P.E.R.C. NO. 86-120

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-85-241-164

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge that the Sayreville Education Association filed against the Sayreville Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it reduced by one day the pay of employees who reported late for work. The Commission, in agreement with the Hearing Examiner, finds that the Board did not violate the Act when it withheld salary for the day that employees reported to work late because they were participating in an unlawful job action.

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Docket No. CO-85-241-164
CO-85-247-165

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hutt, Berkow & Jankowski, Esqs.
(Joseph J. Jankowski, Esq.)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

DECISION AND ORDER

On March 21, 1985, the Sayreville Education Association ("Association") filed an unfair practice charge against the Sayreville 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), (2), (3) and (7),[1/] when it reduced by one day the pay of employees who

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of

Footnote Continued on Next Page

reported late to work on September 26, 1984 because they were attending an Association membership meeting.

On June 14, 1985, a Complaint and Notice of Hearing issued.[2/] The Board then filed an Answer. It admits that employees who failed to report to work in a timely manner were not compensated, but denies that its actions were unlawful. The Board further asserts that it is prohibited from paying for services not rendered.

On September 23 and 26, 1985, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by December 3, 1985.

On December 13, 1985, the Hearing Examiner issued his report and recommended decision, H.E. NO. 86-26, 12 NJPER 86 (¶17030 1985) (copy attached). He concluded that employees who withheld their services on September 26, 1985 were not engaged in protected activity and therefore could not challenge the loss of pay for that day. In addition, he found that docking the employees' pay did not

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (7) Violating any of the rules and regulations established by the commission."

2/ On March 25, 1985, the Association filed a second unfair practice charge. On June 14, 1985 an Order of Consolidation was issued. The second charge was resolved during the hearing and withdrawn on the record.

interfere with or destroy the Association and that no rule or regulation of the Commission was violated. Therefore, he recommended dismissal of the Complaint.

On January 21, 1985, the Association filed exceptions. It asserts that the withholding was in retaliation for protected activity and in repudiation of a no-reprisals agreement. It further asserts that the Board deviated from a past practice and violated the collective negotiations agreement.

On January 27, 1985, the Board filed a reply. It asserts that no protected activity was involved, and even if there had been, it had legitimate and substantial business justifications for docking the employees' pay. In addition, it asserts it did not violate Board policy, the collective negotiations agreement or the no-reprisals agreement.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-9) are accurate. We adopt and incorporate them here.

In In re Bridgewater Township, 95 N.J. 234 (1984), the Supreme Court established a two-part test for considering allegations of discriminatory conduct. In assessing employer motivation, the charging party must first prove that protected activity was a substantial or motivating factor. If proved, the burden shifts to the employer to demonstrate that the same action would have taken place even absent the protected activity. Id. at 242. Because direct evidence of anti-union

motivation rarely exists, the Supreme Court recognized that motivation can be inferred from circumstantial evidence that (1) the employee engaged in protected activity; (2) the employer knew of this activity, and (3) the employer was hostile toward the exercise of protected rights. Id. at 246-47.

The Hearing Examiner found that the Board did not violate the Act when it withheld salary for the day that employees reported to work late because they were participating in an unlawful job action. We agree.

On the morning of September 26, 1984, Association members attended a meeting before school. Attendance at that meeting was protected. When Association members decided to continue their meeting and demonstrate well beyond the start of school, they were no longer engaged in protected activity. See Board of Education, Borough of Union Beach v. N.J.E.A., 53 N.J. 29 (1968).

Because the employees did not report to school on time, the Board closed the high school and junior high school for the day and made special arrangements for supervising elementary school students. Once these actions were taken, the Board justifiably told the employees who later reported to work that they were too late. We do not believe that the Association members' attendance at the meeting before school motivated the Board to withhold any salary. In fact, the superintendent testified that if the employees had arrived late, but before the students were dismissed, they would have been allowed to work and they would have been paid. Once the

Board closed the schools, however, there was no need for the employees' services that day. The decision not to allow them to work, and therefore not to pay them, was not motivated by protected activity, but was a reasonable response to the fact that some schools had been closed and arrangements had been made for student supervision at others.

We reject the Association's argument that the Board violated its own policy on tardiness. Witnesses for both parties testified that when the Board previously paid teachers who came in late, the lateness was involuntary -- due to a snow storm or car trouble. Those incidents did not disrupt the normal operations of the school. The lateness in this case was voluntary and totally disruptive of school operations.

