

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE
BOROUGH OF SOMERVILLE

Respondent,

-and-

Docket No. CO-86-178-153

SOMERVILLE SUPERVISORS ASSOCIATION,
SOMERVILLE FEDERATED TEACHERS' ASSOCIATION,
SOMERVILLE SCHOOL ADMINISTRATORS' ASSOCIATION

Charging Parties.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the Board of Education of the Borough of Somerville violated the New Jersey Employer-Employee Relations Act when it adopted the school calendar which unilaterally increased the workyear of employees represented by the Somerville Supervisors' Association, Somerville Federated Teachers' Association and the Somerville School Administrators' Association. A Hearing Examiner recommended this conclusion and the Chairman, in the absence of exceptions, adopts it.

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Charging Parties.

Appearances:

For the Respondent:

Carpenter, Bennett & Morrissey, Esqs.
(Irving Hurwitz, Esq.)

For the Charging Parties:

Jeffrey Bartges, Esq.

DECISION AND ORDER

On January 14, 1986, the Somerville Supervisors Association, Somerville Federated Teachers' Association and Somerville School Administrators' Association ("Associations") filed an unfair practice charge against the Board of Education of the Borough of Somerville ("Board"). The Associations allege 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/}

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

when it unilaterally established a school calendar that would have lengthened the employees' work year; refused to negotiate the severable mandatorily negotiable consequences of the decision and blamed the Associations, in a press release, for its subsequent decision to shorten the calendar.

On April 11, 1986, a Complaint and Notice of Hearing issued. On April 24, 1986, the Board filed an Answer. It admitted adopting the school calendar and issuing a press release but denied violating the Act. As separate defenses, it contended the Association contractually waived its right to negotiate compensation for the alleged workyear increase.

On May 21, 1986, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On February 13, 1987, the Hearing Examiner issued her report and recommended decision. H.E. No. 87-48, 13 NJPER ____ (¶ ____ 1987) She found that the Board violated the Act when it adopted the school calendar which unilaterally increased the employees' workyear. She found that the Board was obligated to negotiate

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

compensation for this increase. She declined to order negotiations, however, since the Board had already reduced the workyear to a level consistent with past years. Rather, she recommended a cease and desist order and posting notice of the violation. She finally found that the Board's press release did not violate the Act since it was within the acceptable limits of permissible criticism under Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

The Hearing Examiner served her report on the parties and informed them that exceptions were due by March 5, 1987. No exceptions were filed or extensions requested.

The full Commission has delegated authority to me to review cases in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-15) are accurate. I adopt and incorporate them here. Under all the circumstances of this case, I agree that the Board violated the Act when it increased the workyear, but did not negotiate compensation for the increased work. I also agree that a make whole remedy is not necessary since the Board voluntarily reduced the workyear, but that a cease and desist order and posting a notice of the violation is an appropriate remedy. Finally, I agree that the Board's press release did not violate the Act.

ORDER

The Public Employment Relations Commission orders that the Board of Education of the Borough of Somerville to:

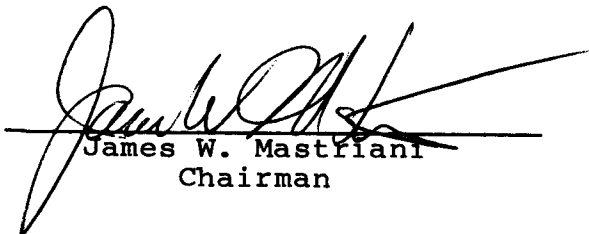
A. Cease and desist from unilaterally increasing the length of the administrators, supervisors and secretaries workyear.

B. Take the following affirmative action:

1. Negotiate in good faith before changing the length of the administrators, supervisors and secretaries workyear.

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 on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained 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.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
April 3, 1987

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 cease and desist from unilaterally increasing the length of the administrators, supervisors and secretaries workyear.

WE WILL negotiate in good faith before changing the length of the administrators, supervisors and secretaries workyear.

Docket No. CO-86-178-153 BOARD OF EDUCATION, BOROUGH OF SOMERVILLE
(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.

H.E. NO. 87-48

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

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BOROUGH OF SOMERVILLE

Respondent,

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SOMERVILLE SCHOOL ADMINISTRATORS' ASSOCIATION

Charging Parties.

