P.E.R.C. NO. 96-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

READINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-85

READINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge and amended charge filed by the Readington Education Association against the Readington Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally implemented a revised salary guide structure. The Commission finds that the parties reached a genuine post-factfinding impasse and that the Board unilaterally implemented its last salary guide offer and remained willing to continue negotiating over modifications to the guides it imposed. Under all these circumstances, the Commission concludes that the Board did not violate its obligation to negotiate in good faith.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 96-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

READINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-85

READINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, P.C. (Martin R. Pachman, of counsel; Lisa A. Sanders, on the briefs)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Robert A. Fagella, of counsel)

DECISION AND ORDER

On September 21 and October 13, 1993, the Readington Education Association filed an unfair practice charge and amended charge against the Readington Township Board of Education. The charge, as amended, alleges that the employer 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 (5),[1/] when it unilaterally implemented a revised salary guide structure.

---

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

On January 11, 1994, a Complaint and Notice of Hearing issued. On January 21, the Board filed its Answer generally denying the allegations in the Complaint.

On May 19, July 21, and August 16, 18 and 30, 1994, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On January 27, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-16, 21 NJPER 90 (¶26059 1995). He found that the Board had negotiated in good faith to post-factfinding impasse before implementing its last best offer and in particular its proposed salary guides. He therefore concluded that it had not violated the Act.

On February 24, 1995, the Association filed exceptions. It claims that the Hearing Examiner erred by not finding that the parties had agreed to be bound by the factfinder's choice between proposed salary guides. It argues that a post-factfinding impasse did not exist given the history of the parties' negotiations, their short duration, the importance of the topic, and the magnitude of the Board's change.

---

1/ Footnote Continued From Previous Page

> 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."

The Association claims that the Board never informed the Association of its intentions regarding proposed salary guide structures up to and through the factfinder's report in March 1993; between March and August 1993, the Association submitted two salary guide proposals and agreed to add two additional steps to the guide; and the Board did not submit a guide proposal until Memorial Day and did not waver from its demand for three additional steps.

The Association further claims that the Board did not act in good faith. In particular, it asserts that the Board was already threatening to impose salary guides unilaterally only a few days after the first negotiations session that considered that issue. It also claims that for all practical purposes, there were only two negotiations sessions before unilateral implementation on an issue of great importance and that dozens of teachers now receive less under the new salary guide than they would have received if there had been no salary increases and the prior salary guide had remained in effect. Finally, the Association contends that the Board did not need to act when it did, and that we should conclude that, under all the circumstances, the parties were not at impasse and implementation was not justified.

On March 15, 1995, the Board filed an answering brief supporting the Hearing Examiner's recommendation. It claims that the Association's exceptions do not comply with N.J.A.C. 19:14-7.3(b) and should be disregarded. It further claims that case law and overwhelming evidence support the Hearing Examiner's conclusion that the Board's implementation did not violate the Act.

The Association was granted leave to file a reply brief and the Board to file a response.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-20).

The unilateral imposition of working conditions is the antithesis of the Legislature's goal that terms and conditions of public employment be established through bilateral negotiation, and, to the extent possible, agreement between the public employer and a majority representative. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). "Unilateral," however, refers to a change in employment conditions implemented without prior negotiation to impasse. Ibid. We long ago held that where parties have exhausted impasse procedures and are at a genuine impasse, the employer can implement its last best offer. Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977);[2/] see also Bayonne City Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Red Bank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp.2d 99 (¶81 App. Div. 1981); Rutgers, the State Univ., P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); see generally In re New Jersey Transit Bus Operations, Inc., 125 N.J. 41, 54 (1991).

This case boils down to a dispute over whether the parties were at a genuine post-factfinding impasse when the Board

---

2/ This rule of law does not apply to police or fire departments subject to interest arbitration. See N.J.S.A. 34:13A-16 et seq.

implemented its last salary guide proposal. We summarize the facts leading up to the disputed implementation.

The parties entered into negotiations in the fall of 1991 for a collective negotiations agreement to succeed the agreement that would expire on June 30, 1992. Little progress was made and the parties mutually declared impasse. The parties resolved many issues through mediation, but could not reach agreement on salaries and certain other issues. No agreement was reached before the beginning of the 1992-93 school year, so the Board paid increments under the 1991-92 salary guides pursuant its obligation to maintain the status quo during negotiations. Galloway. Factfinding then began.

At the second session, the factfinder conducted a formal hearing. Regarding salary guides, the Board proposed the elimination of the Masters Plus 60 Credits column in the salary guides, except for "grandfathered" employees. The parties had previously agreed to this proposal during the negotiations process. The Board also proposed to: (1) restructure the salary guides to redistribute the cost of increments by inserting additional steps within the minimum and maximum salaries on the guides; (2) gradually increase the starting salaries (BA minimum) so that they would approach 60% of the BA maximum salary; (3) gradually adjust "vertical" intermediate steps to reflect an equal dollar increment pattern between the minimum and maximum steps for each column on the guides; and (4) limit the growth of maximum salaries to approach the

cost of living, adjusted for health care (R-2). The Board did not present a proposed salary guide during factfinding.

On March 24, 1993, the factfinder issued his report and recommendations. He stated:

> Finally, as to the issue of salary guides, I recommend that they be mutually constructed by the parties, if at all possible within thirty days. It is not possible or appropriate for me now to make recommendations concerning the proposals by the Board for guide structure. The Association has not responded to them in any substantive way, which is understandable given that guides are normally constructed after settlement is reached and not before. I will, however, retain jurisdiction over these proceedings, to be exercised in the unlikely event that the parties are unable to complete the task of constructing guides that are mutually agreeable.

The parties agreed to adopt the factfinder's recommendations. The Board accepted the recommendations on wage increases because it received offsetting economic incentives in the prescription drug plan and the unused sick leave program. The parties also agreed that the Board would draft the language elements of the agreement and that the Association would draft the salary guides.

Around Memorial Day 1993, the Association received the Board's first salary guide proposal. The parties then met on June 7, 1993 in an effort to resolve five items, including salary guides. The parties devoted the bulk of the session to the language issues. Any discussion of salary guides was preliminary. At the conclusion of this session, the parties agreed to ask the factfinder to clarify two remaining language issues and assist the parties in resolving the salary guide structure. The factfinder clarified the

two language issues and agreed to meet with the parties on June 15 if they could not agree on salary guides.

At the June 15, 1993 session, the parties discussed salary guides in depth for the first time. The Association told the Board that its proposal was too radical to be achieved within the three year contract period. The Board told the Association to continue preparing proposals for consideration. When the factfinder arrived, a dispute arose over whether he would have binding authority.[3/] Each party then made a presentation. On June 18, the factfinder sent the parties a letter stating that he would not be able to resolve the issue of salary guides and refusing to select either side's position. He recommended that the issue be resolved consistent with the points of agreement he detailed at the conclusion of the June 15 meeting. He then withdrew from the case.

