, negotiations for job preference would be a term and condition of employment. The unique status of the University College and co-adjutant faculty makes it a very close question whether some preference for employment from semester to semester is a term and condition of employment for the employees or not. However, that question need not be reached in this case as we find that the Association has not established the factual premise for its argument by a preponderance of the evidence.
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> ...
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> ...the record establishes that assuming a past practice existed, it appeared to exist only with respect to teaching the same course the succeeding semester. The record does not establish how selections were made when someone other than the prior instructor was offered a course, other than Rutgers' assertion that all offers were made to the most qualified teachers available. [5 NJPER at 227-228]

Consistent with the reasoning in Caldwell-West Caldwell, supra, the Commission in Rutgers based its determinations in part on the conclusion that the co-adjutant positions were filled anew each year. Thus, the facts in Rutgers, appear to be more consistent with those in Caldwell-West Caldwell, supra, than with those in Piscataway, supra.

In Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984), aff'd App. Div. Dkt. No. A-5774-83T7 (6/17/85), the Commission carved a limited "exception" out of the doctrine established in Piscataway, supra. In Newark, in July 1982, the Board unilaterally reduced the work year of certain employees at the University High School from eleven months to ten months. Finding a regular eleven-month calendar, as opposed to a ten-month calendar with a one-month summer program, the Commission reasoned as follows:

> We now consider whether there was an established 11-month work year at the University High School. Under all circumstances of this case, we hold that there was. From 1970 through 1981, the University High School operated on an 11 month basis with all students, administrators and teachers required to attend and work during the entire period. Employees did not have an option to decline to work the eleventh month, and employees who asked about taking July off were told they had a commitment to work. School administrators and principals credibly testified that at the time they were hired, they were told they would be expected to work 11 months every year and that the eleventh month was an integral part of the program. Employees were paid the same amount per month as earned from September through June and a different amount than employees earned who worked in summer school program separate from the ten month school year. While separate funding and staffing are approved each year for the July operations, the process of staffing University High School was mechanical with the procedures (e.g, applications and employee action forms) for filling separate summer school programs being ignored or treated pro forma. Viewing all the circumstances concerning the pre-1982 employment relationship, we conclude that an 11-month work year is an established past practice. [10 NJPER at 446-447].

The Commission in Newark, expressly distinguished these facts from those found in Caldwell-West Caldwell, supra, where a summer school program had been conducted separately from the regular school year.[5/] Ultimately, the Commission held

> ...even assuming that the Board had a managerial prerogative to eliminate the eleventh month of the program without negotiations over the decision, ...the Board violated the Act by the last minute manner in which it implemented its decision.... [S]ometimes an employer's nonnegotiable managerial prerogative to make a decision must be reasonably accommodated with the interests of employees adversely affected by that decision.... [T]he Board did not decide to eliminate the funding for the eleventh month of the University High School year until a special meeting on June 30, 1982; employees did not receive notice of that decision until between July 2 and July 5. Thus, the Board's last minute action not only shortened the established 11-month work year, thus eliminating the need for work during July, it also deprived employees of the opportunity to procure other summer employment and compensation. Given the established 11-month work year, employees had a justifiable expectation that there would be work providing them with compensation during July 1982. [10 NJPER at 447]

Finally, in Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985), the Commission found that the college unlawfully reduced the work year of its Assistant Director of Career Planning and Placement from twelve months to ten months reducing compensation accordingly, without prior negotiations. Although the evidence showed that the elimination of the two months from the employees' work year involved the college's summer career planning and placement program, the evidence also showed that the college was motivated primarily by budgetary benefits to be gained from the reduction of the employees' salaries, and not by educational policy

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5/ See, Newark, supra, footnote 6.

considerations. Accordingly, no managerial prerogative was implicated by the college's decision, and the college was found to have violated subsections 5.4(a)(1) and (5) of the Act. The Commission distinguished its decision in Newark, supra, as being inapplicable because in Newark, the Board's decision was based on a valid educational policy decision whereas in Ramapo, the college's budgetary benefits were its primary motivation in abolishing its summer program for career planning and placement and reducing the employees' applicable compensation. The Commission in Ramapo relied upon the precedent set in Piscataway, supra, interpreting the reduction to be that of a twelve-month employee to a ten-month employee and not the reduction of a separate summer program, assigned on a year-by-year basis, to a ten-month employee.

The facts of the instant matter suggest a hybrid situation. The summer program appears to be separate and distinct from the regular ten-month program in the context of the Board's organization; however, the Board failed to communicate this distinction to the employee. Moreover, an overview of the entire program is equally susceptible to a simple twelve-month interpretation.

Under the caselaw, one of the primary issues for determination is whether Lovi's summer employment was separate and apart from his regular employment or not. If the summer work was part of a self-contained summer program for which Lovi was hired anew each year and for which he was paid a stipend, he would not be

entitled to claim twelve month employment in the absence of a binding past practice (See ex., Rutgers, The State University, supra) and the Charging Party's arguments would fail under Caldwell v. Caldwell, supra. However, if the employee was paid one total annual salary, and the summer work was not treated as a separate summer stipend position to which the employee was hired or appointed on a year-by-year basis; but, rather the summer employment was, in every way, a part of the employees' regular employment, the employee would be entitled to claim all the rights of twelve-month employment. Piscataway, supra; Newark, supra.