SYNOPSIS

A Hearing Examiner finds that the Board violated 5.4(a)(5) and, derivatively, (a)(1) when it unilaterally increased the length of the employees workyear. However, no monetary remedy is necessary since the Board subsequently re-struck a workyear which is within the range established by the parties' past practice.

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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Charging Parties.

Appearances:

For the Respondent:
Carpenter, Bennett & Morrissey, Esqs.
(Irving Hurwitz, Esq.)

For the Charging Parties:
Jeffrey Bartges, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 14, 1986, the Somerville Supervisors Association, Somerville Federated Teachers' Association, and the Somerville Administrators' Association, ("Charging Parties" or "Associations") jointly filed an Unfair Practice Charge with the Public Employment Relations Commission ("the Commission"). The Associations alleged that the Board of Education of the Borough of Somerville ("Respondent" or "Board") violated the New Jersey Employer-Employee Relations Act, ("the Act"), specifically, N.J.S.A. 34:13A-5.4(a)(1)

and (5),^{1/} of the Act. Specifically, the Associations allege that without prior negotiations, the Board (a) adopted a school calendar which effectively increased the employees' workyear by five days more than what had been the district's past practice; (b) refused to negotiate in good faith concerning the increased workyear; and (c) upon subsequent adoption of an amended calendar which restored some of the lost vacation time, issued a press release "blaming the employee bargaining groups" for the Board's subsequent decision.

It appearing that the allegations of the charge, if true, may constitute unfair practices, a Complaint and Notice of Hearing (Exhibit C-1)^{2/} was issued on April 11, 1986. On April 24, 1986, the Board filed an Answer to the Complaint admitting to certain factual allegations contained within the charge and denying others, generally denying that the Board committed an unfair practice, and stating affirmatively that, (a) any allegation that the Board failed to negotiate prior to the adoption of the calendar is barred by the

^{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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

^{2/} Exhibits are designated as follows: C-1, etc., are Commission Exhibits; J-1, etc., are Joint Exhibits; CP-1, etc., are Charging Parties' Exhibits; and R-1, etc., are Respondent's Exhibits.

statute of limitations; (b) Charging Parties have waived their rights to negotiate concerning the workyear increase by agreeing to the terms of their respective collective negotiations agreements; and (c) the increase in workyear, if any, is consistent with past practice.

An evidentiary hearing was conducted on May 21, 1986, at which the parties presented evidence and examined witnesses. Thereafter, the parties each filed briefs on August 14, 1986, and the Board filed a reply memorandum on August 28, 1986.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Somerville Board of Education is a public employer within the meaning of the Act (T-7).^{3/}

2. The Somerville Supervisors Association, Somerville Federated Teachers' Association, and the Somerville Administrators' Association, are public employee representatives within the meaning of the Act (T-7-8).

3. The Somerville Administrators' Association is the exclusive representative of a collective negotiations unit of certified administrators, including principals and vice-principals, employed by the Somerville Board of Education (Exhibit J-3). There

^{3/} References to the transcript of the May 21, 1986, hearing are designed as "T-1, etc.

is a current agreement in effect covering the administrators' unit for the period July 1, 1985 through June 30, 1987 (Exhibit J-3). That collective negotiations agreement, which was entered into on January 28, 1986, provides, at Article 4, Section A that:

(1) Administrators shall be employed on a twelve (12) month basis with twenty-two (22) working days' vacation between July 1st and August 31st, and the vacation is earned at the end of the school year.

(2) The in-school work year shall include days when pupils are in attendance, orientation days, and any other on which administrator attendance is required. (Exhibit J-3 at p. 4)

Identical language appears in the previous contract, which covered the period July 1, 1982 through June 30, 1985. (Exhibit J-2).

4. There is also a current agreement in effect between the Board and the Somerville Supervisors Association for the period July 1, 1985 through June 30, 1987 (Exhibit CP-1). This contract, covering supervisors was entered into on October 24, 1984. It provides in relevant part at Article 4, Section A, that

A. 1. Supervisors shall either be employed ...on a ten (10) month basis, or on a twelve (12) month basis with twenty-two (22) working days vacation between July 1st and August 31st and the vacation is earned at the end of a school year.