The Association received a copy of the Board's second salary guide proposal sometime after midnight on June 16.[4/] The parties had informal discussions on June 16 and June 22.

The last Board meeting of the 1992-93 school year was scheduled for June 28. Since the salary guide issue remained unresolved, the Board decided to consider unilateral implementation

---

3/ The parties disagree over whether they agreed that the factfinder would issue a binding award selecting the total salary guide of one side or the other. The Hearing Examiner found that there was a misunderstanding. Resolution of the parties' conflicting views is not necessary to our determination.

4/ The Hearing Examiner found that it was delivered on June 15, but also found that it was delivered after midnight. The proposal is dated June 16.

on July 1, the beginning of the new fiscal year. It had been advised that the Association would remain firm in its refusal to agree to any salary guides where unit members would receive less than they would have received under the 1991-92 salary guides.

On June 22, 1993, the Board advised the Association that it was considering implementation and it encouraged the Association to submit a new proposal. The Association was also advised that the Board would meet on June 28 to consider unilateral implementation. The Association responded with a new proposal on June 28.

Not having enough time to analyze the Association's proposal, the Board postponed implementation. On June 30, 1993, the Board's attorney reiterated to the Association that the Board had delayed unilateral implementation because it had just received the Association's June 28 proposal. He suggested a meeting during the third week of July to explore the Association's proposal. He also stated that the Board would not allow "impasse to force the existence of the 1991-92 guide into the 1993-94 school year" (R-6). On July 6, the Association's team was invited to meet with the Board's team during the weeks of July 12 or 19. On July 19, the Association responded that those dates were not feasible because of team members' vacations and obligations. On July 22, the Board responded that if the Association could not commit by July 29 to meet by August 9, the Board would meet on August 3 to consider implementation. On July 27, the Association agreed to meet on August 9.

On August 2, 1993, the Board sent the Association a third proposal which, like its previous proposals, added three steps to the guides. This proposal shifted some additional money to the highest steps. The Board expressed its desire to have a salary guide with at least 15 steps to reduce the annual increment cost and more uniformly distribute the cost of maintaining the salary premium enjoyed by the staff at the top of the guide. The Board also sought to increase starting and mid-guide salaries, reduce horizontal spread, and move toward an equal dollar increment pattern. The Association determined that the Board's salary guide philosophy had not changed. The Association opposed three additional steps and continued to seek a salary guide structure ensuring that no staff members would receive a lower salary than they would have received under the increment structure of the 1991-92 guides.

The Association presented the Board with several guides at the August 9, 1993 session. The Board suggested a "phantom" step to go into effect during the last year of the contract. Under that proposal, there would be two additional steps under this agreement, but three additional steps going into a successor agreement. The Association rejected that proposal. At a certain point, the Board's attorney and the NJEA's Associate Director of Research recognized that they could not construct a guide satisfying both sides, so they removed themselves from negotiations. The parties continued to meet. The Association expressed its willingness to add one step in 1992-93 and a second step in 1993-94, but it was unwilling to agree to a third new step. The parties agreed to guides for 1992-93, but

no further agreement was reached that evening. The Board told the Association that a complete agreement could not be reached. The Association told the Board that negotiations should continue.

At a special meeting on August 12, 1993, the Board passed a resolution unilaterally implementing its last offer. That offer included all agreed-upon contract language, the guides for 1992-93 as agreed to on August 9, and the guides for 1993-94 and 1994-95 contained in its August 2 proposal. There were discussions over the Labor Day weekend, but no formal negotiations. The Board advised the Association that it was willing to continue negotiating over salary guide structure. The Association did not submit any additional proposals. It filed this charge on September 21.

We agree with the Hearing Examiner that the Board did not violate the Act when it implemented its last best offer on salary guides. The Board presented its salary guide philosophy during factfinding. The factfinder withdrew from the case without issuing a specific recommendation on salary guides, apparently without objection from either party. Although there were only two formal post-factfinding meetings where salary guides were discussed, the parties' positions were clearly staked out and entrenched: the Board demanded that three additional steps be added to the guide before any successor contract expired whereas the Association demanded that no teaching staff member receive less than that member would have under the predecessor salary guide. The Board ultimately presented three different proposals and in the end rejected the Association's last offer. At the last session before

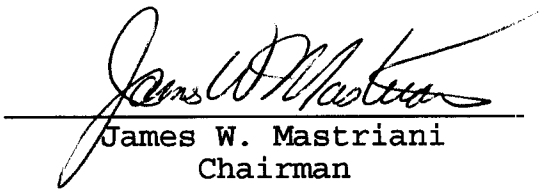
implementation, the parties' professional negotiators recognized that they could not construct guides that would satisfy both parties so they withdrew. This evidence all supports finding a genuine post-factfinding impasse.

The Association knew of the Board's firm intention not to pay increments for a second year under the expired guides and the Association had an equally firm intention not to agree to any salary guide resulting in employees receiving less money than if increments were paid under the expired guides. Unfortunately, an agreement on alternate guides could not be reached within the announced time frame given the parties' impasse. The Board unilaterally implemented its last salary guide offer and remained willing to continue negotiating over modifications to the guides it imposed. Under all these circumstances, we conclude that the Board did not violate its obligation to negotiate in good faith. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: July 28, 1995
Trenton, New Jersey
ISSUED: July 28, 1995

H.E. NO. 95-16

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

In the Matter of

READINGTON TOWNSHIP BOARD OF EDUCATION

Respondent,

-and- Docket No. CO-H-94-85

READINGTON EDUCATION ASSOCIATION,

Charging Party.

## SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Readington Township Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by implementing its salary guide proposal. The Hearing Examiner found that the Board negotiated in good faith to a post-factfinding impasse. The Board then properly implemented its final salary guide proposal.

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. 95-16

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

In the Matter of

READINGTON TOWNSHIP BOARD OF EDUCATION

Respondent,

-and- Docket No. CO-H-94-85

READINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, P.C.
(Martin R. Pachman, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Robert A. Fagella, of counsel)

## HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On September 21, 1993, the Readington Education Association ("Association") filed an Unfair Practice Charge (C-2, C-3)[1/] with the Public Employment Relations Commission ("Commission") against the Readington Township Board of Education ("Board"). The Association alleges that the Board violated the New Jersey

---

1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "R" refer to the Respondent's exhibits and those marked "CP" refer to the Charging Party's exhibits. The Transcript citation "1T1" refers to the Transcript developed on May 19, 1994, at page 1. The Transcript citations "2T," "3T," "4T," and "5T" refer to the Transcripts developed on July 21, 1994, August 16, 1994, August 18, 1994 and August 30, 1994, respectively.

