P.E.R.C. NO. 95-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-320

ATLANTIC CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Atlantic City Education Association against the Atlantic City Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by unilaterally imposing new procedures for assigning teachers to a new high school. The Commission finds that the Board unilaterally established new application requirements for teachers seeking to transfer to the new high school. The Commission views the disputed requirements as substantive not procedural, and that any negotiated agreement to restrict the Board's ability to assess teacher qualifications for a transfer would significantly interfere with the Board's educational policy determinations. Whether notice provisions of the collective negotiations agreement were violated must be resolved pursuant to the negotiated grievance procedure.

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.

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ATLANTIC CITY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, George G. Frino, P.A., attorney

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Edward H. O'Hare, of counsel)

DECISION AND ORDER

On May 2, 1994, the Atlantic City Education Association filed an unfair practice charge against the Atlantic City Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by unilaterally imposing new procedures for assigning teachers to a new high school. The Board required teachers to submit an application,

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to 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...."

essay, and references, and be questioned by a Discovery Committee composed of students, community members, teachers and administrators.

On May 18, 1994, interim relief was denied. I.R. No. 94-10, 20 NJPER 265 (¶25131 1994). The Commission designee found that the employer's decision to appoint students and community members to participate in the transfer evaluation process is not mandatorily negotiable. To the extent contractual transfer procedures may have been violated, the designee noted that the negotiated grievance procedure is the preferred method to resolve those disputes.

On June 2, 1994, a Complaint and Notice of Hearing issued. On June 13, the Board filed an Answer denying that it violated the Act and claiming that transfers are a managerial prerogative and that a pending grievance bars the relief requested.

On July 29 and August 5, 1994, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On August 26, 1994, the Hearing Examiner issued his report and recommendations. H.E. No. 95-7, 20 NJPER 356 (¶25183 1994). He found that the Board violated the Act by unilaterally changing certain procedural provisions of the parties' collective negotiations agreement pertaining to transfers, assignments and reassignments. He did not recommend rescission of any assignments,

but instead recommended ordering the Board to refrain from such conduct in the future.

On September 6, 1994, the Board filed exceptions. It claims that the Complaint should be dismissed because it has a managerial prerogative to ensure a fit between staff and a new instructional delivery system. It further claims that a pending grievance and an appeal of the Board's action to the Commissioner of Education preclude consideration of the Complaint. Finally, the Board contends that any dispute over whether it complied with contractual procedures should be resolved by an arbitrator.

On September 8, 1994, the Association filed its own exceptions. It urges adoption of the Hearing Examiner's findings and legal determinations. However, it seeks an order rescinding the reassignments which stemmed from the new reassignment procedures.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-12).

N.J.S.A. 34:13A-5.3 prohibits a public employer from unilaterally adopting new rules concerning mandatorily negotiable terms and conditions of employment. Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide

> whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Although transfers intimately and directly affect the work and welfare of teachers, they are not mandatorily negotiable, as a rule, because of a school board's "managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978); see also N.J.S.A. 34:13A-25 (transfers of school employees between work sites shall not be mandatorily negotiable). But transfer procedures are mandatorily negotiable. See, e.g., Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Local 195; City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988)(notice of vacancies and bidding procedures); Plainfield Bd. of Ed., P.E.R.C. No. 84-134, 10 NJPER 346 (¶15159 1984)(consultation before transfer); Edison Tp. Bd. of Ed., P.E.R.C. No. 84-20, 9 NJPER 617 (¶14264 1983)(notice before transfer); Newark Bd. of Ed, P.E.R.C. No. 86-6, 11 NJPER 450 (¶16157 1985)(reasons for transfer); Jersey City, P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981)(notice and opportunity to be heard); East Brunswick Bd. of Ed, P.E.R.C. No. 81-123, 7 NJPER 242

(¶12109 1981) (notice and deadlines for submitting transfer requests).

