

P.E.R.C. NO. 92-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOMS RIVER EDUCATION ASSOCIATION,

Charging Party-Respondent,

-and-

Docket Nos. CO-H-90-106
SN-H-90-25

TOMS RIVER BOARD OF EDUCATION,

Respondent-Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the Toms River Board of Education violated the New Jersey Employer-Employee Relations Act by transferring Toms River Education Association unit work to non-unit employees without first negotiating with the Association. The Commission orders the Board to pay the former department chairpersons the negotiated stipend for the 1989-90 and 1990-91 contract years.

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Docket Nos. CO-H-90-106
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TOMS RIVER BOARD OF EDUCATION,

Respondent-Petitioner.

Appearances:

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

For the Charging Party-Respondent, Klausner & Hunter,
attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On October 17, 1989, the Toms River Education Association filed an unfair practice charge against the Toms River 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 transferring

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

department chairperson duties to non-unit employees and failing to pay former department chairpersons a negotiated stipend.

On November 27, 1989, the Board petitioned for a scope of negotiations determination. The Board seeks a determination that its budgetary decision to abolish the department chairperson position, thus enabling the chairpersons to teach a full load and teaching staff to be reduced, is not mandatorily negotiable.

On February 7, 1990, a Consolidated Complaint and Notice of Hearing was issued. On February 26, the Board filed its Answer requesting dismissal of the Complaint based on the position expressed in its scope petition.

On May 15, 1990, Hearing Examiner Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by August 20, 1990.

On November 20, 1990, the Director of Unfair Practices reassigned this matter to Hearing Examiner Alan R. Howe. See N.J.A.C. 19:14-6.4. On February 22, 1991, Hearing Examiner Howe issued his report and recommendations. H.E. No. 91-25, 17 NJPER 139 (¶22056 1991). He found that the Board violated subsections

1/ Footnote Continued From Previous Page

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."

5.4(a)(1) and (5) when, after eliminating the department chairperson position and transferring the duties to non-unit personnel, it unilaterally reduced the annual stipend without first negotiating with the Association.

On March 25, 1991, after an extension of time, the Board filed exceptions. It asserts that Hearing Examiner Gwin erred by refusing to allow it to proceed on its scope petition and Hearing Examiner Howe erred by inferring that the elimination of the department chairperson position was made solely to save approximately \$30,000. The Board claims that it was seeking to maintain the quality of education despite a \$3.8 million budget defeat. It contends that it would have called the senior assistant superintendent and a supervisor to testify had its request to proceed on the scope petition been granted.

The Board further asserts that Hearing Examiner Howe could not render a fair decision because, as a substitute Hearing Examiner, he was unable to assess the demeanor of the witnesses. Specifically, it claims that he made unsubstantiated findings that the decision to eliminate the department chairperson position did not result in reductions-in-force during the 1989-90 school year and the Board saved "in excess of \$30,000" rather than approximately \$250,000.

Finally, the Board contends that it had constitutional, statutory and contractual authority to reassign employees and reduce its workforce. It asserts that there was no one-to-one transfer of

duties from department chairpersons to supervisors since supervisors do not cover first period classes for late teachers.

On April 19, 1991, after an extension of time, the Association filed a reply which incorporates its post-hearing brief. It contends that: the Board had sufficient opportunity to present its negotiability argument as a defense to the unfair practice allegations; the Board did not object when Hearing Examiner Howe was appointed; credibility determinations were not important since material facts were uncontroverted; the recommended decision accords with caselaw holding that an employer may not unilaterally shift unit work to non-unit employees for predominately economic reasons; and the Association did not seek to prevent RIFs or to recreate the position of department chairperson but instead sought compensation for the Board's unilateral decision to shift unit work.

The Board has requested oral argument. We deny that request as the legal issues have been fully briefed.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-9) are accurate. We incorporate them.^{2/}

^{2/} In its exceptions, the Board includes its own chronology of facts. It has not complied with the requirement in N.J.A.C. 19:14-7.3(b) that each exception "shall set forth specifically the questions of...fact...to which exception is taken; shall identify that part of the recommended report and decision to which objection is made; [and] shall designate by precise citation of page the portions of the record relied on...." If the Board excepts to any specific findings of fact, it has not properly registered that exception.