* * *

3. The in-school work year shall include days when pupils are in attendance, orientation days, and any other on which subject supervisor attendance is required; the work year begins on September 1st and continues through June 30th each school year for ten (10) month supervisors. (Exhibit CP-1 at p. 4)

At the time of the hearing, there was a current collective negotiations agreement in effect between the Board and the Somerville Federated Teachers Association covering the unit of classroom teachers and certified non-teaching employees, secretarial and clerical employees, and custodial and maintenance employees (Exhibit J-1). This contract, for the period July 1, 1984 through June 30, 1986, was entered into by the parties on September 10, 1984. In relevant part, that contract provides at Article 17:

- A. The Board agrees that the Superintendent of Schools will transmit the proposed calendar to the Association and shall meet with appropriate officials of the Association to discuss and consider revision of the calendar before transmission to the Board.
- B. Acceptance of the calendar by the Association is not mandatory before the calendar may be transmitted or adopted.
- C. The in-school work year for teachers employed on a ten-month basis shall not exceed 185 days.
- D. The in-school work year shall include days when pupils are in attendance orientation days or other work days.
- E. Teacher attendance shall not be required whenever student attendance is not required due to inclement weather so long as the total student days shall not be less than 180 days (Exhibit J-1 at p. 24).

Article I, "Recognition Clause" of that agreement provides that "The term 'classroom teachers' shall be defined as all certified staff except principals, assistant principals, supervisors, central administrative personnel, substitutes and teacher aides." (Exhibit

J-1 at p. 2). The record does not establish that teachers or any other certified staff members were scheduled to work more than the contractual limit of 185 days (T-32, 104). Article 16 of that contract provides that custodians work 12-months and are given specific holidays off, none of which are implicated in this proceeding.

Article 20, Section G of the contract provides:

All ten (10) month secretarial and clerical employees shall be employed from September 1 through June 30, with the same holiday schedule as teachers, as outlined in the Somerville Public Schools annual calendar. All twelve (12) month employees shall be employed from July 1 through June 30, with the same holiday schedule as teachers, as outlined in the Somerville Public Schools annual calendar....(Exhibit J-1 at p. 26.)

5. Exhibit CP-2 (a through l) are the school calendars of the district during the past 11 school years.^{4/} These clearly show the past practice of the district in terms of holidays, and other periods when school was closed. It shows that over the 11-year period prior to the 1985-86 school year, the average length of a workyear for secretaries, supervisors and administrators was 192 days. In some years, the 10-month employees were scheduled to work as many as 194 days, e.g., in 1983-84; while in other years they were scheduled to

^{4/} Prior to 1979, the supervisors were included in the Federated Teachers' Association unit (T-21).

work as few as 190 days, e.g., 1980-81 (Exhibit CP-2; T-105-107, 142-144). Since 10-month supervisors work September 1 through June 30, excluding days on which school is closed during the teachers' workyear, the average number of days in these employees' workyear was 192. This total workyear in terms of days is a function of two factors: the aggregate number of weekdays occurring between September 1 and June 30, less the number of days (holidays, vacations recesses) that the school calendar dictates pupils and teachers are off. For the 12-month staff, the total workyear is a function of the aggregate number of weekdays during the entire year, less the number of days (holidays, vacation recesses) that teachers and pupils are off.

Exhibit CP-2(a) through (l) shows the following totals:^{5/}

^{5/} The parties stipulated that Exhibit CP-2(a) through (l) are authentic school calendars for the school year 1975-76 through 1985-86. (CP-2a is the 1985-86 calendar adopted by the Board on May 13, 1985.) The unrebutted testimony of Ted Stanik, President of the Supervisors' Association, shows how these calendars are to be read. Specifically, he testified that everything on the calendar from September 1 through June 30 represents a scheduled workday for supervisors, administrators and secretaries, except those days when school is closed, as indicated by a rectangle drawn around the date. Those days are all school holidays except for in-service days which teachers and staff are expected to report. I find CP-2 as being the most accurate way to count the number of workdays and holidays in each year. I did not credit the totals presented by the Superintendent, as attached to Exhibit CP-8, because they were inaccurate.