We reject the Association's argument that the Board violated the contract. The contract provides that employees be paid according to a schedule. But it also provides that the work day includes the time pupils are in attendance, and that employees absenting themselves and failing to comply with the contract procedures will be docked 1/200 of their annual salary. Also, the Board's action did not violate the contract provision permitting Association business on school property. That provision requires that the activity not interfere with or disrupt normal school operations. This job action did not meet that test.

The Association argues that the Board violated the October 15, 1984 no reprisals agreement. We disagree. A mediator drafted

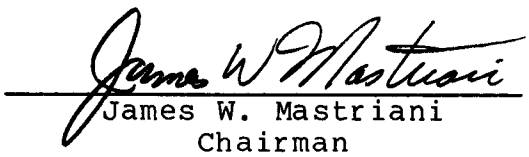
this agreement at the end of the October strike after and unrelated to the September job action at issue here. The agreement provides that the Board shall not take any reprisals for participation in the "job action." (singular) Considering the agreement's language and timing, we believe the agreement prohibits future actions in retaliation for participation in the October strike. The salary withholding in this case was not an act done in retaliation for that later strike, but was the logical consequence of the employees' not reporting to work.

Finally, the Association argues that the Board did not pay some employees that it permitted to work and two employees that it ordered to leave work on September 26. We find that the Association failed to prove that the Board authorized those employees to stay, or that any employees were sent home in retaliation for their protected activity.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
April 18, 1986
ISSUED: April 21, 1986

H.E. NO. 86-26

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

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-85-241-164
CO-85-247-165

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYPNOSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate §§5.4(a)(1), (2), (3) or (7) of the New Jersey Employer-Employee Relations Act when it "docked" certain of its teachers, who participated in a job action, i.e., withheld their services, on September 26, 1984. A majority of the teachers represented by the Association failed to report on time at their respective schools on that date, following the holding of an Association meeting, which commenced at 7:00 a.m., at which authorization to strike was voted upon and a demonstration held thereafter at one of the District's schools in support of successor collective negotiations. The Hearing Examiner relied, principally, upon the New Jersey Supreme Court decision in Board of Education of the Borough of Union Beach v. N.J.E.A., 53 N.J. 29 (1978) in finding that the September 26th job action was not protected activity under the Act.

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. 86-26

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

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Appearances:

For the Respondent
Hutt, Berkow & Jankowski, Esqs.
(Joseph J. Jankowski, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 21, 1985, Docket No. CO-85-241-164, by the Sayreville Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Sayreville Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended N.J.S.A. 13A-1 et seq. (hereinafter the "Act"), in that on Wednesday, September 26, 1984, a general

membership meeting of the Association was held at 7:00 a.m. while the parties were in the midst of contract negotiations and at approximately 9:30 a.m. the members of the Association attempted to enter their respective schools and were met with a mixed response by administration, i.e., at the High School the teachers were not allowed to enter the building and were not compenated for the day while at the Junior High School they worked only one-half day and received a commensurate reduction in pay, and in the remaining schools the teachers were permitted to enter their buildings but were not permitted to interact with students; in every instance there was a Board-directed reduction in pay for all teaching staff, which varies from Board policy, calling for payment of full salary for any day on which a teacher reports to work late; all of which is alleged to have been in retaliation for the lawful exercise by Association members of their rights under the Act, and an alleged violation of N.J.S.A. 13A-5.4(a)(1), (2), (3) and (7) of the Act.[1/]

A second Unfair Practice Charge was filed with the Commission on March 25, 1985, Docket No. CO-85-247-165, by the

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (7) Violating any of the rules and regulations established by the commission."

Association, alleging that the Board also engaged in unfair practices within the meaning of the Act when its Superintendent, contrary to an October 1984 no-reprisal agreement, disciplined Karen Joseph, the President of the Association, on January 11, 1985 and placed a highly critical letter in her personnel file; and in January 1985 the Superintendent reprimanded Judith Sunski, a member of the Association's negotiating team, for not reporting to school on January 11, 1985, a day on which Sunski was ill, and the Superintendent on January 15, 1985 incorporated the reprimand in a letter; all of which is alleged to be a violation of the same provisions of the Act cited above.[2/]

It appearing that the allegations of the two Unfair Practice Charges, if true, may constituted unfair practices within the meaning of the Act, a Complaint and Notice of Hearing and an Order of Consolidation was issued on June 14, 1985. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 23 and September 26, 1985 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs as to the first Unfair Practice Charge only (CO-85-241-164) by December 3, 1985.

2/ At the hearing on September 26, 1985 the parties amicably resolved this second Unfair Practice Charge and it was withdrawn on the record (2 Tr. 54-57).

