

P.E.R.C. NO. 85-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAYWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-87-89

MAYWOOD ADMINISTRATORS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Maywood Board of Education violated the New Jersey Employer-Employee Relations Act when it refused to negotiate with the Maywood Administrators Association over compensation for the work an elementary school principal was required to do as Basic Skills Coordinator, despite having paid a stipend for that position in the past.

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MAYWOOD ADMINISTRATORS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gladstone, Hart & Rathe, Esqs.
(James R. Freeswick, of Counsel)

For the Charging Party, Robert M. Schwartz, Esq.

DECISION AND ORDER

On September 29, 1983, the Maywood Administrators Association ("Association") filed an unfair practice charge against the Maywood Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4 (a) (1), (3), and (5),^{1/} when it refused to negotiate over compensation for the work an elementary school principal, A. Patrick Ferro, was required to do as Basic Skills Coordinator.

^{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."

On February 8, 1984, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to the alleged violations of subsections 5.4(a)(1) and (5), but declined to issue a Complaint with respect to the alleged violation of subsection 5.4(a)(3). The Board then filed an Answer admitting that it assigned Ferro to the additional position of Basic Skills Coordinator and refused to pay him additional compensation for this position. It denied the Complaint's remaining allegations and further averred that the burden the new position imposed upon Ferro was offset by the reduction in his old duties caused by declining enrollment.

On March 8, 1984, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and introduced exhibits. At the close of the Association's case, the Board moved to dismiss the Complaint. The Hearing Examiner denied the motion. The parties filed post-hearing briefs by May 23, 1984.

On July 26, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-6, 10 NJPER ____ (¶ ____ 1984). He found that the Board violated subsections 5.4(a)(5) and, derivatively, (a)(1) by refusing to negotiate with the Association concerning compensation for the position of Basic Skills Coordinator. He ordered the Board to pay the \$1500 stipend Ferro's predecessor as Basic Skills Coordinator received.

On August 3, 1984, the Board filed exceptions. The Board contends that the Hearing Examiner erred in: (1) finding

that the Commission had jurisdiction over this matter; (2) not finding that the dispute should have been handled through the negotiated grievance procedure; (3) concluding that the dispute concerned a negotiable subject; (4) concluding that the Board was required to negotiate with respect to Ferro's compensation for serving as Basic Skills Coordinator irrespective of whether his workload increased; or his functions were different from those his predecessor performed; (5) finding that past practice did not permit assignment of the Basic Skills Coordinator position to Ferro without compensation; (6) finding that past practice required payment of a stipend to the Basic Skills Coordinator; (7) finding that Ferro's workload increased; (8) finding that any workload increase was insignificant; (9) finding that Ferro lost some vacation days as a result of his new responsibilities; and (10) recommending as a remedy the payment of a \$1500 stipend for the 1983-84 school year plus 12% interest.^{2/}

On August 15, 1984, the Association filed a response disputing the Board's exceptions. It urged adoption of the Hearing Examiner's recommendations.

On August 29, 1984, the Board requested special leave to file a reply brief. We grant this request.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-6) are accurate with the modifications

^{2/} The Board has also requested oral argument and the reopening of the record to introduce a collective negotiations agreement entered into subsequent to the hearing. We deny both requests.

and additions set forth in the footnote below.^{3/} We adopt and incorporate them here.

As a threshold matter, we consider the Board's contentions that the Commission lacked jurisdiction over this dispute under In re State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER ____ (¶ ____ 1984) and that the dispute should have been deferred to the parties' grievance procedures. We disagree. This case involves a claimed repudiation of an established term and condition of employment rather than a mere breach of contract claim and the Board has raised a scope of negotiations defense. Accordingly, we clearly have jurisdiction over this case. See In re City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER ____ (¶ ____ 1984); In re Maywood Bd. of Ed., P.E.R.C. No. 85-36, 10 NJPER ____ (¶ ____ 1984) ("Maywood"); In re Liberty Twp. Bd. of Ed., P.E.R.C. No. 85-37, 10 NJPER ____ (¶ ____ 1984) ("Liberty"). Deferral is inappropriate because the parties' grievance procedures do not end in binding arbitration and the Board has raised a scope of negotiations defense. Maywood; Liberty.