<u>School Year</u>	<u>Total # of Weekdays</u>	<u>Holidays</u>	<u>Total Days in Workyear</u>
1985-86 ^{6/}	216	20	196
1984-85	215	24	191
1983-84	217	23	194
1982-83	216	23	193
1981-82	217	25	192
1980-81	217	27	190
1979-80	216	25	191
1978-79	216	25	191
1977-78	217	25	192
1976-77	217	24	193
1975-76	218	25	193
1974-75	216	24	192

6. As is his usual custom, the Superintendent transmitted to each of the three Associations his proposed school calendar for the 1985-86 school year by cover memorandum dated February 20, 1985 (Exhibit R-1; T-22-24; 138-139). That proposed calendar provided for 183 pupil days, plus two staff inservice days (September 3 and 4), totalling 185 days for teachers. Since 10-month supervisors, administrators and secretaries work from September 1 through June 30, the Superintendent's proposed calendar contained a total of 191 total work days for 10-month staff. It included December 23, February 18, and April 2, 3 and 4 as days on which school would be closed. The last day of school for students would have been June 20. (Exhibit R-1). Superintendent Dwyer's memo invited responses and suggestions by March 20.

7. By memos dated March 17 and March 20, 1985, respectively, the Teachers Association and the Administrators

^{6/} Workyear resulting from the calendar adopted by the Board in May, 1985.

Association responded with suggestions (Exhibits J-4 and J-5 respectively).

8. By memorandum dated April 1, 1986, the Supervisors Association notified the Superintendent that proposals currently before the Board of Education to adopt a calendar which, by eliminating December 23, one of the two holidays in February, and three days from the Easter break, would have the effect of "significantly increasing" the supervisors workyear from an average of 192 days to 197 days. After presenting the Association's rationale as to why this alteration in the breaks would be unproductive for faculty and students, the Supervisors Association President urged that the workyear be kept at "around 192" and alternatively, proposed that the supervisors be compensated for the increase in workdays by paying supervisors five additional days pay, or by cutting the workyear by five days in June (Exhibit CP-3).

9. On April 2, 1985, the Administrators Association sent a memo to the Superintendent urging the retention of a "spring break" in the school calendar on the basis of its value to the students. (Exhibit J-6).

10. By memorandum dated April 4, the Teachers Association also urged that the spring break (Easter week) be retained. That memo expressed the position that adding working days during the Easter week constitutes a change in working conditions for secretaries and guidance counsellors and must be negotiated (Exhibit J-7).

11. By memo dated April 22, 1985 to the Superintendent, the Administrators Association notified the Superintendent that the

Administrators Association would seek additional compensation of four days pay if the Board voted to adopt a calendar which deleted three holidays from the spring break and one holiday from the winter break in February (Exhibit J-8).

12. On May 13, 1985, the Board passed a resolution adopting a calendar (Exhibit CP-2a) which deleted December 23, February 18, April 2, 3 and 4 from the calendar as holidays and made them working days, with a school closing date of June 13 instead of June 20, as had been proposed initially by the Superintendent (Compare CP-2a to R-1). The Board's reason for the change in the structure of the calendar was to increase student time-on-task, to decrease interruptions in instruction, and decrease the number of school days in June, which the Board felt were unproductive to the educational process (T-151-152). The total number of holidays in that calendar was 20, and the total workyear for 10-month employees was 196 days (T-146-147).

13. By memorandum dated May 15, 1985, from Ted Stanik, President of the Supervisors Association to Board President Ruth Ann Couch, he recognized the Board's right to establish a school calendar, but noted that there was an increase of four days over the average number of days in the administrator's workyear (from 192 to 196) the Association requested that the Board enter into negotiations over the impact of the new calendar (Exhibit CP-4; T-32).