The Board unilaterally established new application requirements for teachers seeking to transfer to a new high school. The Association contests those requirements, in particular the requirements that teachers submit an application, essay, and references and be interviewed by a committee of students, community members, teachers and administrators.

We view the disputed requirements as substantive, not procedural. They helped the Board assess the teachers' qualifications for placement in the new high school. For example, the Board may determine that the views of students and community members based on an interview with the teacher are a relevant consideration. Any negotiated agreement to restrict the Board's ability to assess teacher qualifications for a transfer would significantly interfere with the Board's educational policy determinations. Because these requirements are not mandatorily negotiable, the Board did not violate the Act when it adopted them unilaterally.

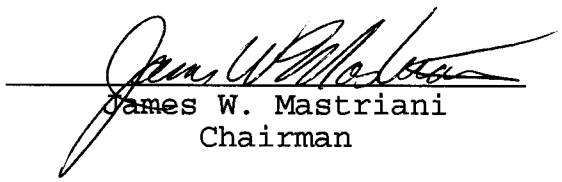
Whether the notice provisions of the collective negotiations agreement were violated must be resolved pursuant to the negotiated grievance procedure. In addition, while there may have been other mandatorily negotiable procedures that would not have significantly interfered with any managerial prerogatives, the Association has not specified what those procedures are or shown

that the Board refused to negotiate over them. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Klagholz was not present.

DATED: May 23, 1995
Trenton, New Jersey
ISSUED: May 24, 1995

H.E. NO. 95-7

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

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-320

ATLANTIC CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act. The Board unilaterally established a series of changes in the procedural criteria for the reassignment of its teachers to the new Atlantic City High School, which constituted "new rules" within the meaning of Section 5.3. Since it did so without first negotiating these changes with the Association before implementation, it violated the Act.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent,
George G. Frino, attorney

For the Charging Party,
Zazzali, Zazzali, Fagella & Nowark, attorneys
(Edward H. O'Hare, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 2, 1994 by the Atlantic City Education Association ("Charging Party" or "Association") alleging that the Atlantic City Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13-A-1 et seq. ("Act"); in that the Board unilaterally imposed new procedures requiring teachers "to submit an application and essay, along with references"; in addition, teachers must submit to questioning from a Discovery Committee, which includes students, community members, teachers and administrators;

this Committee is to make recommendations regarding the assignment of teachers; these new procedures forced Association members to reapply for assignments to their own jobs; teachers were given only 15 minutes to answer the Committee's questions; and finally, the Board permitted the release of personal and confidential information and has failed to take precautions to assure that teachers' interests were protected; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on June 2, 1994. Pursuant to the Complaint and Notice of Hearing, hearings were held on July 29 and August 5, 1994, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived oral argument and they filed post-hearing briefs by August 15, 1994, which supplemented the memoranda previously filed in an interim relief proceeding in May 1994.[2/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The Association had applied for interim relief and an Order to Show Cause was made returnable for May 13, 1994, at which time a hearing was held. Interim relief was denied by the

Footnote Continued on Next Page

* * * *

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Atlantic City Board of Education is a public employer within the meaning of the Act, as amended, and the Association is a public employee representative within the the same Act.

2. The parties are currently bound by a collective negotiations agreement, effective July 1, 1991 through June 30, 1994 (J-1), pending negotiations for a successor agreement. Successor negotiations commenced on December 20, 1993 and have continued through fourteen sessions, the last taking place on August 4, 1994. [1Tr9, 28, 29, 56].

3. The negotiations for the Association have been led by Eugene J. Sharp, a UniServ Representative of the NJEA for twenty eight years (1Tr24, 25). Sharp has been assisted by the Association's President, Ilena R. Pitts, who participated in the negotiations for J-1 and prior agreements (1Tr77-79).