^{3/} We modify finding of fact no. 6 to reflect that while Ferro may have been unable to take the vacation days he anticipated during August because of his new responsibilities, the Board did not prevent him from taking these vacation days during the remainder of the school year. We specifically adopt finding of fact no. 8 that Ferro's average workweek in 1983-84 increased by approximately one and one-half hours over his average workweek in 1982-83 and reject the superintendent's contrary estimate. Additionally, we find that principal John Buffington served as Director of the Pre-School Program for the 1982-83 and 1983-84 school years without a stipend. Finally we add that there is no dispute that the position of Basic Skills Coordinator is within the Association's unit.

We next consider the Board's contention that it had a managerial prerogative to assign Ferro the responsibilities of Basic Skills Coordinator without negotiating over compensation for these responsibilities. We disagree. The Commission and the New Jersey courts have consistently held that school boards do not have a managerial prerogative to refuse to negotiate over appropriate compensation for newly assigned positions and duties. Bd. of Ed. of the Woodstown-Pilesgrove Sch. Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Bd. of Ed. of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973); Burlington Cty Coll. Faculty Ass'n v. Bd. of Trustees, Burlington Cty College, 64 N.J. 10 (1973); Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980) ("Ramapo"); In re Mount Laurel Bd. of Ed., P.E.R.C. No. 83-8, 8 NJPER 435 (¶13204 1983); In re Oakland Bd. of Ed., P.E.R.C. No. 82-125, 8 NJPER 378 (¶13173 1982); Maywood; and Liberty.

Given the general obligation of public employers to negotiate over compensation when appointing employees to new positions and duties, we next consider whether, under the circumstances of this case, the Board had a right under the contract or through established past practice to insist unilaterally that Ferro serve as Basic Skills Coordinator without compensation. In re Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12180 1981), mot. for recon. den. P.E.R.C. No. 81-134, 7 NJPER 336 (¶12150 1981). We agree with the Hearing Examiner, for the reasons stated in his report (pp. 8-9), that the parties' past practice was in fact to pay a stipend to the Basic Skills

Coordinator and that the Board did not have a right under the contract or through established past practice to refuse to negotiate over compensation for that position.^{4/} The Board therefore violated its duty to negotiate when it refused to negotiate over compensation for the position of Basic Skills Coordinator and unilaterally altered the past practice of paying a stipend.

Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 (1978); In re Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983); In re New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. No. A-2450-77 (April 2, 1977).

We next consider the Board's contention that a change in some of the duties of the Basic Skills Coordinator -- in particular the elimination of six meetings between the Coordinator and the Parent Advisory Council -- and a reduction in Ferro's other duties as principal -- in particular a decrease in supervisory duties following an enrollment decline and the partial elimination of his duties as Director of the Minimum Basic Skills Testing program^{5/} -- negated any obligation to negotiate over compensation for his new assignment as Basic Skills Coordinator. We agree with the Hearing Examiner (p. 9) that these facts do not

^{4/} The Board's reliance on the past practice with respect to the position of Director of the Pre-School Program is misplaced; the specific practice with respect to the position of Basic Skills Coordinator controls. We further note that Ferro's predecessor as Basic Skills Coordinator signed the 1981-83 collective negotiations agreement on behalf of the Association; this fact strengthens the implication that the Association had accepted the stipendiary arrangement between the Board and the predecessor for his services as Basic Skills Coordinator.