14. In May 1985, a meeting took place between Board Attorney Dilts, other Board members and Stanik. At that meeting, Dilts said there was no impact to the change in calendar and this was not subject to negotiations. The Board's position was that they were not there to negotiate, they were there to ask the Supervisors Association to drop their demand for extra compensation. No proposals were proffered by either party at this meeting concerning compensation for the days. (T-34-36; 89-90)

15. On May 28, 1985, The Board filed a Scope of Negotiations Petition seeking a determination from this Commission concerning whether it was required to negotiate the impact of the school calendar it had adopted. Both parties agreed to submit the negotiability question to the Commission's Litigation Alternative Procedure. Under this procedure, an assigned staff agent issued an advisory opinion to the parties on September 16, 1985, and the Scope Petition was subsequently dismissed. ^{7/}

16. On October 14, 1985, a meeting took place between four Board members, the Board Attorney Dilts, Stanik (representing the Supervisors Association), Mr. Heller and Mr. Durland for the Teachers Association, and Mr. Mopsick, Ms. Pavol, and Mr. Abate for the Administrators Association (T-90-91). At that meeting, all three organizations expressed the view that this calendar

^{7/} I take administrative notice of the filing of this Scope Petition, and the procedural history of the matter.

represented five additional days of work over past practice and the three organizations were seeking five additional days pay. The Board Attorney asked for an explanation of how the Associations were counting it as a five-day increase. At that point, the Board President asked Stanik to specifically develop the argument of the December 23 day, and he did. Next, the other organizations presented their viewpoints. The Teachers' Association expressed what it felt was the impact of the December 23 day on their group, and the Administrators' Association presented its position. The Board Attorney responded by indicating the Board negotiating committee would take it under advisement, discuss it with the Board, and within two to three weeks, provide the respective Associations with a response (T-42-44; 92-99; 160-165).

17. By letter dated October 18, Board Attorney Dilts corresponded with the three Association representatives (Exhibit CP-6). That letter confirmed that a "negotiations session"^{8/} was held on October 14, 1985, and lasted for 50 minutes. He confirmed that each employee group asserted the position that the members were seeking 5 extra days pay for five extra days work. He indicated that the negotiations committee will consider "this request" with the full Board and will respond within two to three weeks (Exhibit CP-6).

^{8/} I find this characterization to be rather self-serving in the interest of the Board, given the circumstances.

18. On October 22, the Board voted to modify the 1985-86 calendar by reinstating three holidays to the Easter vacation (April 2, 3 and 4), and extending the pupils' school year by three days from June 13 to June 18 (Exhibit R-3; T-48). By memorandum dated October 23, it so notified all school district staff by interoffice mail (Exhibit R-3).

19. On October 23, the Board issued a press release (Exhibit CP-7) indicating that because of lack of cooperation of the employee bargaining groups, the Board was required to alter the school calendar by adding the three additional days back into Easter Recess, and extending the end of the school year by three days. The Board further expressed its disappointment at the resistance of its staffs' representatives, and because of this resistance the Board would have to expend tens of thousands of dollars if it did not modify the calendar (Exhibit CP-7).

20. By letter dated October 25, the three organizations advised Dilts that, since the calendar still contained an additional two days to the workyear as established by past practice, the Associations requested that a meeting be set up to negotiate the financial impact of the increase in workyear (Exhibit CP-5). By letter dated October 25, Board Attorney Dilts notified the representatives of the Associations that the Board negotiating committee was prepared to continue negotiations concerning the calendar issue (Exhibit R-4).

21. By letter dated November 11, 1985, Board Attorney Dilts advised the three Associations that, since the Board had acted to reinstate three days back into Easter Recess, the Board believed that the workyear was increased by only one day over the average. That letter advised, "The Board will not pay any additional compensation over and above that required by current contracts." The Board went on to state its reasons: (a) because of bad weather, the Board had already closed schools one day; (b) the past practice between the parties is that the length of the workyear has been increased before without complaint from the Associations.; (c) the change is authorized by the contracts, thus constituting a waiver of the Associations' right to negotiate, and (d) the impact is de minimis. Dilts concluded this correspondence with :

The Board will proceed with the scheduled session. This letter is sent to advise you of the substance of the Board's position in advance in the event that you deem the meeting unnecessary. If you do wish to meet for the purpose of negotiating these issues further, the Board negotiating committee will be present and ready to continue these discussions.

The Board requests that each unit consider the points raised in this letter and it is our hope that the various units will withdraw the request for additional compensation. If you do not, then we suggest that we have reached an impasse and that the appointment of a mediator would be appropriate (Exhibit CP-8).