4. Teacher assignments are governed by Article 14 of the Agreement. Article 14.1 provides that "Normally" teachers shall be

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2/ Footnote Continued From Previous Page

Commission's Designee on May 18, 1994 [I.R. No. 94-10], based on a finding that assignments, transfers and evaluation processes are not normally negotiable. If procedures are at issue, then the parties' grievance procedure is the preferred method for resolution.

notified of their teaching assignments by June 1st of each year. Further, Article 14.2 states that if "changes are made" then the "teacher affected shall be notified promptly..." [J-1, p.50].

5. Teacher Transfers and Reassignments are governed by Article 15 of the Agreement.

Article 15.2 provides:

> "Teachers who desire a change in grade and/or subject assignment or who desire to transfer to another building may file a written statement of such desire with the Superintendent with a copy to the principals concerned not later than May 1. Such statement shall include the grade and/or subject to which the teacher desires to be assigned and the school or schools to which he/she desires to be transferred in order of preference."

Article 15.3 provides:

> "As soon as is practicable, the Superintendent or his/her designee shall notify the Association regarding the names of all teachers who have been reassigned or transferred.
>
> (Emphasis Supplied).

Article 15.4 provides:

> "In the determination of requests for voluntary reassignment and/or transfer, the wishes of the individual teacher shall be considered. However, all such transfers or reassignments shall be made at the sole discretion of the Board."
>
> (Emphasis Supplied).

Article 15.5 provides:

> "Notice of any pending involuntary transfer or reassignment shall be given to the teacher as soon as is practicable and

> normally not later than April 15. The teacher involved may request and have a meeting with the Superintendent or his designee to discuss the transfer."
>
> (Emphasis Supplied).
>
> * * * *
>
> [J-1, pp. 50-52].

6. Sharp testified that there had been few changes in Articles 14 and 15 over the past ten years (1Tr27). At the first negotiations session on December 20, 1993, the Association suggested a modification to Article 15 (1Tr29). The matter did not arise again until the March 29th session when Sharp sent a fax to the Board's attorney, requesting that Article 15, among others, be discussed that night (1Tr29-32). Sharp next testified that at the ninth negotiations session on May 19th, the Association proposed modification of the last sentence of Article 15.5 to provide that a teacher may request a written statement of reasons or explanations for an involuntary transfer, which statement shall be provided to the teacher by the Superintendent within ten days of the request (CP-4). The Board's response was that the proposed language was "...not out of the question..." [1Tr50-54, 65].

7. The Association prepared a complete statement of its negotiating position after the parties' 10th negotiations session on June 7, 1994 (1Tr67-69; R-5). Following the submission of this package to the members of the Board's Negotiating Committee on June 17th (R-5), the Board's attorney made a complete oral response on behalf of the Board which, inter alia, rejected the proposed

language with respect to a change in Article 15.5 (CP-4; 1Tr55, 56).[3/]

8. Sharp testified without contradiction that if the Board wanted to make procedural changes in the Agreement, it was incumbent on the Board to propose such changes (1Tr54, 55). The Board has never offered to negotiate changes in the reassignment procedures in Article 15 vis-a-vis the new Atlantic City High School (1Tr66).

9. R. Mark Harris has been the Board's Superintendent since July 1992; he was Assistant Superintendent from 1987 through 1992 and has been employed in the District for 25 years (2Tr5, 6). When the new Atlantic City High School was authorized by voter referendum in 1986, planning for a new instructional delivery system was undertaken with the assistance of four prior Superintendents. The model developed was a variation of a plan utilized for several elementary schools in the 1970's. [2Tr8-10, 41].

10. In or around November 1993, Harris commenced laying specific plans for the reassignment of teachers, indicating only that teachers would have to apply for reassignment to the new High School (2Tr12, 13, 42, 43). At four staff meetings in February 1994, Harris gave the teachers an overview of the kind of instructional delivery system that would be employed at the High School (2Tr13, 43, 44). An important component of the reassignment procedure was a new "Application For Reassignment" to the new

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3/ The 13th and 14th negotiations sessions on July 19th and August 4th produced nothing of substance (1Tr56).

