

P.E.R.C. NO. 89-130

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL  
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-222

MATAWAN REGIONAL TEACHERS  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Matawan-Aberdeen Regional School District Board of Education violated the New Jersey Employer-Employee Relations Act by dealing directly and negotiating with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association, and by unilaterally changing the terms of a negotiated agreement which had already been ratified by the employees in the Association's bus drivers and custodial units. The Commission dismisses allegations concerning the deputy superintendent's meeting with Association officials and regarding investigatory interviews over sign-in and sign-out procedures.

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DISTRICT BOARD OF EDUCATION,

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Docket No. CO-H-88-222

MATAWAN REGIONAL TEACHERS  
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,  
Kenney, Kenney, Gross & McDonough, Esqs.  
(Malachi J. Kenney, of counsel)

For the Charging Party,  
Oxford, Cohen, Blunda, Friedman, Levine & Brooks, Esqs.  
(Mark J. Blunda, of counsel)

DECISION AND ORDER

On March 4 and April 8, 1988, the Matawan Regional Teachers Association ("Association") filed an unfair practice charge against the Matawan-Aberdeen Regional School District Board of Education ("employer"). The charge, as amended, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5) and (7),<sup>1/</sup> by: (1) refusing to accept Association salary

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

guides and ratifying its own; (2) disseminating a false and defamatory memorandum intended to undermine the Association; (3) defaming Association President Marie Panos; (4) counselling a member of the Association's Executive and Negotiations Committees to undermine and overthrow the Association's leadership; (5) supporting, assisting and encouraging individual employees in an effort to undermine and circumvent the Association; (6) assisting individual employees in circulating petitions adverse to the Association's position; (7) instructing teaching staff members to sign those petitions; (8) assisting in the scheduling of a secret meeting with clerical staff represented by the Association; (9) providing assistance and facilities for the clerical meeting; (10) giving an employee release time to oppose the Association; (11) promising individual clerical employees better benefits if they dealt directly with the employer; (12) entering into a memorandum of agreement with individual secretaries better than the fair and final

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1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

offer presented to the Association, all without the Association's knowledge; (13) advising clerical staff members that the employer would protect them from the Association; (14) inducing, encouraging, assisting and threatening individual custodians to undermine and circumvent the Association; (15) providing time off for employees to circumvent and undermine the Association, and (16) discriminating against Association representatives. The Association seeks a declaration that the employer is guilty of illegal conduct, injunctive relief, monetary damages and attorney's fees and costs.

On April 11, 1988, a Complaint and Notice of Hearing issued. On April 25, the employer filed an Answer denying the Complaint's substantive allegations.

On June 29, July 13 and 14, August 22, 23 and 30, September 1 and November 9, 10 and 16, 1988, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.<sup>2/</sup>

On May 30, 1989, the Hearing Examiner issued his report and recommendations. H.E. No. 89-41, 15 NJPER \_\_\_\_ (¶ \_\_\_\_ 1989). He found that the employer violated subsection 5.4(a)(5) and, derivatively, (a)(1) when it negotiated with unauthorized individuals from the clerical and custodial units rather than the officially designated Association representatives. He further found

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<sup>2/</sup> The Hearing Examiner granted leave to Barbara Truex, a member of the clerical unit, to file a brief.

that the employer violated subsection 5.4(a)(5) when it unilaterally changed the terms of a negotiated agreement for the bus drivers unit and when it implemented a memorandum of agreement with clerical employees unilaterally changing their terms and conditions of employment. He recommended dismissal of the remaining allegations.

On June 12, 1989, the employer filed exceptions. It claims it did not violate the Act since it executed memorandums of agreement with the secretarial and custodial units' designated representatives who claimed to be and have continually been identified as Association members. It argues that the Association's by-laws do not prohibit the individual unit's ability to negotiate or execute agreements. It further argues that the determination as to who represents the Association can only be made by the courts. The employer also claims it did not violate the Act when it changed the Association's bus driver/custodial agreement to apply only to bus drivers since it already had ratified a separate custodial memorandum.