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically Section 5.4(a)(1), (2), (3) & (5)[2/] by engaging in surface negotiations with respect to the unilateral implementation of the Board's proposed salary guides. The Association contends that the Board's action constitutes a failure to bargain in good faith and was designed to chill negotiations unit members' exercise of their rights protected under the Act.

On January 11, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On January 21, 1994, the Board filed its Answer (C-4) generally denying the allegations contained in the charge. Hearings were conducted on May 19, July 21, August 16, August 18 and August 30, 1994, at the Commission's Offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by November 22, 1994.

---

2/ 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. (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."

Upon the entire record, I make the following:

## FINDINGS OF FACT

1. The parties stipulated that the Board is a public employer and the Association is a public employee representative within the meaning of the Act (1T10-1T11).

2. The parties initiated collective negotiations for a successor collective agreement in the Fall of 1991 (5T99). The predecessor collective agreement expired on June 30, 1992 (1T15). Very little progress was made during the course of bilateral negotiations. An impasse was mutually declared and the parties applied to the Commission for the assignment of a mediator (R-1; N.J.A.C. 19:12-3.1). Mediation resulted in the parties resolving many issues, however, the parties could not reach agreement on salary and certain other issues. The dispute proceeded to fact-finding (N.J.A.C. 19:12-4.1-4.3).

3. On January 13, 1993, the fact-finder conducted an initial meeting with the parties in an effort to achieve a voluntary resolution of the outstanding disputes. On February 23, 1993, the fact-finder conducted a formal fact-finding hearing wherein both sides made presentations and submitted documentary evidence in support of their respective positions (CP-1). On March 24, 1993, the fact-finder issued his report and recommendations (CP-1). In his report, the fact-finder noted that the Board "...has also made

certain proposals concerning guide structure" (CP-1). The fact-finder also stated the following:

> Finally, as to the issue of salary guides, I recommend that they be mutually constructed by the parties, if at all possible within thirty days. It is not possible or appropriate for me now to make recommendations concerning the proposals by the Board for guide structure. The Association has not responded to them in any substantive way, which is understandable given that guides are normally constructed after settlement is reached and not before. I will, however, retain jurisdiction over these proceedings, to be exercised in the unlikely event that the parties are unable to complete the task of constructing guides that are mutually agreeable.

4. In R-2, the Board's position and supporting documents which were presented to the fact-finder, the Board sets forth its proposals to restructure the salary guides. The Board proposed the elimination of the Masters Plus 60 Credits column in the salary guides, except for "grandfathered" employees. The parties had previously agreed to this proposal during the negotiations process. The Board also proposed to (1) restructure the salary guides to redistribute the cost of increments by inserting additional steps within the minimum and maximum salaries on the guides; (2) gradually increase the starting salaries (BA minimum) so that they approach 60% of the BA maximum salary; (3) gradually adjust "vertical" intermediate steps to reflect an equal dollar increment pattern between the minimum and maximum steps for each column on the guides; and (4) limit the growth of maximum salaries to approach the cost of living, adjusted for health care (R-2). R-2 was provided to the

Association on February 23, 1993, through NJEA Field Representative John Thornton, who assisted the Association during the impasse process and thereafter (2T15-2T16). The Board never presented an actual proposed salary guide during fact-finding (1T28-1T29; 5T64).

5. From the outset of negotiations, the Board sought to amend aspects of the salary guides. The Board sought to remove vertical columns on the guides to which a faculty member would move upon achieving a certain number of graduate school credits (1T29). The Board also sought to remove additional steps on the guides for special education teachers (1T30). The parties had reached a tentative agreement, prior to fact-finding, regarding the removal of the vertical columns for degree credit and additional steps for special education teachers (1T31). During fact-finding, the Board proposed a one year contract which would include a lump sum dollar increase for unit employees (5T100). The Board never placed a written proposal regarding salary guide structure modification on the table until the parties entered into fact-finding (5T100). No actual guide proposals were developed by either side before the fact-finder's report was issued (4T81-4T82). However, the construction of the actual salary guides typically does not take place until after the agreed upon percentage increase in wages is known (2T178-2T180).

6. The fact-finders March 24, 1993 recommendation called for salary increases of 6.4% for school year 1992-1993, 6.3% for school year 1993-1994, and 6.1% for school year 1994-1995 (CP-1).

The fact-finder also recommended a modification in the prescription drug plan. The old prescription drug plan provided for a $1.00 co-payment for any prescription. The modified prescription drug plan provided for a $1.00 co-payment for generic prescriptions and a $5.00 co-payment on "brand name" prescriptions (4T80). The recommendation also included changes in the unused sick leave benefit which worked to the financial advantage of the Board (4T80). The parties adopted the fact-finders salary increase recommendation approximately one week after the issuance of his report (CP-2). Although the fact-finder recommended a higher wage increase than the Board proposed, the Board accepted the fact-finder's report because it received offsetting economic incentives in the prescription drug plan and the unused sick leave program that helped pay for the higher salary recommendation (4T80). It was not until after the issuance of the fact-finders report that the parties focused on the construction of the salary guides.

7. After the parties had agreed to adopt the fact-finders recommendation, they agreed to a division of labor to compile the agreement. The Board agreed to draft the language elements of the agreement and forward the draft to Thornton for review. The Association agreed to construct a draft salary guide (1T57; 2T63; CP-4). On April 7, 1993, Thornton received draft salary guides covering the three year period of the agreement prepared by Ray Wenger, NJEA Associate Director of Research (2T64; 2T66; CP-3).

Thornton forwarded the salary guides to the local Association president who, in turn, presented the guides to the Board on or about April 7 or 8, 1993 (2T65-2T67; 3T12). After reviewing the exchanged documents, five items remained in dispute; four "language" items and the salary guides (CP-6). The parties agreed to meet on June 7, 1993 in an effort to resolve the five items (CP-6).

