

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN BOROUGH BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-81-35-14

FRANKLIN EDUCATION ASSOCIATION,

Charging Party.

FRANKLIN EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CE-81-5-79

FRANKLIN BOROUGH BOARD OF
EDUCATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding involving unfair practice charges filed by both the Board and the Association, the Commission affirms the Recommended Report and Decision of its Hearing Examiner. The Commission finds that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by refusing to negotiate as demanded by the Association concerning additional compensation for teachers who were required by the Board to attend June graduation ceremonies and an orientation program conducted in the evening. In the absence of exceptions by the Association, the Commission affirms that part of the Hearing Examiner's Report which recommended that the remaining aspects of the Association's unfair practice complaint, relating to the reprimand of two employees, the Board's filing of unauthorized practice of law charges against an NJEA Field Representative and the Board's filing of unfair practice charges against the Association, be dismissed. The Commission also dismisses the charge filed by the Board against the Association, in accordance with a motion granted by the Hearing Examiner during the hearing.

P.E.R.C. NO. 81-126

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN BOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-35-14

FRANKLIN EDUCATION ASSOCIATION,

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FRANKLIN EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CE-81-5-79

FRANKLIN BOROUGH BOARD OF EDUCATION,

Charging Party.

Appearances:

For the Board of Education, Kovach & Fitzgibbons, Esqs
(William F. Fitzgibbons, of Counsel)

For the Education Association, Zazzali, Zazzali & Kroll,
Esqs. (Albert G. Kroll, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on August 11, 1980 and amended on January 12, 1981 by the Franklin Education Association ("Association") alleging that the Franklin Borough Board of Education ("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. (the "Act"). Specifically the Association alleges that the Board had (1) failed to give notice of or negotiate with the Association the compensation to be paid teachers required to attend a ninth

grade orientation meeting on May 27, 1980 and the June 1980 high school graduation ceremony; (2) reprimanded two employees because of their membership in and activities on behalf of the Association; (3) discriminatorily refused to hire or rehire teachers to supervisor/coordinator positions; and (4) threatened an NJEA representative because of his representation of and activities on behalf of the Association; all of which are alleged to be in violation of N.J.S.A. 34:13A-5.4(a) (1), (3) and (5) of the Act.^{1/}

An Unfair Practice Charge was filed with the Commission on September 12, 1980, and amended on December 8, 1980, by the Board alleging that the Association by its President and NJEA representative acted in bad faith by the submission to the Board of three unmeritorious grievances in violation of N.J.S.A. 34:13A-5.4(b) (1), (3) and (5).^{2/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; 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.

^{2/} These subsections prohibit public employee organizations, their representatives from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed by this Act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit and (5) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the unfair practice charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing in CO-81-35-14 was issued by the Director of Unfair Practices on September 8, 1980 and a second Complaint and Notice of Hearing on CE-81-5-79 was issued December 22, 1980. Pursuant to the Director's order, the cases were consolidated for hearings which were held in Newark, New Jersey January 12 and 13, 1981 before Commission Hearing Examiner Alan R. Howe. At the hearing the parties were given an opportunity to examine witnesses, and present relevant evidence. Oral argument was waived and the parties filed simultaneous post-hearing briefs on February 25, 1981.

The Hearing Examiner's Recommended Report and Decision, H.E. No. 81-29, 7 NJPER ____ (¶ _____ 1981), a copy of which is attached hereto and made a part hereof, was issued March 3, 1981. Exceptions to the report were filed by the Board on March 17, 1981. The Association neither filed exceptions nor replied to the Board's exceptions. This case is now properly before the Commission for determination.

In his report, the Hearing Examiner determined that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused to negotiate the Association's demand for additional compensation to teachers who were required to attend the May 27, 1980, evening ninth grade orientation program and/or the June 10, 1980 high

school graduation ceremony. Further, he recommended the Commission 1) dismiss the Association's charges of violations of section 5.4(a)(1) and (3) for failure to prove anti-union animus in the Board's reprimand of two employees for their failure to attend the ninth grade orientation program and in their refusal to appoint an employee as supervisor for school year 1980-81; 2) dismiss the charges of Board violation of section 5.4(a)(1) in filing charges against the NJEA field representative for unauthorized practice of law by filing a written memorandum on behalf of certain employees whom he was representing in the grievance procedure; 3) dismiss the charges that the Board violated section 5.4(a)(1) by filing unfair practice charges against the Association for processing employee grievances; 4) grant a motion to dismiss the Board's charge against the Association.