On June 13, 1989, the Association filed exceptions. It claims we should: (1) void the memorandum of agreement executed by three custodial employees and compel the employer to execute and adopt the Association's proposed memorandum for those employees; (2) void the memorandum of agreement for the bus drivers unit adopted by the employer and compel the employer to adopt in its original form the Association's proposed memorandum for the custodial and bus drivers units; (3) void the memorandum of agreement executed by

three clerical employees and compel the employer to negotiate with the Association the terms and conditions of employment for its clerical unit for a contract period beginning July 1, 1986; (4) order compensatory and punitive damages of \$109,000 allegedly improperly taken from the teachers' unit; (5) find that the employer sought to undermine the Association when the deputy superintendent summoned certain individuals to his office for a meeting, and (6) find that the employer discriminated against the Association's president when it called her to an investigatory interview concerning sign-in and sign-out procedures.

On June 15 and 19, 1989, respectively, the Association and Board filed replies urging rejection of the other party's exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-50) are accurate. We incorporate them.

We find that the employer violated subsection 5.4(a)(1) and (5) by dealing directly with certain clerical and custodial employees and entering into memorandums of agreements affecting their terms and conditions of employment. The employer's action strikes at the heart of the exclusivity principle: the cornerstone of the Act. Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409 (1970); State of New Jersey (Dept. of Law and Public Safety), I.R. No. 83-2, 8 NJPER 425 (¶13197 1982). The employer was well aware that Association President Panos was the Association's officially designated representative. For 20 years, she had always signed every memorandum of agreement. In fact, Panos notified the employer

that the Association disavowed the disputed clerical memorandum yet the employer chose to ratify it anyway. As for the custodians, the Board was reviewing the Association's proposed agreement when it ratified the agreement executed by individual custodians.

We also find that the employer violated its duty to negotiate in good faith when it unilaterally modified the Association's memorandum of agreement covering bus drivers. See Passaic Valley Water Comm'n, H.E. No. 84-61, 10 NJPER 372 (¶15174 1984), adopted P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984).

We order the employer to rescind the clerical memorandum of agreement and to negotiate immediately with the Association concerning clerical employees retroactive to July 1, 1986. We are aware that on September 1, 1988, an employee organization named PACE filed a representation petition seeking to represent the employer's clerical employees. Representation petitions normally halt negotiations for successor contracts. Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). But here the employer's conduct prevented the parties from completing negotiations on an agreement that should have been executed before PACE's petition was filed. In balancing the Act's commands to conduct prompt representation elections and to remedy unfair practices, we order that these retroactive negotiations commence immediately and that the Director of Representation pend processing of the representation petition for 30 days during which time the Association and the Board will have an opportunity to complete negotiations. We do not order rescission of

the terms and conditions of employment adopted by the employer. We will not impose that remedy absent a union's request.<sup>3/</sup>

We also order the employer to rescind the memorandum of agreement for custodians executed by the three individual employees. We do not order the employer to negotiate or to execute the Association's memorandum since the Association represented at the hearing that the parties had ratified a contract for custodial employees covering the same period (1T16). For the same reasons, we void the bus driver's memorandum, but do not order the employer to negotiate or execute an agreement covering bus drivers.

We dismiss the remaining allegations. We reject the Association's exception concerning the deputy superintendent's meeting with Association officials. Although the deputy superintendent was critical of the Association's president, his actions did not rise to the level of unlawful interference with protected rights. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981)

We also reject the Association's exception regarding the investigatory interviews over sign-in and sign-out procedures. The Association failed to prove that Panos was treated differently from a number of other teachers who had failed to comply fully with the employer's procedures.

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<sup>3/</sup> We reject the Association's claims for compensatory and punitive damages. At the first day of hearing, the Association indicated that it had agreed that the transfer of \$109,000 would not be challenged and that it did not seek to recover that money for the teachers' unit. The litigation proceeded with that understanding.



ORDER

The Matawan-Aberdeen Regional School District Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act, particularly by dealing directly and negotiating with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association.

