P.E.R.C. NO. 92-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VERONA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-91-103

VERONA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Verona Education Association against the Verona Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act by unilaterally changing the schedule for custodians at Verona High School from 3:00 p.m. to midnight, Mondays through Fridays; to 3:00 p.m. to midnight, Mondays through Thursdays; and Saturdays from 8:00 a.m. to 5:00 p.m.; by unilaterally appointing Robert Knapp to this new position that regularly works Saturdays; and by not appointing a custodian with less seniority than Knapp. The Chairman concludes that, given all the facts, the Association did not prove that the Board breached any negotiations obligation.

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VERONA EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Metzler Associates
(James L. Rigassio, consultant)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On November 2, 1990, the Verona Education Association filed an unfair practice charge against the Verona Board of Education. The Association alleged 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

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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, or refusing to process grievances presented by the majority representative."

changing the schedule for custodians at Verona High School from 3:00 p.m. to midnight, Mondays through Fridays; to 3:00 p.m. to midnight, Mondays through Thursdays; and Saturdays from 8:00 a.m. to 5:00 p.m.; by unilaterally appointing Robert Knapp to this new position that regularly works Saturdays; and by not appointing a custodian with less seniority than Knapp.

On March 4, 1991, a Complaint and Notice of Hearing issued. On March 18, the Board filed its Answer. It claimed that it acted pursuant to the parties' contract, no new position was created, the seniority allegation is irrelevant, and the Knapp allegation is moot since he is no longer working Saturdays. It urged that the dispute be deferred to the negotiated grievance procedures.

On April 23, 1991, Hearing Examiner Alan R. Howe conducted a hearing. Since Knapp no longer worked Saturdays, the Association amended its charge to delete the allegations concerning him. The parties then examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On August 26, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-6, 17 NJPER ___(¶_____ 1991). He found that the case was not properly deferrable; the contract was not relevant; no new position was created since there were still six high school custodians; no terms and conditions of employment had been changed since the Board had been involuntarily assigning custodial and maintenance personnel for 15 or 20 years; and the Association had waived any right to negotiate.

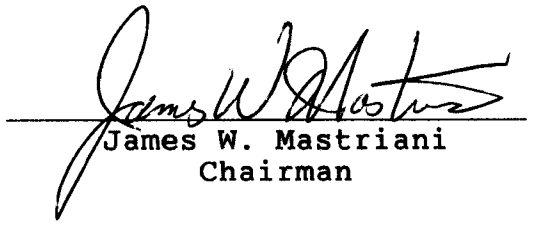
The Hearing Examiner served his decision on the parties and informed them that exceptions were due September 9, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. In the absence of exceptions, I incorporate the Hearing Examiner's findings of fact (H.E. at 3-7). I add that the Board had two custodians besides Knapp permanently assigned to work Saturdays (T71). At least one of them was hired specifically to work Saturdays (T73). Given all the facts, I find that the Association did not prove that the Board breached any negotiations obligation. Accordingly, acting pursuant to authority delegated to me by the full Commission, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: October 3, 1991
Trenton, New Jersey

H.E. NO. 92-6

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

In the Matter of

VERONA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-91-103

VERONA EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Sections 5.4(a)(1) or (5) of the New Jersey Employer-Employee Relations Act since it engaged in no conduct constituting a unilateral change in the terms and conditions of employment of its custodial and maintenance personnel. The Association had alleged that the Board unilaterally and involuntarily assigned a custodian from one set of days and shifts to another set of days and shifts, beginning in September 1990, without offering to negotiate prior thereto. However, no proof of any change was adduced. There was no contractual provision restricting the employer in the method and manner of its assignments of employees. In fact, the Association had clearly and unmistakably waived any claim to negotiate over the subject matter there having been a practice of employer unilateral action over the past 15 or 20 years: South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986).