Atlantic City High School which had been designed by Harris (CP-2; 2Tr13-15). This form, which was distributed at the February staff meetings, sought to elicit from each applicant personal information, areas of teaching interests, personal references and requested that the applicant explain in writing (the "essay") why he/she was "uniquely qualified" to teach at the new High School (2Tr13, 14; 1Tr32-36).

11. Harris testified that he personally "blocked out" with tape any information appearing on the applications received that would have suggested the identity of the applicant (2Tr53-57). Only Harris and his confidential secretary, Yvonne Jones, knew the identity of the respective applicants (2Tr56). Harris also explained the elaborate system that he had devised by which he used outside duplicating equipment to accomplish his objective of complete confidentiality (2Tr55, 56). At the end of the process, Harris alone retained the original of each application (2Tr57, 58).

12. The deadline for the submission of applications was March 11, 1994 (CP-2, p.4). This is consistent with the testimony of Harris that in February 1994 he had begun implementing the reassignment procedures for the new Atlantic City High School, supra.

13. Harris received approximately 170 applications but only 130 teachers were actually reassigned (2Tr27, 47, 48). It appears from the "Application For Reassignment" to the new High School (CP-2), and Superintendent Harris's letter of April 21st, acknowledging the teacher's submission of an application (CP-5),

that the reassignment procedure was voluntary, rather than involuntary. Harris testified credibly that teachers had a choice as to whether to apply to the new High School, i.e., it was not mandatory (2Tr45).[4/] Consistent with my finding that the application for reassignment procedure was voluntary is the fact that of the 170 applicants for reassignment, only 130 were actually reassigned, supra.

14. Superintendent Harris developed a list of thirty three (33) individuals[5/] who constituted the Staff Discovery Committee (2Tr24, 25). According to Harris, there were actually six Association members, suggested by Pitts, who sat on the Committee (2Tr58). Pitts did not sit on the Committee (1Tr98). When Harris issued invitations to the 33 members of the Staff Discovery Committee to attend an orientation at Bally's Casino Hotel on April 20, 1994, Pitts and several Association members attended (R-2; 1Tr91-93, 111, 114, 117, 118).

15. On April 22, 1994, Harris sent to each of the 33 members of the Staff Discovery Committee an acknowledgement of their presence at the April 20th orientation meeting, in which he suggested a few items for review before the first interview session

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4/ Pitts acknowledged that Harris had never said "in no uncertain terms" that a teacher who failed to submit an application would be "locked out" of the new High School (1Tr109, 110).

5/ Drawn from six basic "constituency groups" of students, parents, general members of the community, business partners, educators and administrators.

on the following Monday (R-1). Harris explained that the interview schedule permitted only the interview of 14 applicants per day over the four-day period (Id.).

16. Under date of April 21st, each of the 170 applicants had been sent a letter from Harris, which explained the three-point interview procedure and included a date for interview (CP-5; 1Tr93, 94). The interviews were to be held at the corporate offices of the Atlantic Electric Company (1Tr58, 91, 92; 2Tr27). The interviews were held on four evenings: April 25, 27, 28 and May 2nd (1Tr58, 98-101). At the end of the interview on each of the four evenings, the Discovery Committee members gave their recommendation as to each applicant, which was either "highly recommended, recommended or conditionally recommend." (2Tr29, 30). There was no "reject" category (2Tr30).

17. On the evenings of the interviews, Pitts was present with four other Association members, all of whom had learned the procedures when they attended the orientation meeting on April 20th (1Tr104, 111). Pitts testified that although she was not a member of the Discovery Committee, her role was to greet and make the teachers "feel comfortable." (1Tr98, 121) Harris testified that the off-site interviews took place in "a more relaxed atmosphere" (2Tr27). Sharp was present at the site for two meetings of the Discovery Committee: April 27th and May 2nd (1Tr59-61). He said that students escorted the applicants to the interview rooms. There, after reading a set of questions, the applicants were

interviewed for 15 to 20 minutes. According to Sharp, the applicants were treated courteously and were not threatened. [1Tr61, 62; 2Tr26, 27, 29, 63].