2. Refusing to negotiate in good faith with the Matawan Regional Teachers Association by (a) dealing directly and negotiating with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association and (b) unilaterally changing the terms of a negotiated agreement which had already been ratified by the employees in the bus drivers and custodial units.

B. Take the following affirmative action:

1. Rescind the memorandums of agreement entered into with individual clerical and custodial employees and the memorandum for bus drivers.

2. Immediately negotiate in good faith with the Association over terms and conditions of employment for clerical employees, retroactive to July 1, 1986.

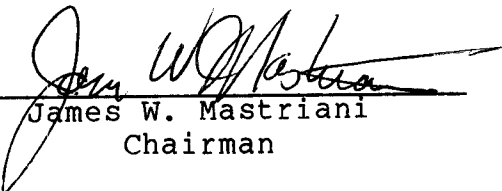
C. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix

"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.

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATE: Trenton, New Jersey  
June 23, 1989  
ISSUED: June 23, 1989

**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 interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act, particularly by dealing directly and negotiating with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association.

WE WILL cease and desist from refusing to negotiate in good faith with the Matawan Regional Teachers Association by (a) dealing directly and negotiating with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association and (b) unilaterally changing the terms of a negotiated agreement which had already been ratified by the employees in the bus drivers and custodial units.

WE WILL rescind the memorandums of agreement entered into with individual clerical and custodial employees and the memorandum for bus drivers.

WE WILL immediately negotiate in good faith with the Association over terms and conditions of employment for clerical employees, retroactive to July 1, 1986.

Docket No. CO-H-88-222MATAWAN-ABERDEEN REGIONAL SCHOOL  
DISTRICT 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.

H.E. NO. 89-41

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL  
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-222

MATAWAN REGIONAL TEACHERS  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Matawan-Aberdeen Regional School District Board of Education violated section 5.4(a)(5) and, derivatively, (a)(1) of the New Jersey Employer-Employee Relations Act when it negotiated with unauthorized individuals from the clerical and custodians units rather than the officially designated Matawan Regional Teachers Association representatives. The Board violated section 5.4(a)(5) when it (1) unilaterally changed the terms of a negotiated agreement with the bus drivers unit after that agreement had been ratified by the Association, and (2) unilaterally implemented the terms and conditions of employment contained in a memorandum of agreement it executed with the clerical employees.

The Board did not violate the Act when the Assistant Superintendent met with certain Association officers to discuss the establishment of negotiations dates, but excluded the Association President from the meeting. The Hearing Examiner found that the Board did not provide assistance, support or encouragement or provide greater benefits to an Association Vice President or certain other clerical employees. The Board did not violate the Act when it required certain Association representatives and active supporters to attend investigatory interviews.

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

H.E. NO. 89-41

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL SCHOOL  
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Appearances:

For the Respondent,  
Kenney, Kenney, Gross & McDonough, Esqs.  
(Malachi J. Kenney, of counsel)

For the Charging Party,  
Oxford, Cohen, Blunda, Friedman, Levine & Brooks, Esqs.  
(Mark J. Blunda, of counsel)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

On March 4, 1988, the Matawan Regional Teachers Association ("Association") filed an Unfair Practice Charge against the Matawan-Aberdeen Regional School District Board of Education ("Board"). On April 8, 1988, the Association amended its Unfair Practice Charge. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act"), specifically subsections 5.4(a)(1), (2), (3), (5) and (7),<sup>1/</sup> by encouraging and assisting individual employees to undermine the Association, which represents the Board's clerical, custodial and bus drivers units. The Association contends that the Board: assisted employees prepare and circulate petitions; granted release time to Association rivals; provided school facilities for meetings by employees who were not Association representatives; promised extra benefits to employees who would defect from the Association; and threatened and discriminated against Association representatives and their supporters. The Association contends that the Board promised superior benefits to individual members of the clerical unit if they would execute a Memorandum of Agreement with the Board. The Association argues that the Board illegally met and negotiated with individual clerical employees, rather than with the authorized majority representative. The Association also contends that the Board has discriminated against Association representatives by: threatening them

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<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

with disciplinary action for supporting the Association; treating Association supporters differently than the Association's rivals; and interrogating Association representatives and supporters.