An Unfair Practice Charge having been filed with the Commission in Docket No. CO-85-241-164, 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 Sayreville Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

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

3. Dr. Marie Parnell was at all times material hereto the Board's Superintendent of Schools. There are approximately 300 teachers on staff of the Respondent, who are represented by the Association in collective negotiations. The most recent collective negotiations agreements between the parties have been and are effective during the period July 1, 1982 to June 30, 1984 (J-1) and July 1, 1984 to June 30, 1986 (J-2).

4. Karen Joseph became the President of the Association on September 1, 1984 during the period that collective negotiations for a successor agreement to J-1 were continuing. Joseph was involved in these negotiations as a member of the negotiating team.

5. On September 26, 1984, Joseph convened a meeting of the Association members at the President Park Fire House in Sayreville in order to apprise them of the status of negotiations. It had been decided by the Association to hold such a meeting several days prior thereto. The meeting commenced as scheduled at 7:00 a.m. on September 26th. During the course of the meeting a strike authorization vote was taken by secret ballot from about 8:00 a.m. to shortly after 9:00 a.m.

6. At about 8:30 a.m., while ballots were being cast, a large contingent of teachers walked three blocks to the Truman School for the purpose of expressing their dissatisfaction to the Board on the progress of contract negotiations. After demonstrating in front of the school this group of teachers returned to the fire house at 9:00 a.m. where for 15 minutes they learned the results of the balloting, which was to take "appropriate action" and were told to return to their respective schools. According to Joseph no one in the Association had directed teachers not to report to their respective schools where the reporting times were 7:45 a.m. for the High School, 8:50 a.m. for the Junior High School and 8:35 a.m. for the four elementary schools: Arleth, Eisenhower, Truman and Wilson.

7. Superintendent Parnell testified credibly that she arrived in the office of the Truman School between 7:10 and 7:15 a.m. on September 26, 1984. She had known in advance of the Association's meeting, scheduled that day for 7:00 a.m., and saw cars parked at the fire house on her way to the Truman School.

Parnell telephoned Homer Dill, the principal of the High School, upon her arrival at the Truman School and directed him to have emergency procedures ready if the teachers did not report on time. By 8:00 a.m. Parnell knew that a majority of staff had not reported to the High School and she had secretaries telephoning other schools to be alert to the reporting of teachers. When teachers had not reported by 9:00 a.m., having observed the teachers picketing in front of the Truman School, Parnell called the High School and Dill stated that "things were breaking down." At that point Parnell left for the High School at about 9:15 to 9:20 a.m. and upon her arrival she decided at about 9:30 a.m. to close the High School. Parnell next decided to close the Junior High School, which is located next to the High School, but she decided to keep the elementary school children in their schools for a shortened day in view of their age and the risk attendant to releasing them without assurance of parental supervision. At about 9:40 a.m. teachers began to arrive at the High School and, at about 9:50 a.m., as she was leaving the High School, Parnell saw Joseph, to whom she stated: "...There is no such thing as mythical teachers. We need you here when we need you here. If you weren't here to give your services when we needed them we certainly don't need them any longer today..." (2 Tr. 16).[3/]

3/ Teachers began arriving at the Junior High School at 9:55 a.m. and were told that the school was closed. At the Truman School, teachers arrived at 9:20 a.m. and were denied entry.

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8. There was introduced in evidence an exhibit indicating the staff members of the district who were paid for September 26, 1984 (J-3). There was considerable testimony as to who was paid and who was not and why. Basically, those employees who were paid, as listed on Exh. J-3, supra, were those who reported for work on or close to schedule and who remained for at or about four hours, that number being the minimum required for payment for a school day under applicable law. The Hearing Examiner discounts any alleged discrepancies in who was paid or not paid to the confusion created by the Association's job action of September 26th.

9. There was also considerable testimony proffered by the Association regarding the Board's policy and practice of payment to staff members who were tardy. The instances that were testified to involved reporting to work late due to a snow storm or "car trouble." The Board's policy on tardiness sheds no particular light on the question (J-4). Plainly, an occasional lateness due to the weather or transportation is not to be equated with lateness in reporting to school due to an Association job action.

10 The various "sign in" sheets, which were received in evidence for the various schools and departments, establish nothing more than which teachers and other staff members reported for work

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3/ Footnote Continued From Previous Page

The situation was similar at the Wilson, Arleth and Eisenhower Schools were teachers arrived at 9:50 a.m., 9:20 a.m. and 10:10 a.m., respectively

at some point in time and signed out on September 26, 1984 (J-5 through J-15 and J-18). They do not add to or subtract in any way to the alleged legitimacy of the Association's job action on that date or establish a right to payment for salary deducted by the Board. The Association did not grieve the non-payment of teaching staff on September 26, 1984, possibly for the reason that, as Joseph testified, she knew that by remaining at the meeting she was violating the contract reporting requirements (1 Tr. 55).