18. The Association had ample notice of the Superintendent's plan for the selection and reassignment of existing faculty to the new Atlantic City High School for the Fall Term of 1994. In fact, the Association participated in the process. For example:

a. Sharp attended one of a series of three meetings in the library with Harris on February 28, 1994, where materials, including an application, were distributed (1Tr32). Sharp also witnessed a 40-minute "sound and light" show on the new High School (1Tr33). Sharp had at this meeting received a copy of CP-2, which he had never seen before (1Tr34, 35). Harris explained the context of CP-2 to the faculty and to Sharp (1Tr33-36). Sharp advised Harris that this was a matter that should be discussed in negotiations (1Tr37, 38). Pitts also testified that she saw a film/slide presentation around the same time, namely, on February 28th (1Tr81, 82).

b. Following a meeting of the Board on March 22nd where Sharp spoke to the Association's concerns, he prepared a two-page letter, dated April 14, 1994, addressed to the Board, which was read to the Board on that date by Pitts (CP-3; 1Tr39, 44-46). In this letter, the Association protested the Superintendent's form of "Application" and his establishment of "Staff Discovery Committees", which were to meet at the end of April (Id.). There followed a series of claimed violations of the parties' Agreement and various statutes (CP-3).

c. By the time of the April 14th Board meeting, Pitts had responded affirmatively to the request of Harris for the names of two teachers per building who might be members of an interviewing team. With the assistance of the principals, a list was prepared by Pitts, dated March 21, 1994, which was addressed to Harris. It contained the names "...of those chosen by the Association to be part of the interview team..." and listed the names of nineteen teachers, ten members of the support staff, five students and two parents. [CP-6; 1Tr95-97, 105, 106; 2Tr22, 23, 51, 52].

19. Applicants were notified of the outcome of their interviews by a letter from the Board secretary, dated May 12, 1994 (R-3; 2Tr32). This notification advised them that the Board had met on May 10th and had voted to approve a list of employees and their transfers within their areas of certification for the 1994-95 school year. Each individual was then advised of his/her listing, which in the case of Gary Howarth (R-3) was a transfer from the Atlantic City High School to the Central Jr. High School. Howarth later became a grievant over this transfer (see R-4, infra).

20. An Association grievance of May 26, 1994 was filed on behalf of sixteen teachers. It sought to void their transfers and reassignments since the Agreement (J-1) had not been complied with (R-4, p.4). This grievance was filed by the Grievance Chairperson on May 27th and Superintendent Harris responded on June 3rd, citing Article 15.5. He contended that the Board gave notice "...as soon as is practicable..." although this was not done prior to April 15th. Harris then recited in detail all of the problems that had arisen in connection with designing a new curriculum and then

staffing the new Atlantic City High School which, he argued, could hardly be classified as "normal." He pointed out that the Association through its President had been apprised of the District's timeline for the staffing of the new High School. Finally, all teachers were individually notified of their assignments following the Board action of May 10th. [2Tr34, 35; R-4].

21. On June 22, 1994, five of the teachers who were the subject of the Association's May 27th grievance, and who had been notified of their reassignment on May 12th, responded in writing to the Board's Secretary, requesting a Board hearing (R-6; 2Tr35, 36). Such a hearing is provided for in Article 5.3 of the Agreement (J-1, p.19).

DISCUSSION

A Fair Reading Of The Association's Unfair Practice Charge Indicates That It Is Objecting To The Board's Unilateral Imposition Of New Procedures For the Assignment Of Teachers To The New Atlantic City High School But, However, The Association Is Not Objecting To The Exercise By The Board Of Its Managerial Prerogative To Make Assignments Or Reassignments Of Its Teachers

Because I have concluded that the basic concern of the Association is with the Board's unilaterally adopted "procedures," rather than the managerial right of its Superintendent to assign or reassign teachers to the new Atlantic City High School, the oft-cited decision of our Supreme Court in Ridgefield Park Ed.

Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) need not be belaborered here.[6/]

Since the Association is not challenging the right of Superintendent Harris to have reassigned teachers to the new Atlantic City High School as a prerogative under Ridgefield Park, then I may assume, additionally, that the Association does not challenge the right of the Board to transfer or reassign employees under the 1989 amendments to our Act, namely, N.J.S.A. 34:13A-25. This section provides that transfers of employees between worksites is not mandatorily negotiable except where the transfer is made for disciplinary reasons; such reasons are not involved in this case.

We now turn to the question of whether or not the Board violated the Act when it unilaterally altered the procedures set forth in Articles 14 and 15 of the Agreement, which pertain, respectively, to Teacher Assignments and Teacher Transfers and Reassignments (J-1, pp. 50, 51). Of initial note is that the rather drastic procedural changes for assignment/reassignment to the new High School were undertaken by the Superintendent "smack in the middle" of negotiations for a successor agreement to J-1 (see F/F

6/ The Court in that case had held that "...teacher transfers and reassignments are not mandatorily negotiable..." because "...the issue of teacher transfers is one on which negotiated agreement would significantly interfere with a public employer's discharge of inherent managerial responsibilities..." [78 N.J. 156]. See also, Plainfield Ed. Ass'n. v. Plainfield Bd. of Ed., 187 N.J. Super. 11 (App. Div. 1982).

Nos. 3, 6 & 7). Recall that Sharp had proposed some modification of Article 15 from the outset of negotiations on December 20th. Further, Sharp had put the Board on notice on February 28th, March 22nd and April 14th that Superintendent Harris's plan for staffing the new High School should have been discussed in negotiations and that plan was violative of the Agreement and various statutes (see F/F Nos. 8, 18a & 18b).

In Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985) the Commission said that "...In order for us to find that the Board violated an obligation to negotiate, the Association bears the burden of proving: (1) a change (2) in a term and condition of employment (3) without negotiations. The Board, however, may defeat such a claim if it has a managerial prerogative or contractual right to make the change..." [12 NJPER at 33]. In that case the Board had reduced the hours of work for all elementary school food servers without first negotiating that change with the Association. The Commission rejected, as inapplicable, its decision in Dept. of Human Services[7/] since the change in the hours of work

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7/ See P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

"...goes to the heart of an employer's negotiation obligations..." [12 NJPER at 33].[8/]

Further, in Willingboro, the Commission considered and rejected the Board's contention that it had a right under the contract to reduce the hours of work without negotiations. The Commission also rejected the Board's argument that there was a past practice which permitted its unilateral action in reducing hours. I have likewise concluded that the instant Board had no basis in contract or past practice to change Articles 14 or 15 without prior negotiations, infra.

Interestingly, the Commission, in Willingboro, did not cite a seminal decision from earlier years, which has been cited many times and is still the controlling law on the subject of unilateral changes without prior negotiations: New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd. App. Div. Dkt. No. A-2450-77 (1979).

In New Brunswick the Commission articulated the definitive test with respect to Section 5.3 of the Act,[9/] which has withstood the test of time, namely, where, during the term of an agreement, a

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8/ So, too, do the instant changes in the reassignment procedures "go to the heart" of this Board's obligation to negotiate, infra.

9/ Section 5.3 provides, in part, that "...Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established..."

public employer desires to alter an established practice governing working conditions, which is not an implied term of the agreement, "...the employer must first negotiate such proposed change with the employees' representative prior to its implementation..." (Emphasis supplied.) [4 NJPER at 85]. Further, the Commission emphasized its holding that "...the obligation is on the public employer to negotiate, prior to implementation, (as to) a proposed change in an established practice governing working conditions..." (Emphasis supplied). Also, "...the Association (is)...under no obligation to request negotiations subsequent to the Board's unilateral action..." (Emphasis supplied). [4 NJPER at 85].