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. 92-6

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

In the Matter of

VERONA BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-91-103

VERONA EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Metzler Associates
(James L. Rigassio, consultant)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 2, 1990, by the Verona Education Association ("Charging Party" or "Association") alleging that the Verona 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. 34:13A-1 et seq. ("Act"), in that the Board unilaterally changed the schedule for custodians at its high school from 3:00 p.m. to midnight, Mondays through Fridays, to 3:00 p.m. to midnight, Mondays through Thursdays, and Saturdays from 8:00 a.m. to 5:00 p.m. (thereby creating a new position); on August 6, 1990, the

Board unilaterally appointed Robert Knapp to this newly created position while there were available custodians for this position having less seniority than Knapp;[1/] 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.[2/]

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 March 4, 1991. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 23, 1991, in Newark, New Jersey. At the hearing, the Charging Party moved to amend its Charge by deleting the fifth and final paragraph (Tr 11-13).[3/] Also, at the hearing, the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived (Tr 85) and the parties filed post-hearing briefs by June 17, 1991.

1/ It was stipulated at the hearing that any issue regarding the seniority of other custodians in relationship to Robert Knapp was moot since Knapp is no longer in the position to which he was involuntarily assigned on August 6, 1990 (Tr 31, 32). This eliminated the need to consider further the third paragraph of the Association's Unfair Practice Charge.

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. (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."

3/ Given the ultimate decision in this case, this amendment does not affect the outcome.

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

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

FINDINGS OF FACT

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

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

3. The current collective negotiations agreement between the parties is effective during the term July 1, 1989 through June 30, 1992 (J-1; Tr 14, 15). This agreement covers three separate units of employees of the Board and the various articles and sections are keyed to Parts A, B and C. The "Part C" group refers to the custodians and maintenance personnel who are involved in this proceeding. [J-1, p. 1].

4. The contract provisions cited by the parties as relevant to the instant dispute are as follows:

Article 17 - Working Conditions (Part C)

17:1 The work day shall consist of eight (8) hours, excluding the lunch period; the work week shall be forty (40) hours; and the work year period shall be from July 1 through June 30, exclusive of holidays and vacations.

17:2 Overtime shall be paid for work over forty (40) hours a week at time and one-half the regular straight time rate.

* * * *

Article 40 - Transfers and Promotions (Part C)

40:1 The Association president will be notified of any job vacancies within the bargaining unit.

40:2 Employees who desire to transfer to another building may file a written statement of such desire with the Superintendent. Such statement shall include the school or schools to which he/she desires to be transferred in order of preference. Such requests for transfers and reassignments for the following year shall be submitted no later than June 1.

[J-1, pp. 14 & 36]

5. Thomas J. Sellitto, the Deputy Superintendent/Board Secretary, has been employed in the district for 35 years and is currently responsible for the supervision and management of its custodial and maintenance employees. For 28 years he has been involved in collective negotiations and in the processing of grievances. [Tr 33, 34].

6. Sellitto testified extensively with respect to the past application by the parties of Article 40, Transfers and Promotions, supra, particularly, Section 40:2 (Tr 41-44; J-1, p. 36). He testified without contradiction that under this provision of the agreement, at one time all of the custodians worked days only

from 8:00 a.m. to 5:00 p.m. However, because of the changing needs of the district for custodians he found it necessary to recommend to the Board that instead of having four day custodians at the high school there should be five custodians, some of whom would work days and some of whom would work in the evenings. [Tr 41, 42].

7. These schedule changes were never incorporated into the parties' collective negotiations agreement. While 24 custodial and maintenance employees' schedules have been changed every year for the last 15 to 20 years there has never been a grievance nor has the Board ever sought permission from the President of the Association. Finally, there has been no overtime payment for work performed on Saturdays during the past three years when the Board first commenced covering Saturdays on a regularly scheduled basis rather than on overtime. [Tr 42, 43, 50].

8. The instant dispute involves custodial coverage at the high school. Normally about five or six custodians are assigned. However, the Board has always attempted to cover its Saturday custodial work at the high school on a voluntary basis. When this proved impossible during the 1989-90 school year because no one volunteered, Sellitto was prepared to make an involuntary assignment. This became unnecessary when three custodians volunteered to provide coverage on a rotating basis. [Tr 43, 44].