^{5/} Ferro remained responsible for basic skills testing within his own building.

eliminate the requirement for negotiations over compensation for the new assignment. Instead, they are relevant to the amount of compensation, if any, to be negotiated for the new assignment. Ramapo; In re Franklin Bd. of Ed., P.E.R.C. No. 81-126, 7 NJPER 248 (¶12112 1981). Here, the Board, in negotiating over appropriate compensation for the new assignment, might have taken the negotiations position that, because of the differences between Ferro's overall duties and his predecessor's overall duties, a \$1500 stipend was no longer appropriate or, perhaps, that no stipend was appropriate. The Association would then have had a chance to present its position concerning the amount of money Ferro should have received for his unit work as Basic Skills Coordinator, and an agreement acceptable to all concerned might have been reached through the negotiations process. Instead, the Board unilaterally imposed upon Ferro its conception of what the appropriate amount of compensation should be. This practice was unfair and violated the Board's negotiations obligation under subsection 5.4(a)(5) and, derivatively, its obligation under subsection 5.4(a)(1) not to interfere with its employees' right to the Association's representation concerning such matters as compensation. In re East Brunswick Bd. of Ed., P.E.R.C. No. 82-76, 8 NJPER 124 (¶13053 1982).^{5/}

^{5/} We agree with the Hearing Examiner that this violation cannot be considered trivial. There is a well-established obligation to negotiate over compensation when requiring an employee to serve in a new position. Ramapo. In addition, and alternatively, we agree with the Hearing Examiner that there was a substantial overall increase in Ferro's workload.

We finally consider the appropriate remedy. We agree with the Hearing Examiner's discussion (p. 11) of this issue. Given the Board's complete refusal to negotiate over compensation for the position of Basic Skills Coordinator, Ferro is entitled to receive the established stipend for that position for the 1983-84 school year. The amount of Ferro's compensation for the 1984-85 school year should be resolved through the negotiations process.

ORDER

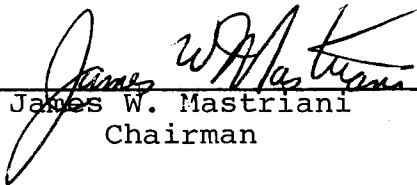
The Maywood Board of Education is ordered to:

- A. Cease and desist from:
 1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, and
 2. Refusing to negotiate in good faith with the Maywood Administrators Association concerning the compensation appropriate for the position of Basic Skills Coordinator.
- B. Take the following affirmative action:
 1. Pay A. Patrick Ferro \$1500.00 together with 12% interest per annum for serving as Basic Skills Coordinator during the 1983-84 academic year;
 2. Negotiate with the Maywood Administrators Association with respect to the compensation appropriate for serving as Basic Skills Coordinator during the academic year 1984-85;
 3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained for a period of at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
November 1, 1984
ISSUED: November 2, 1984

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 employees in the exercise of the rights guaranteed to them by the Act.

WE WILL NOT refuse to negotiate in good faith with the Maywood Administrators Association concerning the compensation appropriate for the position of Basic Skills Coordinator.

WE WILL pay A. Patrick Ferro \$1500.00 together with 12% interest per annum for serving as Basic Skills Coordinator during the 1983-84 academic year.

WE WILL negotiate with the Maywood Administrators Association with respect to the compensation appropriate for serving as Basic Skills Coordinator during the academic year 1984-85.

MAYWOOD 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.

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

In the Matter of

MAYWOOD BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-84-87-89

MAYWOOD ADMINISTRATORS ASSOCIATION,

Charging Party.

Synopsis

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Maywood Board of Education violated N.J.S.A. 34:13A-5.4(a)(5) by refusing to negotiate with the Maywood Administrators Association concerning additional compensation for A. Patrick Ferro in 1983-84. The Hearing Examiner finds that the Board assigned a previously stipendiary and extracurricular responsibility to Ferro in addition to his full-time responsibilities and failed to compensate him. The Hearing Examiner recommends that the Maywood Board of Education be required to reimburse Ferro in the amount of the previously established stipend for the extracurricular position, together with interest, and that the parties negotiate prospectively concerning compensation.

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.