8. Within a few days before or after Memorial Day, 1993, the Association received the Board's first salary guide proposal (CP-5; CP-5A). While the Association's negotiations team received CP-5 and CP-5A as a package, Thornton received CP-5 and CP-5A separately (3T13-3T14; 3T43; 3T71). Thornton's copy of CP-5 was forwarded to him by the Association's negotiation team and he received it a few days prior to the June 7, 1993 meeting. Thornton received CP-5A (the Board's first proposed salary guides, hereinafter referred to as "Proposal A") on the evening of June 7, 1993, just prior to the start of the meeting (1T71). CP-5 and CP-5A were developed through the joint efforts of Board President Karen McCullough and the Board's chief spokesperson Douglas Merchant on May 16, 1993 (5T69). Proposal A was not developed until May 16, because of the time needed by McCullough and Merchant to develop the necessary computer software, learn about salary guide construction, and review the data base. Further, the daily pressures of their individual work schedules added to the delay (4T83; 5T69). Neither Merchant nor McCullough had any prior negotiations experience. On May 17, 1993, McCullough asked the Superintendent of Schools to

deliver CP-5 and CP-5A to the Association's chief negotiator which was done some days later (4T85; 4T87). Between February 23, 1993, the date of the fact-finding hearing, and June 7, 1993, frequent informal meetings and discussions concerning the disputed issues occurred between Association officials and Board administrators (1T56; 2T89; 2T176-2T177).

9. On June 7, 1993, the parties conducted a formal negotiations session for the purpose of trying to resolve their post-factfinding disputes. The meeting concluded in the early morning hours of June 8, 1993. Merchant, McCullough and labor counsel Pachman attended on behalf of the Board, and negotiating team members Stephen Barrett, Ronald Dilzer, L. Anthony Saraceno and Thornton attended on behalf of the Association. McCullough left the meeting early. At about 9:30 p.m., the Board gave the Association a written proposal containing five paragraphs, four of which were aimed at "language" issues. The fifth paragraph called for salary guides to be negotiated (CP-8). At about 10:02 p.m., the Association provided the Board with a written counterproposal containing seven paragraphs, six of which addressed "language" issues. The seventh paragraph proposed that the Association's salary guides with some mutually agreed to changes be adopted (R-4).

10. The parties devoted the bulk of the June 7, 1993 negotiations session addressing disputed "language" issues (4T123; 5T72; 5T116). However, the parties did engage in some limited

negotiations regarding the salary guide dispute (2T102; 3T46; 3T73-3T74 and 5T72). By the end of the session on June 8, 1993, the parties had resolved all but two of the "language" disputes and had no agreement on the salary guides. The parties agreed to place the two unresolved "language" issues before the fact-finder, who retained jurisdiction, for further clarification (1T95-1T96; CP-9).

11. At the conclusion of the June 7, 1993 negotiations session, the parties agreed to schedule another negotiations session for June 15, 1993. The parties asked the fact-finder to attend that meeting in order to clarify the two remaining "language" items and assist the parties in resolving its final disputed issue, salary guide structure (1T96; CP-9). On or before June 15, 1993, Pachman, Thornton and the fact-finder conducted a conference call during which the disputed issues were discussed (1T98). On June 15, 1993, the fact-finder sent Pachman and Thornton a letter (CP-10) in response to CP-9, Pachman's letter of June 8th to the fact-finder. In CP-10, the fact-finder clarified the two disputed "language" issues and confirmed arrangements for the negotiations session that was to take place that evening. The fact-finder stated in CP-10 the following:

> Concerning tonight's meeting, the parties will convene as scheduled and immediately attempt to develop mutually agreeable salary guides. If, as I anticipate, your efforts prove successful and my services are not needed, you should leave a message to that effect at my office...by 9:00 p.m. If I do not receive a message by 9:00 p.m., I will then drive to Readington. Upon my arrival, we will immediately conduct a hearing at which each side will present its 'final offer'

> concerning the salary guide and justification for same. I will, by week's end, issue an award selecting in its totality the salary guide submitted by one side or the other, thereby resolving the issue.

12. As stated above, the arrangements regarding the manner in which the June 15, 1993 negotiations session would be conducted and the role which the fact-finder would play were made during a conference call among Pachman, Thornton and the fact-finder prior to June 15. Thornton and Association negotiations team members Barrett, Dilzer, Saraceno and Wenger believed that the fact-finder would serve as an "interest arbitrator" and select one salary guide proposal which would be binding on both parties (1T99-1T101; 2T189-2T190; 3T18; 3T75; 3T151; 4T7; 4T31). However, as Thornton was the Association's only participant in the conference call, Thornton served as the Association's only information source regarding any "mutual agreement" to have the fact-finder serve as "interest arbitrator" (5T7; 5T42-5T43). Likewise, neither McCullough nor Merchant participated in that conference call (4T128; 5T117). It is the Board's position that it never authorized any representative to agree to "binding arbitration" (4T134; 5T74). McCullough had previously instructed Pachman not to agree to binding arbitration (4T90). During the session with the fact-finder, Merchant never instructed Pachman to extricate the Board from any arrangement providing for a binding determination of salary guides (5T124). I find that a misunderstanding concerning the fact-finder's role and authority had occurred. While Pachman did

agree to allow the fact-finder to select one side's salary guide proposal (4T130), I find no evidence to support the allegation that the fact-finder was granted binding authority. The fact-finder, knowing that his position allows for the issuance of recommendations and not binding determinations, did not expressly state in CP-10 that the parties had agreed to his exercise of binding authority. Had the parties clearly granted the fact-finder such binding authority, an important departure from a fact-finder's customary authority, it would have been clearly expressed in CP-10.

13. During the June 15 negotiations session, the parties discussed salary guides in depth. The Association advised the Board that the Board's guide proposals were too radical to be achieved within the three year contract period (1T102-1T103). The Board told the Association to continue preparing guide proposals for its consideration, however, when the Association asked the Board if any of its ideas on guide structure was closer to being acceptable, the Board responded in the negative (1T103). The fact-finder arrived around 11:00 p.m. After the parties addressed the issue of whether the fact-finder would have binding or non-binding authority, the fact-finder convened a hearing during which each party was given an opportunity to make a presentation and offer a documentary submission (2T118; 3T21; 3T78-3T79; 3T128-3T130; 5T8; 5T75). On June 18, 1993, the fact-finder sent the parties a letter indicating his belief that he would not be able to resolve the issue of salary guides and refused to select either side's position on guide

structure. The fact-finder recommended that the question of salary guide structure be resolved consistent with the points of mutual agreement which he detailed to the parties at the conclusion of the June 15 meeting (CP-12). Thereafter, the factfinder removed himself from further involvement with the dispute (1T110; CP-12).