The Board excepts to several factual findings of the Hearing Examiner and his conclusion of law on the alleged violation of (a)(1) and (3) by refusal to negotiate compensation for extracurricular activities. Specifically, the Board alleges that the Hearing Examiner failed to 1) include a finding that the collective agreement between the parties makes no reference to mandatory evening programs; 2) find Board witness testimony and documentation (Evidence R-5, copies of "Daily Bulletins") conclusive of teacher attendance at evening programs in prior years and 3) to find that past practice for attendance at graduation ceremonies was mandatory rather than voluntary.

Upon review of the entire record in this case, we find the Hearing Examiner's findings of fact are supported by substantial evidence and are hereby adopted for the following reasons.

Contrary to the assertion of the Board, we find that both Charging Party and Respondent witnesses testified in support of a finding that in the past only the November Open House was held in the evening and that the spring or February parent/teacher conferences were by appointment and usually held in the afternoon or during teacher free periods.^{3/} Further, the evidence supports a finding that notice of Open House was by inclusion on a yearly calendar either distributed to teachers at the beginning of the school year or included in a handbook given to teachers in the fall and not by use of Daily Bulletins.^{4/}

The Hearing Examiner correctly found that teachers in prior years attended either the grammar school graduation or high school graduation and often were present only to complete

^{3/} Board Acting Superintendent Rogers testified that "in regard to these Open Houses...most of the Open Houses after November would be in most cases 3 to 5." (T-I, 125). The Hearing Examiner accepted a designation of evening as "after 6:00, but not after 4:00." And Rogers stated that "...most of the spring Open Houses were I believe 3:00 to 5:00." (T-I, 125). After the February Open House "...some by appointment, some 3:00 to 5:00...I would say that the February Open Houses would not be an ordinary thing in my 19 years at Franklin. They were not scheduled yearly." (T-I, 125). Board witness, Frank Virtue, Director of Guidance, testified that "...in the Spring...as was stated before by Mr. Dudzinski conferences by appointment." (T-I, 107).

^{4/} See the following evidence, CP-I, School calendar for 1979-80 refers to a parent/teacher conference on November 20, 1979 and February 5, 1981, but none for May, 1980. R-5, Daily Bulletins, announced the same meetings shown on the 1979-80 yearly calendar.

their specific duties. (For example, Dudzinski, President of the Association in 1979, testified that all teachers were not present at prior high school graduation ceremonies and he attended the 1979 ceremony for approximately 15 minutes to hand out diplomas).

We affirm the Hearing Examiner's findings in paragraph 18 of the attached report as supported by substantial evidence that two grievances filed by the Association were settled and therefore withdrawn. Further, even if the grievances were not resolved, the Association was engaged in protected activity under the Act. This protected activity does not constitute the basis of an unfair practice charge.^{5/}

The Board excepts to the Hearing Examiner's conclusion of law that failure to negotiate compensation for required attendance at evening activities in May and June constitute a violation of sections (a)(1) and (5) because the Board contends there was no increase in workload but in fact a decrease, since teachers were not assigned specific duties at the graduation ceremony, as they had been in the past.

Upon review of the record and the exceptions set forth by the Board, we conclude that the Hearing Examiner was correct in applying our past decisions discussed in his report that, additional compensation for compulsory attendance and participation in extracurricular activities is mandatorily negotiable. The record clearly established a change in the duties the teachers were

^{5/} Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459 (¶4208 1978) and In re North Brunswick Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978).

required to perform at the June graduation ceremony as well as an additional evening program. We hereby adopt the Hearing Examiner's findings of fact and conclusions of law for the above-stated reasons.