We reject the Board's procedural exceptions. The Hearing Examiner had the discretion to proceed on the unfair practice charge rather than the scope petition. The Board was not prejudiced by that decision. In its Answer, the Board raised its managerial prerogative defense, and at the hearing, it presented that defense through the testimony of its senior assistant superintendent. It could have called additional witnesses if it so desired. In addition, N.J.A.C. 19:14-6.4 provides that if a Hearing Examiner becomes unavailable, another Hearing Examiner can be designated to issue a proposed decision and order on the record as made. The Board has not pointed to any disputed facts that were, or should have been, resolved based on the credibility of the witnesses. Neither the Hearing Examiner nor we base any of our findings on credibility determinations or demeanor evaluation.

This case predominately involves the transfer of Association unit work to non-unit employees. Because of a need to reduce operating costs by \$3.8 million, the Board decided, among other things, to eliminate the department chairpersons and to transfer almost all of their work to non-unit supervisors.^{3/} The Board would no longer have to pay the chairpersons a stipend, thus saving approximately \$30,000. The Board would also be able to assign each of the 30 former chairpersons one extra teaching period

^{3/} Except for not covering classes until late teachers arrive, supervisors are now performing the tasks that chairpersons performed.

per day, thus permitting it to eliminate six full-time teaching positions and save approximately \$250,000. The Board did not reduce its force of chairpersons because of a decrease in available work. Instead, it eliminated the stipended position and transferred that work to non-unit employees.

N.J.S.A 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. Preservation of unit work is mandatorily negotiable. See Rutgers, The State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83); see also Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in relevant part, App. Div. Dkt. No. A-3564-78 (6/19/80); Rutgers, The State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd App. Div. Dkt. No. A-3651-78 (7/1/80).

Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Hearing Examiner found that the decision to eliminate department chairpersons and transfer their work to non-unit employees was economically motivated. The Board directly saved approximately \$30,000 and indirectly saved approximately

\$250,000. Nevertheless, the Board had an obligation to negotiate with the Association before transferring the work to non-unit employees. Because the Board did not first negotiate, it violated subsection 5.4(a)(5) and, derivatively, subsection 5.4(a)(1).

Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983), is distinguishable. There, this Board decided that the responsibility of cafeteria management at two elementary schools could be performed adequately by one traveling manager, notwithstanding the fact that each school previously had its own manager. We found that the dominant issue was the Board's managerial prerogative to provide services efficiently and to reduce its force. Here, the Board did not eliminate any of the department chairpersons' work. It instead transferred that work to non-unit employees in order to save money. We pass no judgment on the wisdom of the Board's decision. We simply enforce that provision of N.J.S.A. 34:13A-5.4(a)(5) requiring negotiations before changing terms and conditions of employment.

We now address the appropriate remedy. We would normally order the employer to restore the status quo pending any future negotiations and make any affected employees whole for losses sustained. Here, however, the Board has eliminated the department chairperson position and the Association does not seek to have this decision "recreate" that position. Therefore, under these circumstances and to effectuate the purposes of the Act, we order the Board to pay the former department chairpersons the contractual stipend for the 1989-90 and 1990-91 contract years. Since the

contract has expired and the Association does not seek to have this decision recreate the department chairperson position, we order no further relief besides the posting of a notice.

ORDER

The Toms River Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees represented by the Toms River Education Association in the exercise of the rights guaranteed to them by this Act, particularly by transferring Association unit work to non-unit employees without first negotiating with the Association.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly by transferring Association unit work to non-unit employees without first negotiating with the Association.

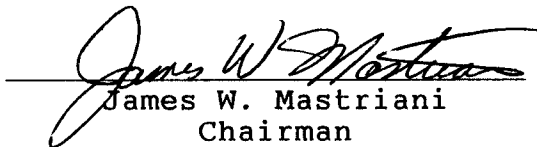
B. Take this action:

1. Pay the former department chairpersons the negotiated stipend for the 1989-90 and 1990-91 contract years.

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 Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
December 19, 1991
ISSUED: December 20, 1991



NOTICE TO EMPLOYEES



PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees represented by the Toms River Education Association in the exercise of the rights guaranteed to them by this Act, particularly by transferring Association unit work to non-unit employees without first negotiating with the Association.

WE WILL NOT refuse to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, particularly by transferring Association unit work to non-unit employees without first negotiating with the Association.

WE WILL pay the former department chairpersons the negotiated stipend for the 1989-90 and 1990-91 contract years.