21. On November 11, 1985, a meeting was held between the Board's negotiations committee and the respective representatives of the Associations (T-55-56). Dilts also attended the meeting, as did Jeffrey Bartges, Counsel to the three Associations. The various points of Dilts' letter were addressed. Dilts proposed

that there be compensation of two days pay for the members of the Associations. The Board negotiations committee's response was that the Board's position was in the letter, and while the parties could continue to meet, and the Board's response would be the same as the position in the letter, and if the Associations were looking for any other resolution, they would have to go to a different forum (T-56; 115-118). Board Attorney Dilts suggested that the parties could get a mediator (T-168). However, the Supervisors Association disagreed that an impasse existed concerning the form or amount of compensation, since the Board's position was that there was no impact of the calendar to negotiate (T-146). Teachers' Association President Durland testified that the Board representatives stated that "the matter was closed" (T-114). While I do not credit this statement, both Durland and Stanik testified credibly that the Board's position was that there was no increase to negotiate. The Supervisors Association had a subsequent proposal that it could have made, but did not because the Board had not responded to the Association's initial proposal (T-114). No other meetings took place, neither party requested a mediator, and the instant charge ensued on January 14, 1986.

ANALYSIS

The (a)(5) Issue:

The Associations allege that the school calendar, adopted by the Board on May 23, 1985, unilaterally increased the staff's workyear by five (5) days. The Associations further allege that the Board continued to refuse to engage in good faith

negotiations, and that on October 23, 1985, the Board again unilaterally modified its school calendar by restoring three days of the Easter break. The Associations allege that the 196-day workyear established by the Board's May 1985 adoption of the school calendar, and even the 193-day workyear established by the October, 1985 adopted calendar, constitutes a change in the parties' past practice. While the Associations acknowledge that they have permitted the calendar to vary in terms of the total number of days each year, the average has been around 192, thus the school calendar adopted May 23, 1985, (hereafter, "Calendar I") and the school calendar adopted October 22, 1985, (hereafter, "Calendar II") constitute an increase in the length of the work year established by the parties past practice over the last 10 years. Charging Parties also assert that past practice has been altered because there has traditionally been a full week off for Easter, December 23 has traditionally been a non-work day, and there has traditionally been a two-day holiday for the Presidents' days in February.

The Board asserts that the charge, as it related to adoption of Calendar I in May, 1985, is outside of the six-month statute of limitations established by N.J.S.A. 34:13A-5.4 for filing such charges; and (b) the adoption of the school calendar is a managerial function, and no negotiations are required prior to its adoption. Secondly, the Board asserts that no negotiations were required since the workyear increase was within the range of

uncompensated increases established by the parties' past practice. Third, the Board asserts that the contracts between the Board and the respective Associations permitted the change.

The Board also asserts that, although not required to do so, it did engage in good faith negotiations concerning the "impact" of its adoption of the calendar on the length of the workyear.

The question presented here is: Did the Board violate N.J.S.A. 34:13A-5.4 (a)(5), and derivatively, (a)(1). The law is well settled that for the Commission to find such a violation, the charging party 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 establishes that it had a managerial prerogative or contractual right to make such a change. E.g., State of New Jersey (Ramapo State College), P.E.R.C. 86-28, 11 NJPER 580 (16202 1985); Willingboro Bd. of Ed., P.E.R.C. 86-76, 12 NJPER 32 (¶ 17012 1985).

Both parties agree that the past practice of the district was to permit the number of days in the workyear to vary slightly from year to year, but that the average was 192 for 10-month employees. Actually, the record demonstrates that the 10-month workyear during the past ten years varied from a low of 190 days in school year 1980-81 to a high of 194 days in school year 1983-84. These were not only attributed to accidents of the calendar, but also to variations in the number of holidays/vacation recesses. The number of school holidays varied

from a high of 27 in school year 1980-81 to a low of 23 days in school years 1982-83 and 83-84. Additionally, these variations were not always attributable to religious holidays falling on a weekday: for instance, in some years, schools were scheduled to be closed on Columbus Day and in other years they were not. Following through for 12-month employees, their workyear is determined by the total number of work days in a calendar year, less contractual vacation days (secretaries), less the number of days school is closed for holidays. Thus, the number of scheduled holidays/vacations recesses during the school year has the same direct effect on 12-month employees: 12-month employees also enjoyed the same number of school holidays ranging from 23 to 27.