ORDER

IT IS HEREBY ORDERED that:

A. 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 refusing to negotiate in good faith with the Franklin Education Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

2. Refusing to negotiate in good faith with the said Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

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

1. Upon demand negotiate in good faith with the Franklin Education Association concerning compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

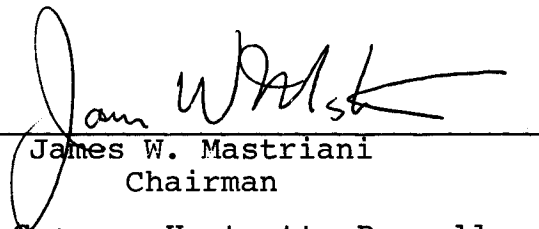
Appendix "A." Copies of said notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Board 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 Board has taken to comply herewith.

C. That the allegations in the Complaint that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(3) be dismissed in their entirety.

D. That the allegations in the Complaint that the Respondent Association violated N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) be dismissed in their entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett, Parcels and Suskin voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
April 16, 1981
ISSUED: April 20, 1981

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 refusing to negotiate in good faith with the Franklin Education Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

WE WILL NOT refuse to negotiate in good faith with the said Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

WE WILL upon demand negotiate in good faith with the Franklin Education Association concerning compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

FRANKLIN BOROUGH 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,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 81-29

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

In the Matter of

FRANKLIN BOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-35-14

FRANKLIN EDUCATION ASSOCIATION

Charging Party.

FRANKLIN EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CE-81-5-79

FRANKLIN BOROUGH BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board violated Subsection 5.4 (a)(1) and (5) of the New Jersey Employer-Employee Relations Act when upon demand it refused to negotiate the issue of compensation for teachers who participated in the extra-curricular activity of a ninth grade orientation program on May 27, 1980 and the graduation ceremony of June 10, 1980. On the other hand, the Hearing Examiner recommended that the Commission dismiss alleged violations by the Board of Subsection 5.4(a)(1) and (3) of the Act by the reprimand of two employees for non-attendance at the May 27, 1980 orientation program and by the failure to reappoint an employee to the position of Supervisor for the 1980-81 school year on the grounds that the Association had failed to prove that the Board was motivated by anti-union animus. The Hearing Examiner also recommended that the Commission dismiss charges that the Board violated 5.4 (a)(1) of the Act when it filed charges of the unauthorized practice of law against an NJEA Field Representative for having filed a written memorandum on behalf of certain employees whom he was representing in the grievance procedure. Similarly, the Hearing Examiner recommended that the Commission dismiss charges that the Board violated Subsection 5.4(a)(1) of the Act by the filing by the Board of an Unfair Practice Charge against the Association.

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
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

FRANKLIN BOROUGH BOARD OF EDUCATION, 1/

Respondent,

- and -

Docket No. CO-81-35-14

FRANKLIN EDUCATION ASSOCIATION

Charging Party.

FRANKLIN EDUCATION ASSOCIATION,

Respondent,

- and -

Docket No. CE-81-5-79

FRANKLIN BOROUGH BOARD OF EDUCATION, 1/

Charging Party.

Appearances:

For the Franklin Borough Board of Education
Kovach & Fitzgibbons, Esqs.
(William F. Fitzgibbons, Esq.)

For the Franklin Education Association
Zazzali, Zazzali & Kroll, Esqs.
(Albert G. Kroll, 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 11, 1980 by the Franklin Education

1/ As amended at the hearing.

Association (hereinafter the "Charging Party" or the "Association") ^{2/} alleging that the Franklin Borough 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: (1) the Respondent without notice to or negotiations with the Association required teachers to attend an orientation meeting on May 27, 1980; (2) the Respondent discriminatorily refused to hire or rehire teachers to positions as supervisors/coordinators; (3) the Respondent reprimanded employees Harold J. Myers and Eugene Kish because of their membership in and activities on behalf of the Association; (4) the Respondent has threatened William J. Flynn, a representative of the New Jersey Education Association (NJEA), because of his representation of and activities on behalf of the Association; and (5) the Respondent without notice to or negotiations with the Association required teachers to attend graduation exercises; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. ^{3/}

^{2/} Notwithstanding that each party is both a "Charging Party" and a "Respondent", it was agreed at the hearing that the Association would be referred to as the "Charging Party" and the Board as the "Respondent" and that the exhibits would be identified accordingly.