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Appearances:

For the Respondent
Gladstone, Hart & Rathe, Esquires
(James R. Freeswick, of counsel)

For the Charging Party
Robert M. Schwartz, Esquire

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On September 29, 1983, the Maywood Administrators Association ("Charging Party" or "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Maywood Board of Education ("Respondent" or "District" or "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by refusing to pay a unit member a stipend for completing the functions of Basic Skills Coordinator, allegedly in violation of N.J.S.A. 34:13A-5.4(a) (1), (3) and (5). ^{1/}

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 (Continued)

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 8, 1984 with respect to the alleged violation of N.J.S.A. 34:13A-5.4(a)(1) and (5), but not as to the alleged violation of subsection (a)(3). Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 8, 1984 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 May 23, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission's designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

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

2. The Maywood Administrators Association is a public employee representative within the meaning of the Act, as amended,

1/ (Continued) 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.

and is subject to its provisions.

3. The Board and the Association are parties to a collective negotiations agreement covering the period July 1, 1981 to June 30, 1983 (Exhibit J-1). This agreement is the last collective agreement reached between the parties.

4. The charge directly concerns Mr. A. Patrick Ferro, an elementary school principal employed by the Board and represented by the Association. During the 1982-83 school year, Ferro was compensated at the rate specified in the collective agreement, and received no additional stipend for his responsibilities as District Director of the Minimum Basic Skills Testing Program.

5. On August 10, 1983, District Superintendent Dr. Francis Moran assigned Ferro to the position of District Basic Skills Coordinator for the 1983-84 academic year (Exhibit R-1). Ferro immediately began working on his new responsibilities, while filing a timely grievance concerning the lack of remuneration for the additional duties (Exhibits R-3). The grievance was ultimately denied by the Board (Exhibit R-4).

6. Ferro's first responsibility as Basic Skills Coordinator was to complete the District's application for state and federal funds for the Basic Skills Improvement Program, a remedial reading and mathematics program. To be timely, the report had to be completed during the month of August. Ferro testified that it took him one week of working exclusively on the report to complete this sixteen page document. Ferro further testified that, because of the time expended to complete the report, he was unable to take planned vacation

days during August. Given contractual and District limitations on the use of vacation days, Ferro estimated that he will forfeit two or three vacation days in 1983-84 because of the other work required in August (T at pp. 22-25, 34; Exhibits CP-1, J-1).

7. In addition to his responsibility to complete the funding request (Exhibit CP-1), Ferro had the following responsibilities during the academic year in his capacity as Basic Skills Coordinator:

- a. pretesting program participants.
- b. arranging schedules for participating students and teachers.
- c. communicating with parents.
- d. providing teaching materials to teachers.
- e. observing program teachers.
- f. handling pay vouchers for program teachers.
- g. monitoring program to assure realization of program goals.
- h. issuing final program report (T at pp. 26-27).

In total, Ferro estimated that he spends two to three hours a week performing his Basic Skills Coordinator functions (T at pp. 26-31).

8. Ferro estimated that his average work week in 1983-84 increased by at least one and one-half hours over his average work week in 1982-83. In making this calculation, Ferro juxtaposed his 1983-84 responsibilities, including the Basic Skills Coordinator functions, with his overall responsibilities in 1982-83. In 1983-84, Ferro was not responsible for the District's Minimum Basic Skills Testing Program which he directed in 1982-83, although he was still responsible for basic skills testing within his own building. Ferro estimated that his school had twenty fewer students in 1983-84 than in the previous year, and one or two fewer teachers. Ferro was responsible for a minimum of one observation and observation report per teacher in 1982-83, and a minimum of two observations and reports

per teacher in 1983-84 (T at pp. 27-32). Ferro testified that he works some evenings and most lunch periods to fulfill his overall responsibilities (T at pp. 55-56, 61).