Docket No. CO-H-90-106, SN-H-90-24

TOMS RIVER BOARD OF EDUCATION

(Public Employer)

Dated: _____

By: _____

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 Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-25

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

In the Matter of

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Respondent-Petitioner,

-and-

Docket Nos. CO-H-90-106
SN-H-90-25

TOMS RIVER BOARD OF EDUCATION,

Charging Party-Respondent.

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 when, after exercising its managerial prerogative to abolish the position of Department Chairperson, and reassigning these duties to non-unit personnel, it simultaneously eliminated the annual stipend for this position without first negotiating the matter of compensation with the Association. The parties had incorporated, in part, the language of Section 5.3 of the Act in their collective agreement, which obligated the Board to negotiate changes etc. before implementation.

The Board's motivation derived solely from economic considerations, following the defeat of its budget and the necessity to save budget dollars. Thus, the Board's actions were not predominantly in furtherance of the non-negotiable educational policy of departmental restructuring [Cherry Hill Tp. Bd. of Ed., P.E.R.C. No. 81-90, 7 NJPER 98 (¶12040 1981)] but rather were mandatorily negotiable since they predominantly involved matters of compensation, which were severable from the non-negotiable action of eliminating the Department Chairperson position [Rutgers, The State University, P.E.R.C. No. 79-52, 5 NJPER 186 (¶10103 1979), aff'd App. Dkt. No. A-3651-78 (1980) and Sayreville Bd. of Ed., P.E.R.C. No. 84-74, 10 NJPER 37-39 (¶15021 1983)].

H.E. NO. 91-25

By way of remedy, the Hearing Examiner recommended the retroactive payment of the annual stipends, which were unilaterally discontinued as of September 1, 1989, followed by negotiations as to the level of compensation, if any, thereafter.

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-Petitioner, Metzler Associates
(James L. Rigassio, Consultant)

For the Charging Party-Respondent, Klausner & Hunter,
Attorneys (Stephen B. Hunter, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") in Docket No. CO-H-90-106 on October 17, 1989, by the Toms River Education Association ("Association") alleging that the Toms River Board of Education ("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 prior to the beginning of the 1989-90 school year there were 30 Department Chairpersons employed within the District (10 in each of the three High Schools) who were assigned, in addition to their teaching

duties, a series of additional professional duties relating to their subject areas but excluding the evaluation of certificated personnel; that prior to the 1989-90 school year these Chairpersons received a negotiated stipend for the performance of their assigned duties at their respective high schools; that beginning with the 1989-90 school year the duties previously performed by these Chairpersons were removed from the negotiations unit represented by the Association and the positions were abolished; that beginning with the 1989-90 school year [September 1989] non-unit supervisory personnel were assigned the duties and functions previously performed by the Chairpersons; 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 Petition for Scope of Negotiations Determination was filed with the Commission by the Board in Docket No. SN-H-90-25 on November 27, 1989, with a supporting brief. The Petition states that as a result of "voter defeat" of the District's operating budget, the Board abolished a number of District positions for reasons of economy, including a reduction-in-force; that one of the positions abolished was that of Department Chairperson at the high

^{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."

schools; 30 individuals were affected by this action of the Board and they thereafter assumed full-time teaching duties, which resulted in a reduction in the numbers of regular teaching staff; and that this action of the Board, based upon budgetary reasons, is not mandatorily negotiable.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint and Notice of Hearing was issued as to both of the above-captioned matters on February 7, 1990, and a hearing was scheduled for March 27, 1990 in Trenton, New Jersey. Pursuant to the Consolidated Complaint and Notice of Hearing, a hearing was rescheduled and held on May 15, 1990, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Neither party argued orally but each filed a post-hearing brief on August 20, 1990.^{2/}

On November 20, 1990, the Director of Unfair Practices reassigned this matter from the original Hearing Examiner, Richard C. Gwin, to the undersigned for decision and the parties were so notified.

^{2/} The Board had also filed a Motion for Summary Judgment with the Chairman on June 22, 1990, but on July 9th, it indicated that it no longer wished to pursue the matter. As a result, the entire proceeding was referred back to the Hearing Examiner by the office of the Chairman on July 11, 1990. Since the Board's Motion has been withdrawn de facto it will not be considered further in this proceeding.