^{3/} These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

An Unfair Practice Charge was filed with the Commission on September 12, 1980, and amended on December 8, 1980, by the Respondent Board alleging that the Charging Party Association had engaged in unfair practices within the meaning of the Act, in that the Association by its President and NJEA representative acted in bad faith by the submission to the Board of three unmeritorious grievances for processing through the grievance procedure under the parties' collective negotiations agreement, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1), (3) (5) of the Act. ^{4/}

An amended Unfair Practice Charge was filed with the Commission on January 12, 1981 by the Charging Party Association alleging that the Respondent Board had engaged in unfair practices within the meaning of the Act, in that the Respondent Board interfered with, restrained and coerced its employees by having filed with the Commission the Unfair Practice Charge in Docket No. CE-81-5-79, supra, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing in Docket No. CO-81-35-14 was issued on September 8, 1980 and a second Complaint and Notice of Hearing in Docket No. CE-81-5-79 was issued on December 22, 1980. Pursuant to the Complaints and Notices of Hearing, which were consolidated, a hearing was held on January 12 and 13, 1981

^{4/} These Subsections prohibit public employee organizations, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the commission."

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 by February 25, 1981.

Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning 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 Franklin Borough Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Franklin Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The most recent collective negotiations agreement between the parties is effective during the term July 1, 1979 through June 30, 1981 (J-1).
4. In past years the School Calendar has provided for a "Parents Night" in November where parents have had an opportunity to meet with a teacher or teachers regarding student progress (see CP-1 and CP-2). There were also parent conferences scheduled in February, which were made by appointment with the teacher or teachers and held in the afternoon at the end of the school day (see CP-1). ^{5/}
5. On May 15, 1980 the Director of Guidance, Frank Virtue, advised approximately one-half of the 9th grade teachers that there would be a Ninth Grade Orientation Program on May 27, 1980. On May 19, 1980 a "student assistant"

^{5/} There was received in evidence as Exhibit R-5 several copies of the "Daily Bulletin" indicating that "Open House" for parents was scheduled on various dates throughout the course of the school year.

advised the remaining teachers of the scheduled Orientation Program.

6. On May 19, 1980 Virtue learned that approximately one-half of the 9th grade teachers would have a problem in attending the Orientation Program on May 27th. Virtue advised the High School Principal, Russell Rogers, of this fact on the same day, May 19th.

7. Rogers immediately sent out a memo to all 9th grade teachers, listing 24 teachers by name, which advised that they "should be present" for the Orientation Program on May 27th (CP-3).^{6/} All of the teachers notified except two, Harold J. Myers and Eugene Kish, attended the Orientation Program as directed.

8. Myers immediately sent Rogers a note advising that he would be unable to attend the Orientation Program on May 27th and Rogers, under date of May 22, 1980, sent a memo back to Myers reiterating that attendance was "required" (CP-9). Myers again responded under date of May 23rd, stating that he could not be present (CP-10). Rogers, on the same date, May 23rd, asked Myers for clarification regarding his reason for non-attendance (CP-11). Myers again replied by note, and Rogers, under date of May 27, 1980, the day of the scheduled Orientation Program, stated that he was available to discuss Myers' reasons for being unable to attend (CP-12). However, Myers testified credibly that he did not receive CP-12, supra, until the following day, May 28, 1980.

Myers testified further that his reason for non-attendance was that he had an outside business and had to attend to other matters on May 27th. ^{7/}

6/ Rogers also sent a memo to all 9th grade teachers on May 22, 1980 advising that "attendance is mandatory at the Ninth Grade Orientation Program" (CP-4).

7/ On May 28th Myers met the Superintendent, Thomas Komlo, and they discussed Myers' non-attendance on May 27th. Komlo said to Myers that he could require Myers to be at school "24 hours a day."

9. Kish, after receiving Rogers' memo of May 22, 1980 (CP-4), sent a letter to Rogers explaining why he could not attend the Orientation Program on May 27th (R-2), testifying that the reason was that he was a Little League coach. Rogers sent a memo to Kish under date of May 27, 1980, again reiterating his availability to discuss Kish's reason for non-attendance, and stating that his presence at the Orientation Program on May 27th was "mandatory" (CP-13). Kish testified that he attempted to meet with Rogers after school, but that Rogers was in a conference. Kish waited for 15-20 minutes and left, no meeting with Rogers having taken place.