11. There was attached to the checks of all teaching staff on September 30, 1984, a notice, which recited that on September 26th some employees failed to report to work at scheduled times and engaged in a work stoppage and that those who were not on approved leave of absence and failed to report to work would have a day's pay deducted (J-16). Parnell testified that those of the teaching staff who were to be "docked" for the September 26th job action were docked by the pay of September 30, 1984.

12. The Association engaged in a further job action, namely, a strike from October 2, 1984 through October 15, 1984. There was introduced into evidence a "side bar" agreement, dated October 15, 1984, reached at the conclusion of the strike, which provided that there will be no reprisals by either side for "...participation in the 'job action'..." (J-17). The testimony of Joseph on direct examination was that this "side bar" referred to the October job action (1 Tr. 36). Subsequent examination of both Joseph and other witnesses for the Association, seeking to expand

the time period for the no-reprisal "side bar" to as far back as September 1, 1984, is not credited by the Hearing Examiner. The initial testimony of Joseph that it applied only to October 1984 appears internally consistent with the language of the "side bar," which refers in the singular to the "job action."

13. In response to a question from the Hearing Examiner, Joseph testified that a "strike" is the withholding of services, adding, however, that it must be officially sanctioned (1 Tr. 156, 157). Joseph then testified that although the persons demonstrating in front of the Truman School were acting under her direction, with the approval of the "action committee," and that this was sanctioned by the Association, nevertheless those teachers were not engaged in a strike (1 Tr. 157-59).

DISCUSSION AND ANALYSIS

Positions Of The Parties

The Charging Party argues that the Board retaliated against the Association by withholding the salaries of teachers on September 26, 1984, in repudiation of a "side bar" agreement executed by the parties on October 15, 1984 (J-17). The Charging Party contends further that its members were engaged in protected activity during a general membership meeting commencing at 7:00 a.m. on September 26th, and that notwithstanding that this meeting continued into the school day at the various schools in the District, the engaging of protected activity continued and, thus, the Board retaliated illegally when it refused payment to the overwhelming majority of teachers in the District on September 26, 1984.

The Charging Party cites no authority for the proposition that the withholding of services by the Association's teachers on or after the commencement of the school day on September 26th constituted protected activity under the Act. The Charging Party cites several provisions of the agreement regarding compensation and State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (1984). Finally, the Charging Party cites disparate treatment between certain teachers who were paid for the day and the majority who were not in alleged contravention of the Board's policy and past practice of paying teachers who reported to work late.

* * * *

The Respondent, citing Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), argues that the teachers who failed to report to work at their regular reporting times unlawfully withheld their services thereafter, and were thus not engaged in protected activity under the Act, a prerequisite to satisfying the first part of the Bridgewater test. In support of its contention that no protected activity was involved, the Respondent calls the Hearing Examiner's attention to the decision of the New Jersey Supreme Court in Board of Education of the Boro of Union Beach v. N.J.E.A., 53 N.J. 29 (1968). See also, Freehold Reg. High School District Board of Education, P.E.R.C. No. 83-10, 8 NJPER 438 (1982), aff'g. H.E. No. 82-48, 9 NJPER 709 (1982).

The Respondent cites No. Brunswick Twp. Board of Education, P.E.R.C. No. 80-122, 6 NJPER 193 (1980) in support of its contention that the Charging Party has failed to demonstrate that the Board violated §(a)(2) of the Act, i.e., the facts fail to establish that the Board was motivated to destroy the employee organization.

Finally, the Respondent cites numerous decisions of the Commissioner of Education that it is illegal for a board of education to make payment for services not rendered, and that the actions of the Respondent in relationship to the events of September 26, 1984, did not constitute a violation of Board policy regarding payment to employees who report late for such reasons as car trouble. Further, the Respondent did not violate the "side bar" agreement of October 15, 1984, by withholding payment from the salaries of teachers who failed to report timely for work on September 26th.

The Association Has Failed In Its Proofs That The Board Violated §(a)(1), (2), (3) Or (7) Of The Act By Its Conduct In Response To The Job Action Of September 26, 1984.

First, the Hearing Examiner concludes readily that the Respondent Board did not violate §§(a)(2) or (7) of the Act by any conduct herein involved. The record in this case indicates clearly that there was no conduct or action of the Board which could legally satisfy the Commission's test for a §(a)(2) violation as set forth in No. Brunswick Twp. Board of Education, supra. Plainly, the Board in whatever it did in response to the job action of September 26,

1984, was not motivated to interfere with or destroy the Association or dominate it. Further, the Association has yet to argue that any rule or regulation of the Commission was violated as proscribed by §(a)(7) of the Act.