An Unfair Practice Charge and a Petition for Scope of Negotiations Determination having been filed with the Commission, a question concerning alleged violations of the Act, as amended, or, additionally, a related question concerning the negotiability of the subject matter contained in the Petition, exists and, after hearing, and after consideration of the post-hearing briefs of parties, these matters are 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 Toms River Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Toms River 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, 1988 through June 30, 1991 (J-1). In Article 1, Recognition, the Board recognizes the Association as the exclusive representative for certain of its employees, including "Classroom Teachers" (J-1, p. 1).
4. There are three high schools within the District, namely, Toms River High School North, Toms River High School East and Toms River High School South (Tr 38).

5. For approximately ten years, since the 1979-80 school year, there has existed a category of "Classroom Teachers," designated as Department Chairpersons ("DCH"), who are the equivalent of Head Teachers in other school districts (Tr 8).^{3/}

6. During the 1988-89 school year there were approximately 30 DCH's^{4/} in the three high schools operated by the Board, divided equally with ten such persons in each of the three high schools (Tr 38, 76). Also, during the 1988-89 school year each DCH received an annual stipend of \$980 as provided in Schedule "A" of J-1 (p. 48). During the 1989-90 school year this stipend was to have increased to \$1066 pursuant to the same Schedule "A" (p. 49). [Tr 24, 35, 43, 44, 50].

7. The DCH's performed a variety of duties^{5/} which may be summarized as follows:

a. Familiarizing substitute teachers with departmental procedures and occasionally substituting for the designated substitute teacher in emergencies (Tr 21, 39, 47, 48).

^{3/} A Resolution adopted by the Board on May 16, 1989, eliminated certain positions, among which were those of "High School Department Heads." Those affected were in fact the Department Chairpersons whose elimination is the subject of this proceeding. [CP-1, p. 2].

^{4/} The record indicates that the number of DCH's eliminated was 30 but the Association uses the number "33" throughout its Brief.

^{5/} See Tr 17-21, 32, 33, 39-42, 47-50 and, also, the job description for "Department Chairperson" (R-3; Tr 78).

b. Serving as liaison between supervisory and administrative personnel and teaching staff members within their respective departments (Tr 49, 50).

c. Preliminary screening and viewing of instructional materials and facilities management for their respective departments (Tr 18, 20, 21, 39, 40, 42).

d. In the English Department, the DCH's were responsible for the maintaining of inventory within the department at each high school (Tr 17, 18, 40, 41).

e. Gathering lesson plans from teachers and performing ministerial functions regarding the collection of grades for submission to the appropriate supervisory personnel (Tr 18, 19, 41, 42, 48).

8. Regular classroom teachers were assigned five instructional periods, a duty period, a conference period and a lunch period. Certain DCH's were assigned five instructional periods, a lunch period, a conference period and an additional period to conduct their DCH duties. The normal work schedule for a DCH has consisted of four instructional periods, a supervisory period, a lunch period and a conference period that involved pupil/teacher contact time. This was followed by a period to conduct DCH duties. [Tr 25, 26, 50, 51).

9. At no time were the DCH's responsible for the evaluation of other classroom teachers, this being the responsibility of the Board's supervisors (Tr 34, 43, 51, 52).

Also, the DCH's were not responsible for the handling of grievances (Tr 33, 34).

10. Effective with the 1989-90 school year, the Board unilaterally decided to transfer in toto all of the negotiations unit administrative work, previously performed by the DCH's, to non-unit personnel, which included principals, assistant principals and general supervisors in the District (Tr 29, 52, 79). These latter individuals have been responsible for the evaluation of classroom teachers in the several departments at the three high schools (Tr 52). This unilateral change also resulted in the discontinuance of the payment of the annual stipends to the DCH's, effective with the 1989-90 school year (Tr 29, 30, 35).

11. In the 1989-90 school year, all of the 30 DCH's were returned to classroom teaching and each assumed the same teaching load as that of regular classroom teachers, namely, five instructional periods, a duty period, a conference period and a lunch period (Tr 30, 31, 44, 50, 77).^{6/}

12. John Garrabrant, the Board's Senior Assistant Superintendent of Schools, testified that after the Board's 1989-90 school budget was overwhelmingly defeated it was determined that \$3.8 million would have to be removed from the 1989-90 operating budget. This required a number of adjustments to plant and

^{6/} Of the 20 to 26 instructional positions, which were eliminated during 1989 and 1990, most of the reductions were effectuated by attrition and none of the former DCH's were affected (Tr 95, 96).

personnel, one recommendation being the elimination of the DCH's. [Tr 71-76]. Following a May 9, 1989, memorandum from Garrabrant to the Superintendent of Schools, the Board on May 16, 1989, adopted a Resolution, previously referred to, which, in part, eliminated the DCH's ("High School Department Heads") [CP-1, p. 2; R-1; Tr 74, 76, 77].