10. As a result of the 9th grade teachers having been required to attend the Orientation Program on May 27, 1980, the Association demanded negotiations with the Board with respect to additional compensation but the Board refused to negotiate the matter. A grievance was also filed on the same subject matter, which was rejected under date of July 14, 1980 (CP-5).

11. As a result of Myers and Kish not having attended the Orientation Program on May 27, 1980 a hearing was held on June 3, 1980 on the issue of insubordination. Representatives of the Board, including Kamlo and Rogers, were in attendance at the hearing together with representatives of the Association, including William Flynn, an NJEA Field Representative. Informal minutes were taken by Gerald Dudzinski, the President of the Association (CP-6).

12. Under date of June 9, 1980 Flynn filed a memorandum on behalf of Myers and Kish with the Board setting forth provisions of the Act and pertinent Court and Commission decisions (R-4). ^{8/}

^{8/} The Board's attorneys subsequently brought Flynn's memorandum (R-4) to the attention of the Franklin County Ethics Committee of the New Jersey Bar Association. The Hearing Examiner declines to pass upon the contention that Flynn was by this memorandum (R-4) engaging in the unauthorized practice of law.

13. At a special meeting of the Board on June 26, 1980 both Myers and Kish were formally reprimanded for not having attended the Orientation Program on May 27, 1980. A copy of the reprimand Resolution was directed to be placed in Myers' personnel file and remain there for a period of one year "...to be considered in the future by the Board of Education with other personnel file matters as contained therein and such other factors related to Harold Myers' performance as a teacher within the Franklin School System when reviewing the entitlement to authorized salary increments" (R-1). A copy of a like Resolution was directed to be placed in Kish's personnel file for a period of three years (R-3).

14. In 1980 the Board departed from the prior practice of teacher attendance at the June graduation ceremony which had always been on a voluntary basis. In early June 1980 all teachers were notified that attendance at the graduation ceremony, scheduled for the evening of June 10, 1980, was mandatory. The Association demanded that the Board negotiate additional compensation for the teachers having had to attend the graduation ceremony. The Board refused to negotiate the issue.

15. At a faculty meeting in December 1980 Rogers, who was at that time Acting Superintendent, said to Dudzinski, the President of the Association, that he would no longer meet with him as the Association President on a monthly basis, indicating to Dudzinski that he did not care for the Association. Myers, who was present at the faculty meeting, testified that Rogers said that he would no longer recognize the Association or meet with the Association President on a regular basis.

16. Dudzinski had been a Department Chairman for six years until June 1979 when the position was abolished. There then existed the related position of Super-

visor. 9/ Dudzinski was not appointed as a Supervisor for the 1979-80 school year, having been told by Rogers that he, Dudzinski, was unable to handle the position. Dudzinski testified that he had had no adverse evaluations as Department Chairman and, further, that he did not recall stating to anyone that he had had a problem handling teachers while he was Department Chairman. Rogers testified that Dudzinski had a problem with one teacher, Jon Roy, and, additionally, that Dudzinski was delinquent in filing his monthly logs.

17. Myers was appointed to the position of Supervisor for the 1979-80 school year. In May 1980 Myers was elected Vice-President of the Association and was designated as a Chief Negotiator for the Association. In June 1980 Myers was advised by Rogers that he would not be re-appointed as a Supervisor for the 1980-81 school year. Rogers indicated that he was not satisfied with Myers' over-all performance. When Myers asked for specific reasons, Rogers declined to respond. Myers testified credibly that he had had no negative evaluations as a Supervisor. At the hearing, Rogers explained that Myers was deficient in submitting reports, and, contrary to direction, failed to utilize tape cassettes and film for the teachers under his supervision. Rogers acknowledged that he had made no written evaluation of Myers as a Supervisor during the 1979-80 school year. 10/

18. With respect to the three alleged unmeritorious grievances, which were filed by the Association in the Summer of 1980 (attached to C-4), testimony

9/ The job description for "Supervisor" was received in evidence as Exhibit CP-14.