9. District Superintendent Moran testified to substantially similar distinctions between Ferro's 1982-83 and 1983-84 responsibilities. Moran testified that Ferro's school had approximately forty-five fewer students in 1983-84 than in the previous year (T at p. 70), and that Ferro would conduct at least forty to forty-five teacher observations in 1983-84, as compared to thirty to thirty-five such observations in 1982-83 (T at p. 96). Moran estimated that Ferro's overall workload in 1983-84 was the same as in the previous year (T at p. 79). Moran based this estimate on periodic observations of and meetings with Ferro, but allowed that he does not know what Ferro does at all times before, during and after the school day (T at pp. 90-91, 103). Moran further testified that "...there's no such thing as free time for a principal." (T at p. 91), and that over many years, he has known Ferro to habitually work before and beyond the regular school day (T at pp. 80-81).

10. The parties stipulated that in the 1980-81, 1981-82 and 1982-83 academic years, the Basic Skills Coordinator position was held by Ferro's fellow unit member and principal, Bruce DeLeyon, at a stipend of \$1,500 per year which was paid to DeLeyon in addition to his base salary. The parties further stipulated that as Basic Skills Coordinator, DeLeyon met with a Parent Advisory Council six times a year, while Basic Skills Coordinator Ferro did not have this particular responsibility in 1983-84 (T at pp. 6-9). The collective

agreement between the parties covering the period of July 1, 1981 to June 30, 1983 references neither the Basic Skills Coordinator position nor a stipend therefor.

ANALYSIS

To prove its allegation that the Board failed to negotiate in good faith in the context presented, the Charging Party must demonstrate that the Board effected a unilateral change in a negotiable subject, and that neither statute nor waiver by the Charging Party permits unilateral action by the Board. Woodstown-Pilesgrove Board of Education v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980); Piscataway Township Board of Education v. Piscataway Township Principals Association, 164 NJ Super 98 (App. Div. 1978); and State of New Jersey v. State Supervisory Employees Association, 78 N.J. 54 (1978).

The Board argues that its unilateral assignment of Ferro to the Basic Skills Coordinator position without additional compensation was not an unfair practice, but rather was a valid exercise of its managerial prerogative. The Association concedes that the Board could unilaterally assign the Coordinator responsibilities to Ferro, but maintains that the Board committed an unfair practice by refusing to pay the established stipend for the Basic Skills position.

It is well settled that a public employer exercises a managerial prerogative when it unilaterally assigns extra-curricular functions to personnel, but that resultant increases in employee workload compel mandatory negotiations regarding compensation. Thus in Rockaway Board of Education, P.E.R.C. No. 84-8, 9 NJPER 534 (¶14219 1983),

the employer exercised a managerial prerogative when it assigned teachers to supervise evening concerts at a school, but compensation for the performance of the assignments was held mandatorily negotiable. Similarly, in Northvale Teachers Association v. Northvale Board of Education, P.E.R.C. No. 80-79, 6 NJPER 13 (¶11007 1980), aff'd App. Div. Docket No. A-1590-79 (January 19, 1981), the Court restrained arbitration of an employer's decision to assign certain teachers to extra-curricular coaching duties, but noted the negotiability of resultant compensation issues when properly presented. Compare Woodstown-Pilesgrove, supra, and Ramapo-Indian Hills Education Association v. Ramapo-Indian Hills Regional High School District Board of Education, 176 NJ Super 35 (1980), where unilateral increases in non-extra-curricular workload required negotiations concerning compensation. In all of these cases, educational statutes empowering boards of administration to make assignments and effect educational policies did not preclude negotiations over related compensation issues.

At the same time, express contractual language or past practice may dictate that assignments which increase workload are to be performed without additional compensation. Thus, in Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (¶12180 1981), mot. for recon. den., P.E.R.C. No. 81-134, 7 NJPER 336 (¶12150 1981), dismissed as moot, App. Div. Docket No. A-4991-80 (April 29, 1982), an employer who refused to negotiate compensation over an extra-curricular assignment did not commit an unfair practice when it acted in a manner consistent with past negotiations which did not lead to compensation for extra-curricular work. Similarly, in Manchester Regional

Education Association v. Manchester Regional High School District Board of Education, P.E.R.C. No. 80-136, 6 NJPER 245 (¶11119 1980), aff'd as mod., App. Div. Docket No. A-3808-79 (March 23, 1981), the employer was not ordered to negotiate compensation for assignment of chaperone duties to teachers where past practice may have permitted such assignments without compensation.