Thus, we are here dealing with whether or not the Respondent violated §§(a)(1) and/or (3) of the Act. The Respondent correctly cites Bridgewater, supra, as the analytical framework for determining whether or not a violation of these subsections has occurred. The first part of the Bridgewater test requires that activities protected by the Act be engaged in, that the employer had knowledge of these activities and, finally, that the exercise of such activities were a substantial or a motivating factor in the employer's decision to retaliate, i.e. withhold payment of salary. Unless the first part of the test is satisfied there is no need to proceed to the second part, which involves assessing whether or not the employer had a legitimate business justification for the action which it took.

It is as plain as a pikestaff that there was no protected activity engaged in by those members of the Association who elected to withhold their services on and after the commencement of their respective school days on September 26, 1984. The factual record is clear that on September 26, 1984, Joseph lawfully convened a meeting of the Association at the Fire House in order to apprise the members of the status of negotiations. The convening of such a meeting was clearly a protected activity. However, when the Association

representatives and their "action committee" decided to demonstrate at the Truman School and continue the meeting thereafter, well beyond the start of the school day at the various schools, their activity lost its protection and they were illegally withholding services, i.e., engaging in a job action, which plainly had a disruptive effect on the operation of the schools in the District. It compelled the closing of the High School and the Junior High School at about 9:30 a.m. and the curtailing the operation of the four elementary schools.

The Respondent correctly cites the Court's decision in Union Beach, supra, and the quotation therefrom that the labels used to characterize the withholding of services are irrelevant (53 N.J. at 39, 40).

The Hearing Examiner has no difficulty in concluding that the action of the Association members in failing to report timely for work at their schools on September 26, 1984, was an illegal job action, unprotected under the Act: Union Beach, supra. That being the case, whatever flows thereafter regarding the nonpayment of teachers who timely failed to report to work on September 26th constitutes a consequence without legal redress. There can be no recoupment of lost salary for that day, notwithstanding the various contractual provisions which provide for payment of teachers nor the Board's policy on tardiness, which has been applied to cases of reporting late to work due to a snow storm or "car trouble." To suggest that Board policy in this regard is applicable to an illegal

job action is to make a mockery of the obvious purpose and intent of the Board's policy and past practice on tardiness. The Hearing Examiner agrees with the Respondent that the Board could not legally compensate those members of the Association who withheld their services on September 26th given a series of decisions to the contrary by the Commissioner of Education (see Respondent's brief, p. 13-15).

Even if the Hearing Examiner was to assume arguendo that the Association and its members engaged in wholly protected activity on September 26, 1984, of which the Respondent had clear knowledge, and assuming, also, that the Board was illegally motivated and retaliated against the Association by withholding salaries of certain teachers, the conclusion would still obtain that the Board has established a totally legitimate business justification for its action in the face of the withholding of services after the commencement of the school day. It plainly would have done this even in the absence of protected activity.

There remains only to consider the contention of the Charging Party that the "side bar" agreement of October 15, 1984, following the strike of October 2nd, operates as some kind of a waiver by the Board of its right to impose any financial penalty upon Association members for their job action of September 26, 1984. Apparently, the Board was not of the view that on September 30, 1984, it was precluded in any way from docking teachers who did not report timely on September 26th. Thus, there was attached to

the checks of all teaching staff on September 30th a notice, which recited that on September 26, 1984, some employees failed to report to work at scheduled times and engaged in a work stoppage and that those who were not on approved leave of absence, and failed to report to work, would have a day's pay deducted (J-16). Those employees to be docked were docked on that date (see Finding of Fact No. 10, supra).

A reading of the "side bar" agreement (J-17), makes crystal clear that it provided for no reprisals by either side for participation in the "job action" (singular), which had occurred between October 2 and October 15, 1984. Joseph so testified on direct examination, notwithstanding her belated attempt, and that of others, to expand the time period for the no reprisal "side bar" to as far back as September 1, 1984. The Hearing Examiner has not credited Joseph and the other witnesses in this regard (see Finding of Fact No. 11, supra).

* * * *

For all the foregoing reasons, and based on the entire record, the Hearing Examiner finds and concludes that the Respondent Board did not violate any of the provisions of the Act alleged by the Charging Party and, thus, makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (7) when it elected to "dock" the pay of certain teachers for their having illegally withheld services from the District on September 26, 1984.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: December 13, 1985
Trenton, New Jersey