13. Jay Wilkinson, the President of the Association, testified without contradiction that the Board did not negotiate with the Association either prior to or after the adoption of its May 16th Resolution eliminating the DCH's (Tr 58, 61).

14. Garrabrant freely admitted that, as a result of the elimination of the DCH's, the duties set forth in their job description (R-3, supra) are currently being performed by supervisory personnel who are not within the Association's collective negotiations unit (Tr 78-80).

15. The parties met on June 13, 1989, where, among other matters, the elimination of the DCH's was discussed (Tr 63, 67, 69, 82-86, 91-93). Essentially, the Board's position on June 13th was and remains that its decision to eliminate the DCH's was not negotiable (Tr 92).

16. By eliminating the annual stipend for the 30 DCH's the Board's projected savings were in excess of \$30,000 per year (Tr 77, 96).

17. Garrabrant was a former President of the Association, who had negotiated contracts on its behalf. He acknowledged that

the DCH's stipend was a term and condition of employment and that transferring their duties to supervisors would result in the elimination of this stipend. Nevertheless, Garrabrant did not recommend to the Board that it had an obligation to negotiate under the provisions of Article 2, "Negotiation Procedure," Section F. [Tr 88-91].^{7/}

ANALYSIS

The Board Violated The Act When On May 16, 1989, It Unilaterally Eliminated The Position Of Department Chairperson And The Annual Stipend As Of The 1989-90 School Year "For Reasons Of Economy" And Transferred The Duties To Non-Unit Personnel Without First Negotiating The Matter Of Compensation.

Introduction:

The Association is not seeking in this case "...to recreate the position of department chairperson..." [Brief, p. 2]. Rather, the Association has focused upon the Board's unilateral elimination of the annual stipend formerly received by the 30 classroom teachers whose DCH's duties were transferred to non-unit personnel in the 1989-90 school year, the sole purpose of which was to reap a saving of budget dollars for that year [Brief, p. 2]. By way of remedy, the Association first requests an order that the Board negotiate

^{7/} Section F of Article 2 of the current agreement provides, inter alia, that "...all terms and conditions of employment applicable on the effective date of this Agreement shall remain in full force and effect except that proposed new rules or modifications of existing rules...shall be negotiated with the majority representative before they are established..." (J-1, p. 3).

compensation for those classroom teachers who formerly served as DCH's. Additionally, the Association seeks an order that the "...affected teaching staff members..." be made "...whole for the unilateral elimination of their stipends...effective the start of the 1989-90 school year..." [Brief, p. 31]. Whether a "make whole" remedy, in addition to an order to negotiate, is appropriate in this case will be determined hereinafter.

The Board views its decision to eliminate the DCH's, and the transferring of their duties to non-unit personnel, as one merely involving "musical chairs" since a "one-to-one" change has occurred, which does not constitute the negotiable transfer of unit work. The Board concedes freely that its decision was economically based and arose from the fiscal exigencies in its budget for the 1989-90 school year. Thus, does the Board contend: (1) that it may abolish positions, such as DCH's, for reasons of economy [Brief, pp. 7-11]; (2) that it is not required to negotiate the "impact" of its decision [Brief, pp. 11-13]; and, (3) as mentioned previously, that it has not transferred the unit work of the former DCH's but rather it has reassigned their duties to non-unit personnel, which does not require mandatory negotiations [Brief, pp. 13-16].

* * * *

Although, as noted previously, the Board makes three separate arguments in its Brief, it would appear that the heart of its case is that its action in eliminating the DCH was "...not a transfer of bargaining unit work...[as contended by the Association]

but rather it was "...a reassignment of work as part of restructuring necessitated by the budget cut with the Department Chairpersons returning to full-time teaching instead of a four-fifths teaching load now that they are not serving as Department Chairs..." [Board's Brief, p. 15]. The essential issue to be resolved is whether the Board's unilateral decision to (1) eliminate the 30 DCH positions, (2) reassign their duties to non-unit personnel and (3) eliminate their annual stipend, constituted the exercise of a non-negotiable managerial prerogative and/or an educational policy decision. Or, in the alternative, was the Board's decision motivated solely by economic considerations related to terms and conditions of employment.