Thus the past practice of the parties was to permit the total workyear, for 10 and 12 month employees, to vary slightly from year to year. However, at no time during the past ten years, did the length of the workyear ever exceed 194 total days for 10-month employees, nor did not the number of holidays (the factor which creates deviation in the workyear for 12-month employees) ever fall below 23. Thus, the establishment of a school calendar which sets the 10-month workyear at 196 total work days, with 20 school holidays, is outside of the scope of the parties' past practice, and thus, I find is a change. However, when the Board re-struck the workyear as a result of its adoption of Calendar II in October, 1985, that resulted in a workyear of 193 days with 23

holidays, well within the sphere of the parties' past practice. In Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440 (1981), the Court found that a "change" in the number of pupil contact hours that remained within a range established by the parties' past practice did not require negotiations. Similarly, I find that here, the Board's implementation of a 196-day workyear (for 10-month employees) with 20 school holidays (for 10- and 12-month employees), is outside the range established by the parties' past practice, and thus, would constitute a change in terms and conditions of employment requiring negotiations. Its adoption of Calendar II in October, 1985, requiring a workyear of 193 days with 23 holidays amounted to a return to the status quo ante.

The parties do not disagree that the Board has a managerial right to set the school calendar. See Bd. of Ed. of Woodstown-Pilesgrove Reg. School Dist., 81 N.J. 582 (1980). In this instance, the Board's initial decision to set a calendar which reduced the length of the Easter recess, the February break, and eliminated December 23, resulted from its concern that the students spend more time on task. It arose out of educational philosophy, not economic concerns. Therefore, I find that the adoption of the school calendar, including which specific days shall be holidays, is a managerial prerogative and the Board had no obligation to negotiate the calendar with the Association prior to its adoption. However, the Commission and the courts have previously found that the issue of compensation for increased

workload is severable from the issue of the Board's right to establish the school calendar. See, Bd. of Ed. of Woodstown-Pilesgrove Reg. School Dist., supra ; Maywood Bd. of Ed., P.E.R.C. 85-36, 10 NJPER 571 (¶ 15266 1984); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶ 12071 1981); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶ 10026 1979). In Maywood Bd. of Ed., supra, the Commission held that where the Board has a right to require that school be in session on particular days as an incidence of its right to establish the calendar, the Board prerogative does not enable it to require that employees work on those extra days without any additional compensation. The Board has an obligation to negotiate before it increases pupil contact time. See also, New Brunswick Bd of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶ 4040 1978).

In the instant matter, I find that compensation for the increase in the overall number of days required for the staff to work is severable from the setting of the calendar. This is particularly true here, where the workyear for administrators and non-teaching staff extends well beyond the student's school year. Thus, I find that the decision to increase the staff's workyear, as a consequence of the adoption of the calendar, resulted in an obligation to negotiation compensation with the Association for that increased workyear prior to its implementation.

The Board also asserts that the charge is not timely filed under N.J.S.A. 34:13A-5.4. In Warren Hills Reg. Bd. of Ed.,

P.E.R.C. No. 78-69, 4 NJPER 188 (¶ 4094 1978) and Galloway Tp. Bd. of Ed. v Galloway Tp. Assn. of Ed. Sec., 78 N.J. 1 (1978), the implementation, as well as the announcement, of a unilateral alteration of term and condition of employment constitutes an unfair practice. Here, the Board argues that it did not have an obligation to negotiate with the Association prior to the adoption of the calendar in May, 1985. I agree. Until the Board voted on a calendar, there was nothing to negotiate. However, the Board's obligation to negotiate with the respective majority representatives concerning the increase in workyear arises prior to the implementation of the new, increased workyear, which began in September, 1985.

I find that the Board did not negotiate in good faith with the Associations concerning compensation for the increased worktime. The standard for determining whether a parties' conduct evidences good faith has been established by the Commission in State of New Jersey, E.D. No 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super (App. Div. 1976), wherein it held that:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred....A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach,

an agreement. State of N.J., at p.40. (Footnote omitted).