In the instant matter, there is clearly no past practice which would permit the Board to assign the Basic Skills Coordinator position to Ferro without negotiating compensation. To the contrary, the record clearly indicates a past practice of the Board's payment of \$1,500 per school year for the Basic Skills Coordinator position previously held by DeLeyon. ^{2/}

The Board further argues, in effect, that any past practice is vitiated by the changes in circumstances between academic years. Citing a decrease in Ferro's student and teacher complements, as well as the removal of a parent conference component of the Basic Skills Coordinator position, the Board argues that Ferro should not be compensated for performing the Basic Skills Coordinator duties. In support of this contention, Superintendent Moran testified of his belief that Ferro's workload had not increased between 1982-83 and 1983-84 even

^{2/} In this regard, the Board argues that because the Basic Skills Coordinator position and stipend are not referenced in the collective agreement, the stipend was strictly a matter between the Board and DeLeyon, and not the result of negotiations between the Board and the Association (T at p. 15). While the lack of negotiations over the stipend precludes a Barrington-type defense by the Board, it does not negate the existence of a past practice. The record clearly reveals evidence which rises to the level of a controlling past practice, recently defined by the Commission as a practice "...which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." [citation deleted]. Borough of Somerville, P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984).

with the addition of the Basic Skills Coordinator duties.

Given that Ferro testified credibly that his workload has increased, and that the increase was not de minimis, ^{3/} the undersigned is not persuaded by the Board's argument. Assuming, arguendo, that Ferro's workload did not increase (or increased only marginally) between 1982-83 and 1983-84 in spite of his additional Basic Skills Coordinator responsibilities, this would not eliminate the requirement for negotiations over compensation for the stipendiary position. Instead, such facts are relevant to the amount of compensation, if any, to be negotiated for the historically extra-curricular assignment. Franklin Board of Education, P.E.R.C. No. 81-126, 7 NJPER 248 (¶12112 1981). Moreover, if the Board has, in effect, created a new position for Ferro which includes a previously stipendiary and extra-curricular activity, the Board must negotiate over compensation for the new position. Ramapo, supra.

The Board also raises a contractual waiver defense when it argues that its denial of Ferro's related grievance is, by the terms of the parties' collective agreement, final and binding, and that the Association waived any rights to pursue the matter further when it failed to submit the dispute to advisory arbitration as allowed by the collective agreement. Thus, the Board argues, the charge actually concerns contractual proceedings wherein the Board has already prevailed.

The Commission has recently considered similar arguments in State of New Jersey, Department of Human Services and C.W.A.,

^{3/} See, e.g. Caldwell-West Caldwell Education Association v. Caldwell-West Caldwell Board of Education, 180 NJ Super 440, 447-8 (1981), where a fifteen minute per day change, under circumstances presented, did not constitute an unfair practice. By comparison, the instant facts hardly present a de minimis situation; Ferro testified credibly that he performs Basic Skills Coordinator responsibilities during most lunch hours and after the working day, and that he would lose two or three vacation days because he completed his Basic Skills responsibilities in August 1983.

P.E.R.C. No. 84-148, 10 NJPER _____ (¶ _____ 1984), where the public employer argued that an unfair practice allegation was actually an allegation of breach of contract, and that the parties should be required to utilize their contractual procedures. The Commission concluded that:

...allegations setting forth at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction. An employer which negotiates terms and conditions of employment as set forth in a collective negotiations agreement, which agrees to specific grievance procedures for the resolution of contractual disputes, and which is willing to abide by those negotiated procedures, does not "refuse to negotiate in good faith" simply because its interpretation of an unclear contract clause may ultimately prove to be mistaken.