Here, the Board has basically treated Lovi as a twelve-month employee since he was initially hired on July 3, 1969.[6/] Although CP-7 makes no mention of any additional salary for the Distributive Education Coordinator, CP-8 through CP-12 all reflect a .1% stipend for the position of Distributive Education Department Head. This stipend was contained in lists of stipends for Senior High School Department Heads including department heads

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6/ Over the years the Board has used both eleven-month and twelve-month designations for employees performing summer work, in contrast to the traditional ten-month teaching employee. Nevertheless, both designations carry the same meaning. A twelve-month employee would be one working eleven months with one month vacation and an eleven-month employee would also be one working eleven months with a one-month vacation. Either designation is to be distinguished from the traditional ten-month employee. Although Lovi's employment was characterized as both twelve-month and eleven-month employment, depending upon the particular year involved, for simplicity sake, I shall refer to it as twelve-month employment.

in Business, English, Foreign Language, Math etc. There was never any indication that this stipend reflected separate summer work. On the contrary, from the list of department heads receiving stipends it would appear to apply to work performed during the regular school year and paid in consideration for the employee performing the additional function (i.e. department head, etc.).

Not until 1985 did the contract reflect the title "Cooperative Education Summer [emphasis added] Coordinator" carrying the same .1% stipend with the added language "additional coordinator if numbers warrant" (CP-14). Thus, it appears that although the Board may have always considered the position of Summer Coordinator to be a separate stipend position for which the employee was hired anew annually, it never conveyed this to the employee. On the contrary, the employment contracts reflect twelve-month employment, with the type of work performed during the summer apparently the same as the type of work performed during the regular school year. Moreover, until 1985, all of the other official Board minutes and all other communications between the Board and Lovi reflect twelve-month employment. It was not until April 22, 1985, (R-1) that Lovi was notified by the Superintendent of Schools that he would be in charge of both the Cooperative Education Program and the Distributive Education Program as a result of reduced summer enrollment. Thereafter, both contracts between the Board and the

Association (CP-13 and 14) refer to a position known as Cooperative Education Summer Coordinator carrying a .1% hourly stipend.[7/]

Thereafter, beginning November 3, 1987, a series of letters between the Board, Lovi and the Association followed in which the Board stated that the employee had been erroneously paid on a twelve-month contractual basis when he actually should have been paid on a ten-month contractual basis with a separate stipend for summer work (CP-1). The Board stated that its purpose in making this distinction was to indicate that summer work was contingent upon both student enrollment and adequate funding. The Association responded that Lovi was a twelve-month employee who was entitled to be continued on such a basis absent any negotiations to the contrary (CP-2).

Although Lovi had at all times held the position of Distributive (Cooperative) Education Coordinator on a twelve-month basis, on November 3, 1987, he was notified by the Board that as of the 1988-89 school year he would be treated as a ten-month employee and paid on a ten-month contractual basis with the summer work treated as a separate stipend position. (CP-1). It is this unilateral act which the Association claims to be an unfair practice.[8/]

7/ At that point the positions of Distributive Education Coordinator and Cooperative Education Coordinator were combined.

8/ The Association acknowledges that Lovi has not suffered any unilateral reduction in any of his terms and conditions of employment.

The Board asserts that it cannot be required to negotiate whether an employee will continue to be employed in a stipend position, and relies primarily on Caldwell v. Caldwell, supra. However, the Board's handling of Lovi's continued appointment to the Summer Coordinator position was "mechanical" with any special appointment procedures being "ignored or treated pro forma," as was the case in Newark, supra. Other than the evidence that Lovi's vacation benefits did not conform to those of the standard twelve-month employee, Lovi was never given any indication of the Board's interpretation of his status as that of a ten-month employee, repeatedly filling a one-month summer stipend postition, despite the Board's assertion that he should have known this was the case.[9/] On the contrary, based on all the circumstances enumerated above, the record shows that Lovi was performing a regular twelve-month position. Accordingly, the Board's notification on November 3, 1987 that, henceforth, Lovi would be treated as a ten-month employee with summer work treated as a separate stipend position constitutes a unilateral change in terms and conditions of employment. Piscataway, supra; Newark, supra; Ramapo, supra.

9/ Lovi's terms and conditions of employment did conform sufficiently those of other twelve-month employees to create the impression of twelve-month employment. Moreover, to the extent his awareness could be considered a factor, there is no evidence in the record that Lovi was aware of any inconsistency between his terms and conditions of employment and those of other twelve-month employees.

Based upon the record and the above analysis I make the following:

CONCLUSIONS OF LAW

1. The Board violated subsection 5.4(a)(5) and derivatively 5.4(a)(1) of the Act by failing to negotiate with the Association over the unilateral change in the terms and conditions of employment of the Cooperative (Distributive) Education Coordinator.

RECOMMENDED ORDER

I recommend that the Commission order:

A. That the Board cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by this Act, particularly by failing to negotiate with the Association over the change in terms and conditions of employment of the Cooperative (Distributive) Education Coordinator.

B. That the Board take the following affirmative actions:

1. Restore the status quo ante by restoring the Cooperative (Distributive) Education Coordinator position to a twelve month status.

2. Negotiate with the Association over any change in the terms and conditions of employment of the Cooperative (Distributive) Education Coordinator.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the

Commission shall be posted immediately upon receipt thereof and, after being signed by the 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.

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

Marc F. Stuart, Hearing Examiner

DATED: November 23, 1988

Trenton, New Jersey

Recommended Posting
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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by this Act, particularly by failing to negotiate with the Association over the change in terms and conditions of employment of the Cooperative (Distributive) Education Coordinator.

WE WILL restore the Cooperative (Distributive) Education Coordinator position to a twelve month status.

WE WILL negotiate with the Association over any change in the terms and conditions of employment of the Cooperative (Distributive) Education Coordinator.

Docket No. CO-H-88-247 Livingston 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.