14. Another dispute which arose out of the June 15 negotiations session concerned whether the Board gave the Association a copy of CP-11, the Board's View of the Philosophy that should Govern the Evolution of the Salary Guide and the Implementation of that Philosophy, or R-5 which is the same first five pages as CP-11 but also includes another set of proposed salary guides. There is no dispute that the Association received CP-11 from the Board at the conclusion of the June 15 meeting. The dispute is whether the Board gave the Association a copy of the Board's second guide proposal, referred to as "Proposal B." During the afternoon of June 15, 1993, McCullough typed CP-11 (the non-guide portion of R-5) into her computer (4T145-4T146). During the evening, while the negotiations session took place, McCullough and Merchant jointly worked on the computer preparing Proposal B (4T91-4T92; 4T137). McCullough and Merchant worked in the superintendent's office, away from the ongoing negotiations (4T138). McCullough departed at about 11:00 p.m. She and Merchant had not yet finished programming the computer to generate Proposal B. McCullough left before Proposal B was printed from the computer and did not see whether it was distributed (4T141). Proposal B was

printed sometime after midnight (5T126). Proposal B, like Proposal A, added three steps to the top of the salary guides, however, placed more money at the top of the guides then did Proposal A (5T76; 5T133). Merchant gave R-5 to the fact-finder but cannot recall to whom he gave it on the Association team (5T75).

15. I find that the Association did receive a copy of R-5, inclusive of Proposal B. Wenger sent Barrett a memorandum which, among other things, included a set of salary guides to be presented by the Association to the Board on June 28, 1993 (R-13[3/]). On page 3 of R-13, Wenger indicates that the Association's salary guides for the first year of the proposed successor agreement (1992-1993) is not significantly different from the Board's proposal. Wenger states "the Board reduces the increase at maximum by $125 and these [sic] money was distributed to the first three (3) steps." The Association's proposed salary guides for 1992-1993 showed a maximum step of $54,825 (CP-3). The maximum salary on the Board's initial salary guide proposal (Proposal A) for an employee in the "B" column was $54,750; a $75 difference from the Association's proposal (CP-5A). The Board's Proposal B salary guides showed a maximum salary in column "B" of $54,700; a $125 difference from the Association's proposal (R-5). On page 7 of Wenger's memorandum (R-13) Wenger states "the Board has expressed a desire to have beginning salary significantly increase. The Board's

---

3/ R-13 is dated July 28, 1993. The date on R-13 is in error and should read June 28, 1993 (2T161).

proposal has a BA starting salary of $31,075 for 1994/95." Board Proposal A (CP-5A) and Proposal B (R-5) show a starting salary for the "B" column of $31,075. Wenger conceded that the guides annexed to R-5 (Proposal B) may have been what he used to formulate R-13 (5T28-5T29).[4/] Thus, while the record does not disclose how Wenger, on behalf of the Association, came into possession of R-5, the facts lead me to conclude that the Board delivered at least one copy of R-5 to the Association on June 15, 1993, which somehow made its way into Wenger's possession.

16. Although the parties did not conduct a formal negotiations session between June 15 and June 22, 1993, the parties engaged in informal discussions in an effort to resolve the salary guide dispute (1T125; 3T74; 4T147). The last Board meeting for fiscal year 1992-1993 was scheduled for June 28, 1993 (5T82). Since the salary guide issue remained unresolved, the Board decided that it should consider during its June 28 meeting whether to impose its last salary guide offer on July 1, 1993, the beginning of the new fiscal year (4T95-4T96). Additionally, the Board considered unilateral implementation because as of June 22, 1993, it had received only one formal salary guide proposal from the Association and had been advised, both formally and informally, that the Association would remain firm in its position that it would not

---

4/ Even assuming arguendo, that the Association had not received the Board's Proposal B, my recommendation in this matter would remain the same.

agree to unit members receiving less than their normal increment as provided in the 1991-1992 salary guides (4T149; 5T78). Moreover, the Board felt that if it had to implement the collective agreement, it wanted to do it at a time when the teachers were at school rather than away on summer vacation (5T82-5T83).

17. On June 22, 1993, McCullough met with Barrett and Dilzer in the Superintendent's office to advise them that the Board was considering imposition of the collective agreement, explain the Board's position and encourage the Association to prepare a new salary guide to avoid unilateral Board action (4T149). After the June 22, 1993 meeting concluded, Barrett and Dilzer contacted Wenger and requested that he prepare new salary guides (3T26). Also on June 22, 1993, Pachman, on behalf of the Board, sent Thornton a letter advising that on June 28, 1993, the Board would meet to consider the unilateral imposition of its last offer to the Association including the Board's guide proposal (CP-13). Wenger responded with a new set of guides which were presented to the Board on June 28, 1993 (CP-15; 3T48; 3T91; 5T83).

18. Having received the new salary guide proposal from the Association on June 28, the Board refrained from taking action to impose the collective agreement during its meeting that evening. Although the Board recognized that the Association's new proposal differed from the earlier guides it had submitted, the Board determined that it did not have sufficient time to fully analyze the Association's proposal before the Board meeting (4T97-4T98; 5T84).

Subsequently, the Board determined that CP-15 did not make the fundamental changes in the increment pattern which it sought (4T99; 5T84).

19. On June 30, 1993, Pachman sent Thornton a letter reiterating that the Board had delayed unilateral implementation of its last offer in light of its receipt of the Association's salary guide proposal submitted June 28, 1993 (R-6). Pachman suggested that a meeting be scheduled during the third week of July in order to explore the Association's proposal at the negotiations table. He confirmed that although the Board recognized its obligation to negotiate, it would not allow the existence of an impasse "...to prevent it from instituting the benefit of its bargain on the overall agreement, nor to permit such impasse to force the existence of the 1991-92 guide into the 1993-94 school year" (R-6). On July 6, 1993, McCullough sent Dilzer a letter inviting the Association's negotiating team to meet with the Board's team in an effort to resolve the salary guide structure issue (R-7). McCullough suggested a meeting be scheduled during the week of July 12 or July 19, 1993. On July 19, 1993, Dilzer responded to McCullough's July 6 letter indicating that the scheduling of a negotiations meeting during the weeks of July 12 or July 19 were not feasible because of Association team members' vacations and other obligations (R-8). On July 22, 1993, McCullough responded to Dilzer advising him that if the Association could not commit by July 29, 1993, to schedule a negotiations session on or before August 9, the Board would meet on

August 3, to consider unilateral implementation of the collective agreement (R-9). On July 27, 1993, Dilzer sent McCullough a letter agreeing to schedule a negotiations session for August 9, 1993 (R-10).

20. On or about August 2, 1993, McCullough sent Dilzer a letter in preparation for the August 9, 1993 negotiations session (R-11). Attached to R-11 was another set of proposed salary guides (Proposal C) which, like Proposals A and B, added three steps to the guides, however shifted some additional money to the highest steps (R-11). Dilzer did not have the opportunity to review Proposal C in depth until the August 9 negotiations session (3T99). Upon review, the Association determined that the Board's salary guide philosophy as set forth in R-5 and CP-11 had remained unchanged, notwithstanding the limited changes in money distribution presented in Proposal C.