Based upon the instant record, and a fair reading of Willingboro and North Brunswick, the conclusion necessarily follows that Superintendent Harris, however well-intentioned, did, by his unilateral actions alter the procedures in Articles 14 and 15 of the current Agreement. Thus, did the Board violate the Act as alleged. It is of no moment that Sharp and Pitts participated in the various meetings and procedures that Superintendent Harris had created for the reassignment of teacher-applicants to the new Atlantic City High School. I conclude, therefore, that the Association did not waive its right to have negotiated with the Board, regarding Harris's changes in the reassignment procedures before they were implemented, i.e., Section 5.3, supra.

In concluding that the Board violated Sections 5.4(a)(1) and (5) of the Act, I recognize as exemplary the intentions of

Superintendent Harris in his undertaking to staff the new High School. I am also mindful of the fact that the procedures for reassignments have been fully implemented and are, thus, a fait accompli. Thus, this is not a case where the status quo ante can be restored, nor should it since, as a matter of law under Ridgefield Park, supra, the inherent right of the Superintendent to transfer, assign or reassign teachers is a managerial prerogative.

However, I can, and will, recommend that the Board negotiate as to future procedural changes in the assignment and reassignment of teachers as provided for in Articles 14 and 15. I will make clear that it is incumbent upon the Board to negotiate proposed procedural changes prior to their implementation: New Brunswick, supra.

* * * *

Upon the foregoing, and upon the entire record in the case, I make the following:

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(5), and derivatively 34:13A-5.4(a)(1), when its Superintendent unilaterally undertook to modify and to implement changes in certain procedural provisions of Article 14 and Article 15 of the parties' Agreement, pertaining to transfers, assignments and reassignments, vis-a-vis the new Atlantic City High School without negotiating the proposed changes prior to implementation.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Refusing to negotiate in good faith with representatives of the Association during the course of negotiations for the successor Agreement to J-1, particularly, by ceasing forthwith unilateral modifications, and implementation of changes in certain procedural provisions of Article 14 and Article 15 of the parties' Agreement without negotiating the proposed changes prior to implementation.

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

1. Upon demand, WE WILL negotiate in good faith with representatives of the Association regarding the terms and conditions of employment to be incorporated into the successor Agreement to J-1 and, further, WE WILL refrain, in the future, from implementing unilateral changes in negotiable terms and conditions of employment without negotiating such changes prior to implementation.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Refusing to negotiate in good faith with representatives of the Association during the course of negotiations for the successor Agreement to J-1, particularly, by ceasing forthwith unilateral modifications, and implementation of changes in certain procedural provisions of Article 14 and Article 15 of the parties' Agreement, without negotiating the proposed changes prior to implementation.

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

1. Upon demand, negotiate in good faith with representatives of the Association regarding the terms and conditions of employment to be incorporated into the successor Agreement to J-1 and, further, refrain, in the future, from implementing unilateral changes in negotiable terms and conditions of employment without negotiating such changes prior to implementation.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

Alan R. Howe
Hearing Examiner

Dated: August 26, 1994
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith with representatives of the Atlantic City Education Association during the course of negotiations for the successor Agreement to J-1, particularly, WE WILL cease forthwith unilateral modifications, and the implementation of changes in certain procedural provisions of Article 14 and Article 15 of the parties' Agreement without negotiating the proposed changes prior to implementation.

WE WILL, upon demand, negotiate in good faith with representatives of the Atlantic City Education Association regarding the terms and conditions of employment to be incorporated into the successor Agreement to J-1.

WE WILL, in the future, refrain from implementing unilateral changes in negotiable terms and conditions of employment without negotiating such changes prior to implementation.

Docket No. CO-H-94-320 Atlantic City Board of Education
(Public Employer)

Dated _____ **By** _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.