On April 11, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On April 25, 1988, the Board filed an Answer generally denying any wrongdoing. Hearings were conducted on June 29, July 13, 14, August 22, 23, 30, September 1, November 9 and 10, 1988, at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs.<sup>2/</sup>

On August 23, 1988, I granted the Association's Motion to Amend the Unfair Practice Charge. The Association alleged that the Board illegally ratified a memorandum of agreement with the custodians unit. The Association also alleged that the memorandum was signed by three custodial employees who were not authorized by the Association to act on its behalf. Additionally, the Association contended that the Board ratified a memorandum of agreement covering the bus drivers unit which the Board unilaterally altered after the memorandum was signed by authorized Association representatives.

Upon the entire record, I make the following:

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<sup>2/</sup> I granted leave to Barbara Truex to file a brief in this case.

FINDINGS OF FACT

The parties stipulated that the Matawan-Aberdeen Regional School District Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and that the Matawan Regional Teachers Association is a public employee representative within the meaning of the Act. The Association is recognized as the exclusive negotiations representative for four separate collective negotiations units of employees employed by the Board. The parties' last contracts expired on June 30, 1986 (1T9).<sup>3/</sup>

Prior to the 1983-86 contract,<sup>4/</sup> collective agreements covering teachers, clericals, custodians and bus drivers were signed on behalf of the Association by its president and secretary, both of whom were teachers. (1T56-57).

In May 1986, the parties began collective negotiations for a successor agreement. After four negotiations sessions, an impasse was declared and mediation begun. The parties failed to resolve their negotiations disputes through mediation and sought the assistance of a fact finder. On September 28, 1987, the fact finder issued his Report and Recommendations for a successor agreement. The fact finder's report recommended a three-year agreement with across-the-board increases for teachers, custodians and bus drivers of 8%; 8% and 8.3%,

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<sup>3/</sup> Transcript citation 1 T 9 refers to the transcript produced on the first day of hearing at p. 9; 2 T 1 refers to the transcript taken on the second day of hearing at p. 1, and so forth.

<sup>4/</sup> The collective agreement covering the period 1983-1986 was never signed.



and a salary increase for the secretarial unit of 9%; 9% and 9.3% over the three-year term (CP-13<sup>5/</sup>).

Shortly after the fact finder issued his report, the clerical employees met with John Shaw, Vice President of the Association, and expressed dissatisfaction with the fact finder's recommended salary increase (3T21; 7T10; 7T72). During the meeting with the secretaries, Shaw indicated that the three other units represented by the Association might enter into agreements with the Board on the basis of the fact finder's report. Shaw indicated that if the three other units entered into settlements, the Association would continue to negotiate on behalf of the secretarial unit (7T73).

Subsequent to the meeting with Shaw, the secretaries met with Marie Panos, the Association's President, and again expressed their dissatisfaction with the fact finder's recommendation for clerical salary increases (7T73). During that meeting, Panos neither indicated that the Association would abandon the secretaries in negotiations nor did she attempt to force the secretaries to accept the fact finder's recommendation (7T74). Panos told the secretaries and the Board during a negotiations session which occurred at about the same time, that the Association would not settle any of the contracts because the clerical employees were dissatisfied with the economic proposals (7T77-78).

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<sup>5/</sup> Exhibits received in evidence proffered by the Association are designated "CP"; exhibits proffered by the Board are designated "R" and exhibits of the Commission are designated "C."

On October 5, 1987, shortly after the fact finder issued his report, the Association mailed a flyer to its membership recommending that the fact finder's report be accepted with certain clarifications (3T20). In the first negotiations session after the issuance of the fact finder's report, the Association maintained that the report was unacceptable in light of its recommended salary increase for secretaries (3T23). The Association also indicated that it could not accept the fact finder's report unless the Board dropped a court action to vacate arbitration awards favoring of the Association (3T18; R-1).

The Board accepted the fact finder's recommendation without modification (1T65).