10/ Myers, on his own initiative, prepared a form of evaluation of his performance as Supervisor and in October 1980 received completed forms from eight teachers, who had been under his supervision, which rated him uniformly "superior" (CP-15). Exhibit CP-15 was never submitted by Myers to the school administration nor did it become a part of Myers' school records.

was taken only as to two of the the said grievances, namely, those pertaining to the "Talented and Gifted Committee" and Ann Sekelsky's request for a personal day. Rogers testified that the "Talented and Gifted" grievance was amicably resolved by his setting forth in a letter that teachers were not required to attend formal meetings during the Summer. Additionally, Rogers testified without contradiction that Sekelsky's request for a personal day to attend her son's graduation was granted. A hearing on the Sekelsky grievance was put on "hold" and the Association eventually withdrew the grievance. ^{11/}

THE ISSUES

1. Did The Respondent Board violate Subsections(a)(1) and (5) of the Act when it refused to negotiate the Association's demand for additional compensation for teachers who were required to attend the Ninth Grade Orientation Program on May 27, 1980 and for teachers who were required to attend the graduation ceremony on June 10, 1980?

2. Did the Respondent Board violate Subsections(a)(1) and (3) of the Act by reprimanding Harold J. Myers and Eugene Kish for their failure to attend the Ninth Grade Orientation Program on May 27, 1980?

3. Did the Respondent Board violate Subsections(a)(1) and (3) of the Act by refusing to reappoint Harold J. Myers as a Supervisor for the 1980-81 school year?

4. Did the Respondent Board violate Subsection (a)(1) of the Act by filing charges of the unauthorized practice law against William Flynn, an N.J.E.A. Field Representative, by reason of his representation of Myers

^{11/} The Charging Party made a Motion to Dismiss as to the Board's Unfair Practice Charge (Docket No. CE-81-5-79). The Hearing Examiner deferred his ruling at that time. The Hearing Examiner now grants the Motion to Dismiss the Board's Unfair Practice charge, supra, on the ground that the grievances having been settled do not present a case or controversy for the Hearing Examiner to resolve. Further, even if not resolved, the Hearing Examiner finds and concludes that the Charging Party, in filing the three grievances, was engaging in an activity protected by the Act: Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459, 461 (1978) and North Brunswick Township Board of Education P.E.R.C. No. 79-14, 4 NJPER 451, 453 (1978).

and Kish at a disciplinary hearing and thereafter filing a written memorandum with the Board on their behalf?

5. Did the Association violate Subsections(b)(1), (3) and (5) of the Act by virtue of its having filed certain grievances pursuant to the contractual grievance procedure? 12/

6. Did the Respondent Board violate Subsection(a)(1) of the Act by virtue of its having filed the aforesaid charge of unfair practices against the Association?

DISCUSSION AND ANALYSIS

The Respondent Board Violated Subsections (a) (1) and (5) of the Act When It Refused To Negotiate The Association's Demand For Additional Compensation For Teachers Who Where Required To Attend The Ninth Grade Orientation Program On May 27, 1980 And the Graduation Ceremony on June 10, 1980

The Hearing Examiner finds and concludes that the Respondent Board violated Subsections(a)(1) and (5) of the Act when it refused to negotiate the Association's demand for additional compensation on behalf of teachers for mandatory attendance at the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980. Clearly, the decisions of the Commission and the Courts have held that the matter of mandatory attendance at and participation in extra-curricular activities, including the attendant workload, are non-negotiable as inherent managerial prerogatives in furtherance of major educational purposes. It is equally clear, however, that the matter of additional compensation for compulsory attendance and participation in such activities is a mandatorily negotiable term and condition of employment: Ramapo-Indian Hills Education Association, Inc., v. Ramapo-Indian Hills Regional High School District Board of Education, P.E.R.C. 80-9, 5 NJPER 302 (1979), aff'd App. Div. Docket No. A-4613-78 (1980) 12/ This issue has been disposed of previously (see footnote 11, supra).

and Carteret Board of Education v. Carteret Education Association, P.E.R. C. 80-30, 5 NJPER 397 (1979), aff'd App. Div. Docket No. A-419-79 (1980).

The Appellate Division, in affirming the Commission in Ramapo-Indian Hills and Carteret, supra, cited and discussed the decision of the New Jersey Supreme Court in Board of Education of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Education Association, 81 N.J. 582 (1980). The Court in Woodstown-Pilesgrove stated that there must be a balancing of interests as between negotiable terms and conditions of employment and the extent of their interference with express or inherent managerial prerogatives. When the dominant issue is an educational goal there is no obligation to negotiate the subject matter, including its impact on employees' terms and conditions of employment (81 N.J. at 591). The Court in Woodstown-Pilesgrove stated, inter alia "...Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, the negotiation would be proper even though the cost may have a significant effect on a managerial decision..." (81 N.J. at 591).