It is noted preliminarily that the Board had decided in May 1989, to eliminate the DCH's, beginning with the 1989-90 school year, in order to effect a budgetary savings in excess of \$30,000. Based upon the contractual requirement the stipend for the 30 DCH's would have been \$1,066 in 1989-90 and \$1,160 for the following year (1990-91)[J-1, pp. 49, 50]. Thus, the projected accrued savings over the last two years of the agreement were substantial.

The event which triggered the Board's economic retrenchment was the defeat of its operating budget at a special election on April 4, 1989. Because the Board concluded that a reduction of \$3.8 million was required to balance its 1989-90 school budget, it adopted a Resolution on May 16, 1989, which, inter alia, caused the elimination of the position of DCH for the 1989-90 school year

"...for reasons of economy..." (CP-1, p. 2). However, this decision to eliminate the DCH position did not result in reductions-in-force of DCH's during the 1989-90 school year. Thus, there is no issue involving the "RIF" of DCH's under N.J.S.A. 18A:28-9, which the Board has unnecessarily addressed in its Brief (see pp. 7-10).

The Hearing Examiner in Cherry Hill Tp. Bd. of Ed., H.E. No. 81-16, 6 NJPER 569 (¶11288 1980), adopted, P.E.R.C. No. 81-90, 7 NJPER 98 (¶12040 1981)^{8/} addressed a set of facts, which while similar to the case at bar, are distinguishable in a significant respect. The Board there eliminated the positions of "Chairperson of Physical Education" and "Chairpersons of Related Arts" and "transferred" their duties to non-unit personnel (a principal, vice principal and assistant principal)[6 NJPER at 570, 571]. The affected chairpersons, whose positions were eliminated, were not "RIFFED" but instead assumed regular teaching duties.^{9/} Since the basic issue was in fact one of "...reassignment of duties...", the Hearing Examiner found that the case before him predominantly involved a non-negotiable major educational policy decision by the

8/ Relied upon by the Board herein.

9/ There being no "RIF," neither N.J.S.A. 18A:28-9, supra, nor the issue of negotiating the "impact" of eliminating the position of "Chairperson" was involved: Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979) and the Board's Brief at pp. 11-13.

Board^{10/} arising from "...a reorganization of departmental structure and a reassigning of supervisory duties from one group of employees to another and such transfers are non-negotiable..." (6 NJPER at 571).^{11/}

The Commission, in adopting the conclusion of its Hearing Examiner in Cherry Hill, placed an important gloss upon its ultimate holding by twice emphasizing that the facts before it involved the reassignment of work from unit employees to employees outside of the unit as part of "...a general restructuring of the supervisory responsibilities...for predominantly educational policy reasons rather than economic or other reasons related to the employees' working conditions..." (7 NJPER at 98)(Emphasis supplied).

Therefore, the Commission distinguished between Point Pleasant [non-negotiable] and Rutgers [mandatorily negotiable] in the same fashion as had the Hearing Examiner.^{12/}

^{10/} Relying upon Point Pleasant Boro Bd. of Ed., P.E.R.C. No. 80-145, 6 NJPER 299 (¶11142 1980) and East Orange Bd. of Ed., P.E.R.C. No. 79-62, 5 NJPER 190 (¶10107 1979). See also, Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 1 (1973).

^{11/} Compare: Rutgers, The State University, P.E.R.C. No. 79-52, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979), aff'd App. Div. Dkt. No. A-3651-78 (1980).

^{12/} The Commission restated this distinction once again, stating clearly that if the Board's motivation in Cherry Hill had been "economic," and related to the terms and conditions of employment of the affected employees, then the result would have been different (7 NJPER at 99). See also, Point Pleasant, 6 NJPER at 301 (n. 4).

It is deserving of note that in Toms River Bd. of Ed., P.E.R.C. No. 84-4, 9 NJPER 483 (¶14200 1983), cited by the Board herein, the Commission clearly distinguished restructuring and reassignment decisions.^{13/} from those in which an employer may be deemed to have violated the Act: (1) by unilaterally abolishing a unit position and then creating an identical position outside of the unit^{14/} or (2) by unilaterally removing unit work and assigning it to an employee or employees outside of the unit^{15/} from those decisions where an employer changes the level of services delivered through personnel changes thereby restructuring the employee's or employees' responsibilities.