The next negotiations session occurred on November 5, 1987. With the encouragement of the Association, clerical unit employees picketed the session in a lobbying effort to obtain a higher salary increase. Panos asked Barbara Truex, a clerical employee, to join the Association's negotiating team as an observer. During the November 5, 1987 negotiations session, the Board rejected the Association's demand for higher secretarial salaries (7T76-77). Panos later changed the Association's proposal on secretaries' salary.

The precise terms of Panos' offer is the subject of considerable dispute. On November 5, 1987, while the parties met jointly, Panos orally offered to transfer money from the recommended teacher's unit settlement into the secretarial unit to bolster the secretaries' salaries beyond that which was recommended in the fact finder's report. Panos testified that her offer was to take \$100 off

of each step of the teacher's salary guide in the second and third years to transfer a total of \$71,000 over two-years to the secretaries (3T29-3T32). Panos put conditions on her proposal: the Association must control the distribution of money on the secretarial salary guide (to remedy imbalances); and the Board must agree to the across-the-board salary increase in the teacher's salary schedule, as the Association interpreted the fact finder's report (1T68; CP-11).<sup>6/</sup>

On November 5, 1987, the Association brought salary guides it had prepared for the teachers and clerical units to the negotiations session. The Association was prepared to give the Board revised teacher salary guides reflecting a reduction of \$100 from each step in academic years 1987-88 and 1988-89. The Board declined to take the revised teacher salary guides and indicated that it would simply deduct \$100 from each step in each of the two years. The Association had also prepared revised clerical unit salary guides indicating the addition of \$35,500 from the teacher's unit into the clerical unit. The Association explained that the \$35,500 would be added to the clerical unit after the application of the across-the-board salary increase recommended in the fact finder's report. The Association indicated that its proposal included the same salary enhancement process used for academic year 1987-88 to be applied in academic year 1988-89; thus \$35,500 would be transferred to the clerical unit from the teacher's

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<sup>6/</sup> A dispute existed between the Board and the Association regarding the manner in which the increase recommended by the fact finder for the teacher's unit would be distributed on the teachers salary guide.

unit after the application of the across-the-board increase recommended in the fact finder's report (3T26-29).<sup>7/</sup>

Michael Klavon, Deputy Superintendent of Schools and Barbara Truex attended the November 5, 1987 negotiations session and heard the Association's salary transfer offer. Klavon and Truex testified that the Association stated during its presentation that by transferring \$35,500 from the teacher's unit to the clerical unit in 1987-88, the secretaries would receive a 13% increase which was 4% above the percentage increase recommended by the fact finder. Klavon and Truex also testified that the transfer of the \$35,500 from the teachers' unit to the clerical unit in academic year 1988-89 (the third year of the agreement) would result in a 13.3% increase in clerical salaries (8T50; 7T13-15).

The Association gave the Board a copy of the revised clerical salary guides showing the addition of \$35,500 in academic years 1987 through 1989. Prior to February 4, 1988 Bruce Quinn, the Board's Business Administrator, reviewed the salary guides and advised Klavon that the salary increases shown for academic year 1988-89 did not reflect an increase of 13.3%. Quinn advised Klavon that his analysis

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<sup>7/</sup> In rebuttal testimony, Panos indicated that she had provided the Board with copies of the teacher's unit salary guides reflective of the \$100 deduction at each step in academic years 1987 through 1989 (10T143; CP-32). While the rebuttal testimony is in conflict with her earlier testimony, I credit the earlier testimony because it is clear and specifically on point, whereas the testimony given on rebuttal refers to a package of salary guides attached to a cover letter and carries less weight since it was given as rebuttal testimony.

of the Association's proposed salary guides showed a cost of some \$36,000 less than what the Board understood the Association's proposal would cost (8T58; 8T126-127; 8T135; 9T77).

Between November 5, 1987 and February 4, 1988, no negotiations sessions were conducted by the parties. Prior to February 4, 1988, Bruce Quinn reviewed the clerical unit salary guide which the Association had provided to the Board on November 5, 1987, to determine whether the mathematical calculations reflected on the guide conformed to the Association's November 5, 1987 salary proposal for clerical employees (8T58).