The facts in Carteret, supra, are clearly analogous to those in the instant case. There teachers were required to attend an extra-curricular workshop for one day only, which entailed an additional 49 minutes in the work-day of the teachers. The matter of compensation for this additional 49 minutes was held to be mandatorily negotiable, notwithstanding that the assignment and requirement of attendance was a non-negotiable educational policy decision. In the instant case, the attendance by ninth grade teachers at the evening orientation program on May 27, 1980 was mandatory and, upon demand by the Association, the Respondent was obligated to negotiate the subject of additional compensation for the teachers who attended. Similarly, with respect to mandatory attendance at the graduation ceremony on June 10, 1980 the Respondent was obligated to negotiate additional compensation since this was a clear departure

from the past practice of voluntary attendance at the graduation ceremony.

The Respondent Board having violated the Act by its refusal to negotiate as aforesaid, an appropriate remedy will be recommended hereinafter. 13/

The Respondent Board Did Not Violate Subsections (a)(1) and (3) of the Act By Reprimanding Harold J. Myers and Eugene Kish For Their Failure to Attend The Ninth Grade Orientation Program On May 27, 1980 Or By Refusing to Reappoint Myers As Supervisor For The 1980-81 School Year

In order for the Association to succeed with respect to the charges that the Respondent violated the Act by reprimanding Myers and Kish and by refusing to reappoint Myers as a Supervisor as alleged there must be proof by a preponderance of the evidence that the Board acted discriminatorily and was motivated in whole or in part by anti-union animus towards Myers and Kish for their exercise of rights guaranteed by the Act: Haddonfield Borough Board of Education, P.E.R.C. 77-31, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as modified 82 N.J. 1 (1980).

The Hearing Examiner finds and concludes that the Association has failed to establish that Myers and Kish were reprimanded by reason of their exercise of rights guaranteed by the Act. Similarly, the Association's proofs fall short of establishing that Myers was not reappointed as Supervisor for the 1980-81 school year in retaliation for his exercise of rights guaranteed by the Act.

Clearly, it would be specious to contend that the failure to attend a required extra-curricular activity such as the instant ninth grade orientation

13/ The Association also contends that the Respondent refused to negotiate concerning a representation fee in lieu of union dues (see Association Brief, p. 12). It is difficult to see how a demand for negotiations of a term and condition of employment such as this during the term of an existing agreement can be made the subject of mandatory negotiations. This is not a matter of additional compensation for hours of work, which can arise at any time during the term of an existing agreement. A matter such as representation fee would appear to the Hearing Examiner appropriately to be reserved for the advent of negotiations for a successor agreement.

program constituted the exercise of a right guaranteed by the Act. Myers and Kish assumed the risk of discipline when each voluntarily made a decision not to attend the orientation program on May 27, 1980. The Hearing Examiner notes that the Board apparently took into consideration the additional effort made by Myers in communicating with Rogers regarding his inability to attend as compared to that of Kish (see Findings of Fact Nos. 8 and 9, supra). Thus, Myers was given a reprimand for a period of one year while Kish was given a reprimand for a period of three years.

The Hearing Examiner notes that while Myers served as a Supervisor for a period of one year it was not contended that he had acquired tenure as a Supervisor. Thus, when Rogers advised Myers in June 1980 that he was not recommending his reappointment as a Supervisor, Myers was in the same position as that of an untenured teacher and could be non-appointed at will unless by its proofs the Association established that Rogers was motivated in his decision by anti-union animus. As indicated previously, the proofs failed in his respect.

The Hearing Examiner is not impressed by the argument of the Association that the mere fact that Myers was elected Vice-President of the Association in May, 1980 and was designated as Chief Negotiator establishes that Rogers was motivated by anti-union animus in June, 1980 when he advised Myers that he would not recommend his reappointment for the 1980-81 school year. Additionally, the Hearing Examiner does not impute animus toward Myers by what Rogers may have said to Dudzinski at a December 1980 faculty meeting (see Finding of Fact No. 15, supra). Finally, the Hearing Examiner is not inclined to give any weight to Exhibit CP-15, which consists of the self-serving evaluations of Myers as a Supervisor by eight teachers. This Exhibit is not part of the school records and, having been solicited by Myers on his own behalf, it is in no way binding

upon the Respondent Board.