In both Point Pleasant and Toms River the Commission concluded that the controlling facts predominantly involved the exercise by the respective Boards of a managerial prerogative: in Point Pleasant the prerogative was one of an educational policy judgment to transfer the supervision of certain teachers from department chairpersons to a principal thereby reorganizing the

^{13/} See Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. District Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980) and Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, *supra*.

^{14/} See Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1981), *aff'd* App. Div. Dkt. No. A-1818-80T8 (1982) and Passaic County Reg. H.S., P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981).

^{15/} See Monroe Tp. Bd. of Ed., P.E.R.C. No. 81-145, 7 NJPER 357 (¶12161 1981) and Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), *aff'd* App. Div. Dkt. No. A-468-81T7 (1983).

departmental structure; and in Toms River the Board's prerogative was exercised to replace two unit cafeteria managers with one non-unit traveling cafeteria manager where the objective of the Board was to effect a reduction-in-force and provide efficient services.

* * * *

In the case at bar, the Hearing Examiner has concluded that the facts presented predominantly involve a mandatorily negotiable economic decision by the Board to effect savings in excess of \$30,000 per year by eliminating the DCH's and their annual stipends. As noted previously, the Board in its Brief (p. 15) acknowledges that the subject matter of the instant Unfair Practice Charge is "...a reassignment of work as part of a restructuring necessitated by the budget cut..." (Emphasis supplied). Since the reassignment of the DCH's to a full five-period teaching load as classroom teachers was in point of fact "necessitated by the budget cut" then a fortiori the Board's decision was motivated by mandatorily negotiable economic factors and did not involve non-negotiable departmental reorganization or the reassigning of duties from the DCH's to non-unit personnel in furtherance of a major educational policy. Compare Point Pleasant, supra (6 NJPER at 300). This case purely and simply involves the "...revamping (of) personnel assignments..." (within the meaning of Rutgers (5 NJPER at 186).

* * * *

The Association has from the outset has disclaimed any intent to seek the resurrection of the DCH position. Instead it seeks economic recompense for those 30 DCH's whose positions were eliminated, *i.e.*, their annual stipend. The question now is one of the appropriate remedy for the Board's violation of the Act by having unilaterally eliminated the stipend "...for reasons of economy..." (Association Brief, pp. 2, 15, 30; CP-1, p. 2). Note is made of a statement by counsel for the Association in his Brief (p. 15) that it is "plain as a pike staff"^{16/} that there were no non-negotiable "managerial reorganizational objectives" in the Board's decision to eliminate the DCH positions. The Board's only interest was in saving money by its "shifting of unit work" thereby eliminating the stipend of \$1,066.00 for each DCH, beginning with the 1989-90 school year [Association Brief, p. 15].

The Hearing Examiner has noted previously that Article 2, Section F 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..." (J-1, p. 3) (Emphasis supplied). This provision in the agreement is, of course, merely a restatement of a portion of Section 5.3 of the Act which, when applicable, excuses the Association (in this case) from making a demand upon the Board to

^{16/} A phrase occasionally used by this Hearing Examiner to emphasize the absence of doubt. Source: WW II memorandum from Sir Winston Churchill to FDR - [Gilbert, Martin: Road to Victory, 1941-1945, p. 1268 (Houghton Mifflin 1986)].

negotiate prior to its implementation of a "new rule" - the elimination of the DCH position and with it the accompanying annual stipend.

Commission precedent on this issue dates back to 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). There it was held that "...Where, during the term of an agreement, a public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement though a 'maintenance of benefits' or other similar provision, the employer must first negotiate such proposed change with the employees' representative prior to its implementation..." (4 NJPER at 85)(Emphasis supplied).^{17/}

As the Association again points out, the Board's decision to eliminate the DCH position was in and of itself the exercise of a non-negotiable managerial prerogative. However, the economic component, i.e., the annual stipend, is a form of compensation, which has been recognized many times by the Commission and the courts as severable and, thus, mandatorily negotiable. A

^{17/} Other relevant decisions, involving the New Brunswick principle, are: Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); East Newark Bd. of Ed., P.E.R.C. No. 82-123, 8 NJPER 373 (¶13171 1982); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. No. A-3380-80T2 (1982); Middletown Tp. Bd. Ed., P.E.R.C. No. 88-118, 14 NJPER 357 (¶19138 1988); Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322 (1989) aff'g App. Div. Dkt. No. A-5558-86T8 (1988). See also, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

representative case is that of Sayreville Bd. of Ed., P.E.R.C. No. 84-74, 10 NJPER 37 (¶15021 1983) where the Commission restated the law on the subject as follows:

We agree with the Board that it has a non-negotiable managerial prerogative to make the assignments in question. See, e.g., Ramapo-Indian Hills Ed. Assn. v. Ramapo-Indian Hills H.S. Dist. Bd. of Ed., PERC No. 80-9, 5 NJPER 302 (¶10163, 1979), aff'd 176 N.J. Super 35 (App. Div. 1980)("Ramapo"); In re Byram Twp. Bd. of Ed., PERC No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super 12 (App. Div. 1977)("Byram"); Wanaque. It has been repeatedly held, however, that the severable issue of compensation for such assignments is mandatorily negotiable and arbitrable. See, e.g., Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Ramapo; In re Perth Amboy Bd. of Ed., PERC No. 83-36, 8 NJPER 573 (¶13264 1982), motion for reconsideration denied, PERC No. 83-63, 9 NJPER 16 (¶14007, 1982). See, also Piscataway; In re Hillside Bd. of Ed., PERC No. 76-11, 1 NJPER 55 (1975)("Hillside"); In re East Brunswick Bd. of Ed., PERC No. 83-87, 9 NJPER 68 (¶14037, 1982). In the instant case, therefore, the issue of compensation for the new classroom assignments is mandatorily negotiable and arbitrable. (10 NJPER at 38, 39).

See also: Boro of Middlesex, P.E.R.C. No. 85-3, 10 NJPER 486 (¶15218 1984) and Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986), aff'd App. Div. Dkt. No. A-4545-85T7 (1987), certif. den. 108 N.J. 208 (1987).

While the Hearing Examiner declines to order the restoration of the status quo ante, which would immediately restore the stipend to all of the affected DCH's, he will recommend that the DCH's be made whole for the loss of their stipend retroactive to September 1989 when it was unilaterally discontinued. Further, he will recommend that the Board forthwith negotiate in good faith with

the Association with respect to the subject matter of the unilateral elimination of the stipend "for reasons of economy," all of which has been found to be a violation of Sections 5.4(a)(1) and (5) of the Act.

* * * *

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

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, after eliminating the position of Department Chairperson on May 16, 1989, it unilaterally reduced the annual stipend as of the 1989-90 school year "for reasons of economy ," transferring the duties to non-unit personnel, without first negotiating the matter of compensation with the Association.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally eliminating the annual stipend of the Department Chairperson as of the 1989-90 school year "for reasons of economy" without first negotiating the matter of compensation with the Association.

2. Refusing to negotiate in good faith with representatives of the Association with respect to the terms and

conditions of employment of its former Department Chairpersons, including the matter of compensation for loss of the annual stipend.

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

1. Forthwith make all of the Department Chairpersons, whose positions were eliminated on May 16, 1989, whole for all monies to which they would have been entitled as stipends under the Agreement, retroactive to September 1, 1989, together with interest on the monies due them at the rates authorized by R.4:42-11 for the years 1989, 1990 and 1991, respectively.

2. Negotiate with the Association over compensation for the elimination of the Department Chairperson stipends as of September 1, 1989, and further, negotiate as to any future proposed changes in the terms and conditions of employment of employees within the unit prior to implementation.

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 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.

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



Alan R. Howe
Hearing Examiner

Dated: February 22, 1991
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT.

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally eliminating the annual stipend of the Department Chairperson as of the 1989-90 school year "for reasons of economy" without first negotiating the matter of compensation with the Association.

WE WILL NOT refuse to negotiate in good faith with representatives of the Association with respect to the terms and conditions of employment of its former Department Chairpersons, including the matter of compensation for loss of the annual stipend.

WE WILL forthwith make all of the Department Chairpersons, whose positions were eliminated on May 16, 1989, whole for all monies to which they would have been entitled as stipends under the Agreement, retroactive to September 1, 1989, together with interest on the monies due them at the rates authorized by R.4:42-11 for the years 1989, 1990 and 1991, respectively.

WE WILL negotiate with the Association over compensation for the elimination of the Department Chairperson stipends as of September 1, 1989, and further, negotiate as to any future proposed changes in the terms and conditions of employment of employees within the unit prior to implementation.

Docket No. CO-H-90-106
SN-H-90-25

TOMS RIVER 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.