This holding does not mean, however, that a breach of contract is never evidence of an unfair practice or that we do not have the power to interpret collective negotiations agreements.... To determine whether a charge is predominantly related to subsection 5.4(a)(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate any obligations and policies arising under our Act, it is necessary to look closely at the nature of the charge and all the attendant circumstances. (Slip op. at pp. 14-15; footnotes omitted)

The Commission then reviewed a variety of circumstances which may arise, and concluded, inter alia, that "[a] specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5)." [Citations and footnote omitted].

In view of the above language, it is clear that the Commission's jurisdiction is appropriate. While the record reveals that the Associa-

Association invoked the contractual grievance procedure, the nature of the charge is not merely a dispute over the meaning of contractual language. Instead, the gravamen of the charge is a claim that the employer has repudiated an established practice; as such, the charge clearly calls within the exceptions to Human Services, supra, noted by the Commission.

Based on the above, the undersigned concludes that the Board has violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, subsection (a)(1), of the Act, by refusing to negotiate with the Association concerning additional compensation for A. Patrick Ferro when the Board assigned a previously stipendiary and extra-curricular responsibility to Ferro in addition to his full-time responsibilities.

REMEDY

Were the position of Basic Skills Coordinator newly created within Maywood, the appropriate remedy would be to order the Board, upon demand by the Association, to negotiate compensation for the extra-curricular function. However, since the parties have established, by past practice, a stipend for the position of \$1,500 per annum, Ferro is entitled to benefit from the past practice for the academic year in question, 1983-84, in the absence of negotiations which may have decreased or increased the amount. While Ferro's responsibilities as Basic Skills Coordinator did not include the Parent Advisory Council function previously performed by DeLeyon, the undersigned cannot conclude that any reduction in stipend should be effected. Indeed, any such reduction is an appropriate topic for negotiations. Prospectively, the parties should negotiate in good faith.

RECOMMENDED ORDER

The undersigned recommends that the Commission ORDER:

A. That the Maywood Board of Education cease and desist from:

Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, and refusing to negotiate in good faith with a majority representative of employees concerning terms and conditions of employment, particularly, by failing and refusing to negotiate with the Maywood Administrators Association concerning compensation for A. Patrick Ferro for performing additional and previously stipendiary duties which significantly affected his workload.

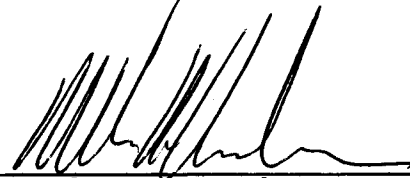
B. That the Maywood Board of Education take the following affirmative action:

1. Reimburse A. Patrick Ferro \$1,500.00 together with 12% interest per annum for completion of the Basic Skills Coordinator functions during the academic year 1983-84.

2. Negotiate prospectively concerning compensation for A. Patrick Ferro or any other employee represented by the Maywood Administrators Association who may be assigned the responsibilities of the Basic Skills Coordinator.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be taken by the Respondent Board to insure that such notices are not altered, defaced or covered by other materials.

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



Mark A. Rosenbaum
Hearing Examiner

DATED: July 26, 1984
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, nor refuse to negotiate in good faith with a majority representative of employees concerning terms and conditions of employment, particularly, by failing and refusing to negotiate with the Maywood Administrators Association concerning compensation for A. Patrick Ferro for performing additional and previously stipendiary duties which significantly affected his workload.

WE WILL reimburse A. Patrick Ferro \$1,500.00 together with 12% interest per annum for completion of the Basic Skills Coordinator functions during the academic year 1983-84.

WE WILL negotiate prospectively concerning compensation for A. Patrick Ferro or any other employee represented by the Maywood Administrators Association who may be assigned the responsibilities of the Basic Skills Coordinator.

MAYWOOD 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 Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.