The Board met with the Supervisors' Association on May 23, 1985. The Board Representatives attended that meeting and specifically stated that they were not there to negotiate. Shortly thereafter, the Board filed a scope of Negotiations Petition in which it sought a determination from this Commission as to whether it was required to negotiate. While I find that the Board's filing of the Scope Petition is not evidence of an unfair practice, I also find that the filing of the Petition does not eliminate the Board's responsibility to negotiate either. The Commission processes cannot be used as a shield against fulfilling the parties obligations under the law.

At no time prior to the implementation of the new increased workyear did the Board ever engage in negotiations. After the parties received a determination from the Commission that the issue was negotiable, the parties met on October 14, 1985. At that meeting, the Associations presented their initial demand for five days pay at the per diem rate. The Board presented no counterproposals, but rather Board Attorney Dilts responded by letter that the Board would consider the Association's request and get back to them within two to three weeks. Rather than making counterproposals, the Board then acted to adopt a modified calendar which had the effect of eliminating three work days from the spring break, thus reducing the total workyear to 193 days. The Board

also issued a press release clearly indicating that the Board was taking the action to avoid having to compensate the staff for the extra days. Based upon the totality of its conduct between the May decision to increase the workyear and its October decision to rescind part of the increase, I find no evidence that the Board engaged in good faith negotiations with the Association.

The Board asserts that the increase was permitted by the respective contracts with these Associations. In order to find that the Association waived its right to negotiate concerning the length of the workyear, the contract must clearly and unequivocally authorize the change, e.g., Sayerville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (§ 14066 1983); Tp. of Edison, P.E.R.C. No. 86-124, 12 NJPER 379 (§ 17149 1986). The language in each of the contracts merely states the outside limits of the employees' work year and permits the employer to select which days shall be holidays. But it is silent on the subject of the length of the workyear within the contract year. Therefore, I find that the respective contracts with the Supervisors Association, the Administrators Association, and the Teachers Association (as it applies to secretaries), does not authorize the Board to unilaterally change the length of the workyear without negotiations.

The Press Release Issue:

Charging Parties assert that the Board's issuance of the press release constitutes an independent violation of N.J.S.A. 34:13A-5.4 (a)(1). In Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (§ 12223 1981), the

Commission stated:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal...

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other.... 7 NJPER @ 503.

It is true that the press release criticized the respective employee organizations for seeking compensation over the increase. However, the Board and the Associations are on equal footing in this dispute. Moreover, the communication did not carry with it any threat of reprisal or force, or promise of benefit. See, Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶ 16208 1985); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (¶ 15195 1984).

Therefore, I find that the issuance of the press release did not constitute an independent violation of N.J.S.A. 34:13A-5.4 (a)(1).

CONCLUSIONS

Based on all of the above, I conclude that the Board violated N.J.S.A. 34:13A-5.4 (a)(5) and derivatively, 5.4(a)(1) of

the Act, by its failure and refusal to negotiate in good faith with the respective Associations concerning compensation when the Board implemented a lengthened workyear which altered past practice by increasing the number of workdays to 196 for 10-month employees, and by reducing the number of holidays to 20 for 12-month employees, thus increasing the length of the 12-month employees workyear.

REMEDY

No make whole remedy is necessary here since the Board has already restored the staff workyear to 193 days for 10-month employees and increased the number of holidays to 23 for all employees--which are within the range consistent with the past practice of the parties.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Board cease and desist from unilaterally increasing the length of the workyear of administrators, supervisors and secretaries beyond the workyear as established by district's past practice, and from failing to negotiate with the Association concerning increases in the length of the workyear.

B. That the Board take the following affirmative action:

1. Negotiate in good faith before changing the length of the workyear for administrators, supervisors and secretaries beyond the range established by past practice.

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

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


Susan Wood Osborn
Hearing Examiner

DATED: February 13, 1987
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 cease and desist from unilaterally increasing the length of the workyear of administrators, supervisors and secretaries above that established by past practice.

WE WILL negotiate in good faith before increasing the workyear of the administrators, supervisors and secretaries above that established by past practice.

Docket No. CO-86-178-153

BOARD OF EDUCATION , BOROUGH OF SOMERVILLE

(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.