21. During the August 9, 1993 negotiations session, the parties' fundamental differences regarding salary guide structure continued. The Board sought to establish a salary guide containing at least fifteen steps in order to reduce the annual increment cost and more uniformly distribute the cost of maintaining the salary premium enjoyed by the staff at the top of the salary guide. The Board also sought to increase starting salaries, reduce "horizontal spread" by maintaining an emphasis on advanced degrees and reducing the emphasis on accumulating college credits which do not lead to a post-baccalaureate degree, increase salaries in the "middle of the

guide", move toward an equal dollar increment pattern and other objectives (R-11). The Association maintained its position opposing the addition of three steps to the salary guides and seeking a salary guide structure that would provide for no staff members to receive less increment money than they would have otherwise received under the increment structure of the 1991-1992 guides (3T60; 5T20; 5T37; R-13).

22. During the course of the August 9 negotiations session, Wenger, Dilzer, Merchant and Pachman met numerous times throughout the evening (3T101). The Association presented the Board with several salary guides (5T44). The Board suggested a "phantom" step (3T102; 4T163). The "phantom" step allowed for employees to go into the last year of the contract with a salary guide containing only two additional steps. During the course of the third year of the contract the third "phantom" step would be added to the salary guides so that the successor contract would include three additional steps in the salary guides; the third step only impacting upon the successor contract. The Association rejected the "phantom" step idea (3T102; 5T88-5T89). With the rejection of the "phantom" step, Wenger and Pachman recognized that they were not going to be able to construct a salary guide that was going to satisfy both sides (5T22). While discussions between representatives of the parties continued to take place, Wenger and Pachman removed themselves from the negotiations (5T23). No agreement was achieved that evening (3T101; 3T137; 5T22). By its last proposal that evening, the

Association expressed the willingness to add one step to the salary guides in 1992-1993 and a second step to the salary guides in 1993-1994. The Association was unwilling to agree to the addition of a third step to the salary guides in 1994-1995 as sought by the Board (CP-18). By the end of the August 9 meeting, either Pachman or Merchant told the Association that an agreement could not be reached (3T158; 5T90). The Association expressed the position that negotiations should continue (3T103; 3T158).

23. On August 12, 1993, the Board conducted a special meeting wherein it passed a resolution providing for the unilateral implementation of the Board's last offer to the Association, "...including all contract language as initialed by the parties and clarified by the fact-finder...and the salary guides for 1992-93 as agreed to on August 9, 1993, and its proposed salary guides for 1993-94 and 1994-95 as contained in its 'Proposal C' as presented to the Readington Education Association on August 2, 1993..." (CP-19). The parties continued to have informal discussions. While the Board provided the Association with certain materials and computer software which related to salary guide composition, they conducted no formal negotiations after the August 9, 1993 meeting (3T105; 5T91; 5T93-5T94). However, McCullough and Dilzer did engage in discussions over Labor Day weekend in an effort to try to resolve the guide structure issue (4T101; 5T93-5T94). Although the Board advised the Association that it was willing to continue to negotiate with respect to salary guide structure, the Association never

submitted additional salary guide proposals to the Board (4T101; 5T94). The Board told the Association that it moved to implement its salary guides because it did not want the 1991-1992 salary guide structure to continue into school year 1993-1994 as it had for school year 1992-1993 (3T136).

24. Wenger conceded that salary guides are usually constructed at the time the overall collective agreement is reached or shortly thereafter (5T35). Wenger noted that when the parties do not agree to the dollar increase quickly, it is, likewise, common for the parties to require a more lengthy period to achieve mutual agreement on guide structure. (5T35). Wenger noted that standard language contained in a fact-finder's report includes a direction to the parties to mutually develop and agree to a salary guide after the level of salary increase is agreed to by the parties (5T6).

25. Under the 1991-1992 salary guide structure, the cost of increments was 5.3% (5T56). The more typical increment cost in comparable school districts was about 2% to 3% (5T56-5T57). Thus, the cost of increments in Readington was considered on the higher side (2T26; CP-1). One of the Board's goals in proposing to restructure the salary guides was to bring the increment cost down (R-2).

## ANALYSIS

The facts established that the parties made little progress during the pre-mediation phase of bilateral negotiations. While mediation resulted in numerous agreements, the parties were unable to reach an overall successor agreement. Consequently, a relatively small number of items proceeded to fact-finding. The primary focus in the instant matter is on the time frame between the start of fact-finding and the implementation of the salary guides by the Board. The events which occurred during and after fact-finding constitute the crux of the dispute in this case and are what make this case somewhat different from other "unilateral implementation" cases. The parties do not argue that they had not reached an impasse in their negotiations at the time that they sought mediation. They mutually requested mediation which, since there remained unresolved issues, proceeded in the normal course to fact-finding. General Board proposals to modify the salary guides were provided to the fact-finder and the Association during the February 23, 1993, fact-finding hearing. While the Board did not present actual salary guides reflective of its position, the Association was on notice as to the scope of the changes in the salary guides sought by the Board as of the hearing date. Thornton, Wenger and the fact-finder concur that salary guides are normally constructed after an economic settlement has been reached. Accordingly, it would not be expected for the parties to have

engaged in detailed salary guide construction discussions before the level of salary increase was established. The salary increase was established approximately one week after the March 24th issuance of the fact-finder's report; the time when the parties adopted the fact-finder's salary recommendations. Moreover, by adopting the fact-finder's recommendation, the Association specifically agreed to embark on the task of mutually constructing a salary guide based on the adoption of the fact-finder's salary increase recommendations.

A public employer cannot normally alter terms and conditions of employment during collective negotiations with the majority representative. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), petit. for rehearing den. (App. Div. Dkt. No. A-8-75 1975), cert. den. 70 N.J. 150 (1976). But when the employer and representative exhaust dispute resolution procedures and a genuine impasse exists, the employer may act without committing an unfair practice. City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); Rutgers, the State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980); Redbank Bd. of Ed., P.E.R.C. No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp.2d 99 (¶81 App. Div 1981).

Permitting an employer to unilaterally implement terms and conditions of employment after a collective negotiations agreement expires is troublesome in the public sector because employees do not have the legal right to strike. In Jersey City, the Commission stated:

> ...even recognizing the significance of the absence of the statutory right of public employees to strike in terms of the relationship between the parties, we can not accept what we regard as the extreme position of requiring agreement between the parties before a public employer can implement its last best offer at the expiration of the existing agreement. Although we are not completely comfortable with this situation, we believe that it is an accurate reflection of the legislative intent and that any other interpretation would require amendatory legislation.5/ [3 NJPER at 124.]

Impasse has been defined as "...a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 53 LRRM 2298, 2305 (5th Cir. 1963). "Whether an impasse has been reached is a difficult judgment to make and must be tied to each specific situation." Rutgers, 6 NJPER at 181. The Commission sees impasse as "a hybrid, partly a factual determination and partly a conclusion of law." Id. It does not use "a mechanical counting of the number of bargaining sessions but will look to the totality of the negotiations history in all post-factfinding unilateral implementation matters." Id.

In Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967), aff'd 395 F.2d 622, 67 LRRM 3032 (D.C. Cir. 1968), the National Labor Relations Board stated:

---

5/ In 1977, the Legislature amended the Act, providing "terminal procedures", including binding arbitration, "for the settlement of impasse disputes" for public fire and police departments. N.J.S.A. 34:13A-16 et seq. This statutory provision is inapplicable in the instant matter.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. [64 LRRM at 1386.]

The Commission noted that it did not necessarily mean to imply that all of the factual considerations or elements which it has identified as indicia of the existence of an impasse must always be present before an employer can implement its last best offer. Jersey City, 3 NJPER at 124, fn. 8.

I first address the bargaining history. As stated above, the critical time frame in this case runs from February 23, 1993, the date when the fact-finder conducted the hearing until late summer, 1993. The Association contends that the Board never informed it of the Board's intentions to modify the salary guide structure, until the fact-finder's report issued on March 24, 1993. I agree that the Board never indicated to the Association what its intentions were regarding salary guide structure prior to the date of the fact-finding hearing. Board proposals regarding the elimination of one or more columns on the 1991-1992 salary guides and the removal of additional steps on the salary guides for special education teachers did not serve to advise the Association of the structural changes which it ultimately proposed. However, the Association was put on notice of the significant structural changes sought by the Board in the Board's presentation (R-2) to the

fact-finder. Indeed, this was recognized by the fact-finder who stated, "[i]t is not possible or appropriate for me now to make recommendations concerning the proposals by the Board for guide structure." Thus, contrary to the Associations argument, I find that when the Association agreed to accept the fact-finders recommendation, it was aware, or should have been aware, that the Board was seeking significant changes in the salary guide structure.

The parties agreed to have the Board draft the language elements of the agreement and have the Association construct a draft salary guide. The Association's proposed guides were delivered to the Board on or about April 7 or 8, 1993. After reviewing the exchanged documents, five items remained in disagreement; four "language" items and the salary guides. The Association did not receive a salary guide proposal from the Board until sometime just before or after Memorial Day. The Board required this much time to prepare Proposal A, the Board's first salary guide draft, because Board members McCullough and Merchant needed time to learn about salary guide construction, develop the necessary computer software, and review the data base needed to compile its proposal. Since neither McCullough nor Merchant was an experienced negotiator and neither had background in salary guide construction, I find that the time period needed to develop Proposal A was neither unreasonable nor done in bad faith. Further, the parties engaged in frequent informal discussions concerning salary guides during this time.

On June 7, 1993, the parties conducted their first formal post fact-finding negotiations session. The parties resolved all but two of their post fact-finding "language" disputes during the June 7 negotiations session. Thus, the parties made progress in resolving their disputes. Although the salary guides were addressed on June 7, the bulk of the session addressed the disputed "language" issues and the parties engaged in only limited negotiations regarding the salary guide dispute. The parties agreed to conduct another negotiations session on June 15, 1993.

During the June 15 session, the parties resolved the two remaining "language" items based on a letter sent to the parties by the fact-finder earlier that day clarifying his recommendations on those items. With the prompt disposal of the "language" issues, the balance of the meeting which went on into the early morning hours focused on salary guide composition. During the June 15 session, the Board presented the Association with its second set of salary guides, Proposal B. Like Proposal A, Proposal B added three steps to the salary guides over the three year term of the collective agreement. However, in response to one of the Association's objections to Proposal A, the Board placed additional money at the top of the salary guide in Proposal B.

Nonetheless, the parties could not jointly reach an agreement on the salary guide structure by 9:00 p.m. on June 15, 1993. Consequently, pursuant to a prior arrangement, the fact-finder arrived at the session at about 11:00 p.m.

Notwithstanding the fact-finder's personal assistance, the second post-factfinding negotiations session did not resolve the parties' dispute regarding guide structure.

The negotiations history demonstrates that the parties conducted three post-factfinding negotiations sessions during which both sides modified their respective positions. Early into the second session, all of the "language" items had been resolved and the only issue remaining was the salary guides. Nearly the entire second session and all of the third session was devoted to the salary guide issue. During both the second and third sessions, the Board offered salary guide proposals which moved additional money to the top of the guides as sought by the Association. Nevertheless, the parties firmly remained committed to their respective positions, the Board seeking three additional steps on the guide and the Association agreeing to only two. By the end of the August 9, 1993, negotiations session, the Board's labor attorney and the representative assigned by the NJEA to assist the Association with salary guide construction, recognized the futility of further efforts to construct a mutually agreeable guides in light of the parties' firm positions. The parties were at impasse.

The Association's own conduct hindered a negotiated resolution of this matter. Pachman's June 30, 1993 letter advised the Association that the Board would not allow the existence of an impasse to result in the 1991-1992 guide structure to continue into the 1993-1994 school year, and he suggested further negotiations be

scheduled during the third week of July. In a subsequent letter, McCullough offered to conduct negotiations either during the second or third week of July. While I do not suggest that there was any bad faith in the Association's inability to meet during the month of July, the fact is that the Association did not make itself available for such negotiations sessions. Moreover, the parties were now into the second year of the three year term of the collective agreement. See, Redbank.

The Board had a right to seek the modification of the salary guide structure after the fact-finder issued his recommendation. The fact-finder recommended that the parties mutually construct their salary guides in accordance with the elements contained in his recommendation. By specifically agreeing to the fact-finder's recommendation, the Association, which was on notice from the Board's submission (R-2) to the fact-finder that it sought to significantly change the guides, also agreed to participate in salary guide construction negotiations. Thornton, Wenger and the fact-finder recognized that salary guides are normally constructed after the settlement is reached. In this case, the settlement was reached when the parties adopted the fact-finder's recommendation.

Another element mentioned in Taft Broadcasting, relates to the number of negotiations sessions conducted. The Association argues that the number of negotiations sessions were insufficient to establish the existence of impasse. In Rutgers, the Commission

indicated that it does not use a mechanical counting of the number of negotiations sessions in determining the existence of impasse, but rather looks to the totality of the negotiations history. I find that the post-factfinding negotiations history demonstrated that impasse existed. The parties addressed the salary guide issue during each of the three post-factfinding negotiations sessions conducted. Moreover, there was significant informal discussion which took place among the parties' representatives concerning guide structure. While the June 7 negotiations session only minimally addressed the salary guide issue, the June 15 and August 9 sessions dealt with the issue at length. Although the parties disagreed regarding the role which the fact-finder was supposed to play on June 15, the session was nearly entirely devoted to the salary guide issue and involved the fact-finder's personal assistance in an attempt to resolve it. The Board was prepared to conduct additional negotiations sessions during the month of July which the Association was unable to accommodate.