9. In May of 1990, the high school custodians, who had volunteered to provide rotating Saturday coverage during 1989-90, informed their supervisor that they would not continue this

arrangement for the 1990-91 school year. Thereafter, on June 20, 1990, Sellitto addressed a memorandum to the night custodial staff at the high school, in which he thanked them for their past volunteering for Saturdays. He then advised them that if no volunteers were forthcoming for the 1990-91 school year then it would be necessary to post a permanent custodial position, which would require working four nights per week plus Saturdays. Finally, he stated that if there were no applicants by July 15, 1990, then he would recommend to the Board that one of the existing night shift custodians be assigned to this position and that the assignment would be made by July 31, 1990. [R-2; Tr 44-46].

10. As Sellitto had predicted, the Board posted a permanent custodial position in July 1990. When no volunteer had stepped forward by the end of the two-week period, he asked his maintenance supervisor to make a recommendation. The recommendation was that Robert Knapp be appointed and this appointment was confirmed by Sellitto in a letter to Knapp dated August 6, 1990. Knapp was informed that, beginning September 5, 1990, his work schedule would be Monday through Thursday evenings from 3:00 p.m. to midnight and Saturdays from 8:00 a.m. to 5:00 p.m. [CP-1; Tr 18, 19, 46, 47].

11. Within one month of commencing his new schedule, Knapp was reassigned to his former schedule of Monday through Friday, 3:00 p.m. to midnight, since another custodian had volunteered to take the new shift. [Tr 23, 47, 48]. No grievances were filed in connection with the events involving Knapp (Tr 50).

12. It is undisputed that the Board never offered to negotiate with the Association with respect to the involuntary assignment of Knapp to a new shift/position as set forth in Sellitto's letter to Knapp of August 6, 1990 (CP-1 Tr 21, 22).

ANALYSIS

The Respondent Board Did Not Violate Sections 5.4(a)(1) And (5) Of The Act When It Unilaterally Created And Then Posted A New Custodial Position In July 1990 And Unilaterally Assigned Robert Knapp To That Position On August 6, 1990.

I.

The Board argues that this dispute should have been grieved by the Association and then submitted to arbitration under the parties' collective negotiations agreement, i.e., the Hearing Examiner should now defer the dispute to the parties' negotiated grievance procedure (Tr 32; Brief, pp. 13-17).[4/]

It would appear to the Hearing Examiner that the instant matter does not present an appropriate case for deferral to the grievance procedure. This is not merely because the Association has never filed a grievance but rather because the Commission has stated on more than one occasion that if deferral is deemed appropriate, it

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4/ Although not cited by name, presumably the Board is referring to State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) where the Commission clarified the distinction between a true refusal to negotiate in good faith under the Act as opposed to an unfair practice charge which presents a mere breach of contract claim.

should occur prior to the hearing: Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983); Tp. of Pennsauken, P.E.R.C. No. 88-53, 14 NJPER 61, 63 (¶19020 1987) and Stafford Tp. Bd. of Ed., P.E.R.C. No. 90-17, 15 NJPER 527 (¶20217 1989). In the case at bar, the Board failed to pursue deferral before the hearing, which was scheduled upon the issuance of the Complaint on March 4, 1991.

Finally, an additional reason for not recommending deferral in this case is that a question exists as to whether or not the dispute is "...interrelated with a breach of contract..." within the meaning of Tp. of Pennsauken, supra. Accordingly, there will be no deferral of the instant Unfair Practice Charge to the parties' negotiated grievance procedure.

II.

It is now clear that the cited provisions in the parties' agreement, namely, Article 17, Working Conditions, and Article 40, Transfers and Promotions, are of little assistance in deciding the case at bar. There is no issue before the Hearing Examiner under Article 17 bearing upon the length of the work day or work week or the payment of overtime for work over 40 hours per week. Nor, is there any issue presented under Article 40 since it involves only the approval by the Association President of job vacancies within the unit and how employees may voluntarily transfer from one building to another. In other words, the contract clauses, which the parties suggested had at least marginal relevance, do not appear

to have any relevance whatever to the resolution of the instant dispute.

It is noted in passing that the Unfair Practice Charge incorrectly alleges that a "newly created position" was involved when Knapp was unilaterally appointed on August 6, 1990. The number of custodial positions at the high school remained unchanged between the 1989-90 and 1990-91 school years. This is clear from Sellitto's memorandum of June 20, 1990 (R-2), in which he stated at the beginning of the second paragraph thereof that the Board had to continue the scheduling of one of the four night men to Saturday duty along with two other men. This adds up to the same six custodial employees who had worked during the school year ending June 30, 1990.