Thus, the Hearing Examiner will recommend dismissal of the allegations that the Respondent violated Subsections(a)(1) and (3) of the Act with respect to Myers and Kish.

The Respondent Board Did Not Violate Subsection(a)(1) Of The Act By The Filing Of A Charge Of The Unauthorized Practice Law Against William Flynn of The NJEA In Connection With His Having Filed A Written Memorandum With The Board on Behalf of Myers and Kish In Connection With A Grievance Hearing on Insubordination

The Hearing Examiner finds and concludes that the Association has been unable to prove that the Board action in the filing of the charge of the unauthorized practice law against William Flynn had a chilling effect upon its employees in the exercise of the rights guaranteed to them by the Act. The proffer of objective evidence that such had occurred might have persuaded the Hearing Examiner that the Board violated Subsection(a)(1) of the Act. However, all that the Hearing Examiner has before him is the fact that the Board's attorneys filed a charge of the unauthorized practice of law against Flynn with the Ethics Committee with no evidence of any adverse effect upon the employees.

It is noted that the Charging Party has not in its brief provided the Hearing Examiner with any legal precedent whatever for finding a violation of the Act. The Hearing Examiner's independent research has disclosed no relevant precedent.

Accordingly, the Hearing Examiner will recommend dismissal of a Subsection (a)(1) violation in this regard.

The Respondent Board Did Not Violate Subsection (a)(1) Of The Act By Having Filed Charges Of Unfair Practices Against The Association

N.J.A.C. 19:14-1.1 provides that "...any public employer, public employee, public employee organization, or their representative" may file a charge of unfair

practices. The Hearing Examiner construes this language as creating an absolute right to file such a charge. The merits of the charge will ultimately be considered and disposed of by the Director of Unfair Practices, a Hearing Examiner and ultimately the Commission.

In the instant case the Respondent Board filed a charge of unfair practices against the Association regarding the filing of certain grievances and the Director of Unfair Practices issued a Complaint. The Hearing Examiner has considered the allegations in the Complaint and has determined that a Motion to Dismiss by the Association should be granted (see footnote 11, supra).

Accordingly, the Hearing Examiner will recommend dismissal of this aspect of the Unfair Practice Charge.

* * * * *

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

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when upon demand it refused to negotiate the issue of additional compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

2. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it reprimanded Harold J. Myers and Eugene Kish for their failure to attend the Ninth Grade Orientation Program on May 27, 1980 and when it refused to appoint Myers as a Supervisor for the 1980-81 school year.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) by the filing of charges of the unauthorized practice of law against William Flynn and by the filing of Unfair Practice Charges against the Association.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the Franklin Education Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

2. Refusing to negotiate in good faith with the said Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

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

1. Upon demand negotiate in good faith with the Franklin Education Association concerning compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

2. 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 the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Board to insure that such notices are not altered, defaced or covered by other material.

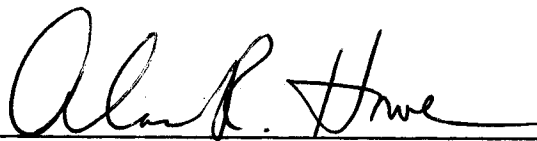
3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Board has taken to comply herewith.

C. That the allegations in the Complaint that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(3) be dismissed in their entirety.

D. That the allegations in the Complaint that the Respondent Association

violated N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) be dismissed in their entirety.

Dated: March 3, 1981
Trenton, NJ

A handwritten signature in cursive script, reading "Alan R. Howe", written over a horizontal line.

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 refusing to negotiate in good faith with the Franklin Education Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

WE WILL NOT refuse to negotiate in good faith with the said Association regarding compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

WE WILL upon demand negotiate in good faith with the Franklin Education Association concerning compensation for teachers who attended the Ninth Grade Orientation Program on May 27, 1980 and the graduation ceremony on June 10, 1980.

FRANKLIN 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 James W. Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780