It was clear to the parties at the conclusion of the August 9 negotiations session that the issue would not be resolved at that time. Moreover, the Board advised the Association that it was prepared to continue to negotiate, post-implementation, and provided the Association with the materials it used to prepare its proposals. Yet, the Association neither sought additional negotiations sessions nor proferred alternative salary guide proposals to the Board. Finally, it is important to note that at

the time of implementation, the parties were in their second year of a collective agreement which anticipated a three year term, and the second school year was about to begin. Had the parties continued with additional negotiations sessions which went into the second school year, the Board would have been required, absent the Association's agreement, and such agreement had been denied by the Association during the first school year, to pay the increment on the basis of the 1991-1992 increment cost pattern. Thus, with the Board having informed the Association in June that it did not intend to allow the 1991-1992 increment structure to continue into 1993-1994, and the start of the 1993-1994 school year a mere two or three weeks away, I find the existence of an impasse to be sharply apparent, and the Board's unilateral implementation to have been undertaken in good faith.

Another element which must be considered is the degree of the employer's purported need for the terms it had unilaterally implemented. In effect, the Association has argued that an employer should not be permitted to unilaterally implement its last offer without a compelling need for such action at that time. The Commission has found this argument to have some merit. Redbank, 6 NJPER at 366, fn. 5. The Association asserts that the Board had the money to fund the overall salary increase. Also, the Association made compromises in its proposed salary guides which would have allowed the Board to attain many, although not all, of its goals. While it is true that the Association had made compromises in its

positions throughout the process, it is also true, as the Association asserts, that the Association maintained positions which did not result in overall agreement. The Association is not required to modify its positions in order to accommodate all of the Board's demands. However, the focus of this decision is on the Board's actions, not the Association's. As noted above, the Board's compelling reason to unilaterally implement its last offer was that the parties were already in the second year of a proposed collective agreement covering a three year term, and the second school year was to begin in two or three weeks from the date of the implementation. Absent the Association's agreement to withhold the increment, which the Association refused to agree to for the 1992-93 school year, or absent the Board's decision to implement its proposed guides, the Board would have been forced to apply the 1991-1992 salary guide configuration, along with its higher increment cost, to school year 1993-1994. I find that the timing of the Board's unilateral implementation, a few weeks prior to the start of the school year, constituted a "compelling reason" for the employer's unilateral action at that time.

The post-factfinding negotiations history, set forth in detail above, establishes that the Board engaged in good faith negotiations. In State of New Jersey, Ed. No. 79, 1 NJPER 39, 40 (1975), adopted P.E.R.C. No. 76-8, 1 NJPER 72 (1975), aff'd 141 N.J. Super. 470 (1976), the executive director stated the following:

> Good faith collective negotiations do not require one party to adopt the position of the other;

> they only require a willingness to negotiate the issue with an open mind and a desire to reach an agreement. The fact that the two parties approach negotiations with different priorities does not mean that either side is not negotiating in good faith.

During the course of post-factfinding negotiations, the parties resolved all outstanding issues except for salary guide structure. Throughout the post-factfinding negotiations process, both parties compromised aspects of their initial positions. The Association's proposed salary guides added steps and moved money into the starting salary level. Each of the three Board guide proposals added dollars to the top of the guides as an accommodation to the Association's position. The Board proposed the "phantom" step. Neither party compromised to the point where an overall agreement was reached.

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position...is not necessarily a failure to negotiate in good faith. [Id. at 40.]

I find that both parties engaged in "hard bargaining." Nevertheless, the Board continued to recognize its ongoing obligation to meet and negotiate with the Association regarding salary guide structure. In that regard, the Board gave the Association computer software, and other materials, and, in a last ditch effort, the parties' representatives engaged in discussions during Labor Day weekend to try to resolve the salary guide issue before the start of the 1993-1994 school year.

The Association points out that the Board voted to unilaterally implement the collective agreement on August 12, 1993, merely three days after the August 9, 1993, negotiations session. The Association cites Bayonne City Board of Education, H.E. No. 90-32, 16 NJPER 84 (¶21034 1990), adopted P.E.R.C. No. 91-3, 16 NJPER 433, (¶21184 1990), to stand for the proposition that a three day notice period from the last negotiations session to the unilateral implementation demonstrates the Board's bad faith. In Bayonne, the Board advised the Bayonne Teachers Association of its intention to implement its last offer three weeks in advance. Here, the Association asserts in its brief that the Board was "chomping at the bit" to implement its salary guide and never had a real desire to reach an agreement. However, in Rutgers, a case in which only two post-factfinding negotiations sessions were conducted until an impasse was declared, only two days elapsed between the last post-factfinding negotiations session and Rutgers' unilateral implementation of its last offer. Rutgers, 6 NJPER at 181. In Rutgers, the Commission found that an impasse existed, notwithstanding only two post fact-finding negotiations sessions. The Commission also noted the concessions made by Rutgers on other issues to hold that it engaged in good faith negotiations. Looking at the totality of the negotiations history, the Commission found that Rutgers did not commit an unfair practice. Id. Likewise, in light of the totality of the negotiations history here, I find three days notice prior to implementation was adequate, and that the Board

engaged in good faith post-factfinding negotiations. Consequently, I find that the Board did not violate N.J.S.A. 34:13A-5.4(a)(5) or, derivatively, (1).

Regarding the Association's section 5.4(a)(2) allegation, the Commission, in North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980), set forth the standard constituting a violation of subsection (a)(2) as a "...pervasive employer control or manipulation of the employee organization itself...." I find that the evidence has not met that standard, thus, the Board has not violated subsection (a)(2) of the Act.

In re Township of Bridgewater, 95 N.J. 235 (1984) establishes the standards for determining whether an employer has discriminated against an employee in order to discourage protected activity. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record

demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve. I find that the Association has failed to introduce evidence that anti-union animus was a motivating or substantial factor for the Board asserting its salary guide structure position during the negotiations. Consequently, I find no violation of subsection (a)(3) of the Act.

Accordingly, on the basis of the entire record and the analysis set forth above, I make the following:

## CONCLUSIONS OF LAW

The Readington Township Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), or (5) by unilaterally implementing the terms of the collective agreement including the Board's proposed salary guides (Proposal C) at the conclusion of the post fact-finding dispute resolution process.

## RECOMMENDATION

I recommend that the Commission **ORDER** that the complaint be dismissed.

Respectfully submitted,

Stuart Reichman
Hearing Examiner

DATED: January 27, 1995
Trenton, New Jersey