This conclusion is unchanged by the fact that in the same memorandum Sellitto spoke about posting a "permanent custodial position" while also stating his intention to recommend to the Board that "...one of our existing night men be assigned to this new position..." Finally, he referred to the moving of only one man involuntarily to Saturdays. He testified at the hearing that the position that had to be posted "...was not a new position, it was a matter of taking one of those four existing positions and changing

the work week, as we've done many times in the past with other positions..." (Tr 46).[5/]

The essential questions presented are: (1) whether, in the absence of express contract language, a clearly defined practice has existed with respect to the assignment of custodial and maintenance personnel at the high school over many years,[6/] and (2) whether the Association has clearly and unmistakably waived its right to negotiate proposed changes in the assignment of custodial and maintenance personnel.

III.

The Charging Party correctly sets forth the three-pronged analysis articulated by the New Jersey Supreme Court in IFPTE, Local 195 and State of New Jersey, 88 N.J. 393 (1982) for determining

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5/ Also, Sellitto's statement in his August 6, 1990 letter to Knapp, regarding his appointment "...to this new position..." (emphasis supplied) in no way changes the Hearing Examiner's conclusion that no new position was created on and after July 1, 1990 (CP-). Plainly, there was a mere rejuggling of assignments among the six existing custodial and maintenance personnel.

6/ It is well settled that a binding past practice is generally entitled to the same status as a term and condition of employment, which may be defined either by the terms of the collective negotiations agreement or by statute: Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978); Watchung Boro, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981) and Cty. of Sussex, P.E.R.C. No. 88-4, 8 NJPER 431 (¶13200 1982). Where an agreement is silent on the particular issue in dispute, then past practice controls: Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982); Cty. of Sussex, supra; Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Dkt. No. A-4991-80 (1982).

whether a subject is negotiable. Facially, the requisites would appear to be met and applicable to the case at bar. However, one essential ingredient is missing, namely, the occurence of a "change" in a term and condition of employment[7/] since the Board has been involuntarily assigning custodial and maintenance personnel for 15 or 20 years.[8/]

Even if the Hearing Examiner were to assume, arguendo, that a change had occurred in August 1990, he would still conclude that the Board has defeated any claim by the Association that a negotiable change in a term and condition of employment occurred. This is based upon his conclusion that the Association has clearly and unmistakably waived its right to negotiate on the subject matter of its Unfair Practice Charge under the doctrine of contractual waiver.[9/] Thus, the Board had the right to assign Knapp

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7/ See Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32, 33 (¶17012 1985).

8/ Not only has a grievance never been filed but the practice of involuntary custodial assignments has also been in effect at other schools in the district. [Tr 42, 43, 57-59].

9/ See Red Bank Reg. Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); So. River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986); State of N.J., P.E.R.C. No. 86-64, 11 NJPER 723, 725 (¶16254 1985); Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 112 LRRM 3265, 3271 (1983); and Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636, 111 LRRM 2165, 2168 (2nd Cir. 1982). Cf.: Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980); and No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 452 (¶4205 1978).

involuntarily in August 1990 since this represented no departure from prior past practice.

An example of a case involving a waiver based upon past practice as distinct from the waiver of a specific contractual provision is found in So. River Bd. of Ed., supra. There, the facts were that over a period of five years three high school teachers had had their hours reduced and their salaries adjusted. The association had never sought to negotiate any prior hours reduction and only complained in this instance when the board reduced hours solely by eliminating an assigned duty period. The Commission noted first the failure of the association to have sought to negotiate any prior reductions in hours and second, that salary distinctions had never been drawn between teaching and assigned duty periods. The Commission concluded that the schedule changes were consistent with the parties' prior conduct and that, therefore, a clear and unmistakable waiver of the right to negotiate had occurred.

* * * *

The Hearing Examiner has no alternative but to recommend dismissal of the Complaint. Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) by its conduct herein since it made no unilateral change in the terms and conditions of employment of its custodial and maintenance personnel at the high school and any

contrary claim by the Association of a right to negotiate regarding the assignment of maintenance and custodial personnel at the high school has clearly and unmistakably been waived.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

Dated: August 26, 1991
Trenton, New Jersey