On February 4, 1988, a super-mediation session was held. The session began with the parties meeting jointly in one room and later separating into caucus rooms. One of the issues raised during the mediation session was the Association's November 5, 1987 clerical unit salary proposal, and the discrepancy between the Association's guides and the Board's salary cost calculation. The Board costed the Association's November 5 proposal at approximately \$109,000 (8T128). While the February 4, 1988 negotiations session addressed the issue of the cost discrepancy in the Association's clerical salary guides, the Board ended the session believing that the discrepancy amounted to a calculation error on the part of the Association and not a proposal which substantively differed from that which the Board understood to have been made by the Association on November 5, 1987. In other words, at the end of the February 4, 1988 negotiations session, the Board did not understand that the Association was proposing the transfer of only

\$71,000 from the teachers' unit to the clerical unit as opposed to \$109,000 (9T75-85; 9T108-114).

Marie Panos invited Barbara Truex to observe the November 5, 1987 negotiations session. Truex's testimony confirms that during the Association's presentation proposing the transfer of teacher's money into the clerical unit, the Association indicated that the clerical unit would receive an additional 4% in the second and third years of the agreement so that their salary increases would amount to 13% and 13.3% in each of those years, respectively (7T13).

On January 28, 1988, the Association held a membership meeting for all of its units. During that meeting, clerical salary guides were given to the secretaries for their review. Panos explained to the secretaries that money would be transferred from the teacher's unit to the secretarial unit to increase the percentage raise recommended by the fact finder to 13% and 13.3% in the second and third years of the agreement. The explanation Panos provided to the secretaries during the January meeting mirrored her explanation at the November 5, 1987 negotiations session to the Board (7T20). After receiving the proposed salary guides during the January Association membership meeting, Truex met with Rae Rainone, a clerical unit employee who works in the Board's payroll department, to review the calculations contained on the salary guide (7T22; 7T90). As the result of Rainone's calculations, Truex discovered that the third year of the Association's proposed salary guide did not amount to a 13.3% wage increase (7T22-23; 7T93).

On the basis of Panos' testimony and documentary evidence received in the record, I find that the Association never intended to transfer more than \$71,000 to the clerical unit from the teachers' unit (CP-31a-d; CP-32; R-14). Indeed, on November 5, 1987, the Association understood its proposal to cost \$71,000. However, when the transfer proposal was communicated at the negotiations table on November 5, 1987, at least two of the people listening to the Association's proposal came away with an understanding different from the Association's. Both Klavon and Truex understood the Association's proposal to result in an increase in clerical salaries equal to 13% in the 1987-88 academic year and 13.3% in 1988-89. Confusion existed with respect to whether the \$35,500 added to the salary guides in the 1987-88 academic year would remain or be removed from the salary guide prior to academic year 1988-89. As the parties met on February 4, 1988, Klavon and Truex believed that the \$35,500 added to the clerical guides in academic year 1987-88 would remain in the guide and that the \$35,500 transferred from the teachers' unit for academic year 1988-89 would be added to that base. The result is that Truex and Klavon understood the Association's transfer proposal to effectively cost between \$106,000 and \$109,000.

A few days prior to February 4, 1988, the Board provided the Association with clerical unit salary guides reflecting the Board's understanding of the Association's money-transfer proposal. On February 4, Panos gave a copy of the Board's proposed salary guides to Truex and asked her to compare it with the Association's proposed

clerical salary guides. While Truex made only a cursory inspection of the Board's proposed salary guides, she could immediately determine that the Board's proposed guides provided more money to clerical unit employees than the Association's proposed guides. However, having had the opportunity to review the Association's proposed clerical salary guides prior to February 4, Truex advised Panos that she had problems with the Association's proposed guides. Truex told Panos that under the Association's guides the percentage increase did not amount to 13.3% in the third year. Panos explained to Truex how the Association arrived at the figures reflected in the Association's proposed guides, but Truex told Panos that she was still dissatisfied (7T91-93). Later, Truex heard that the Board's proposal would result in the transfer of approximately \$109,000 from the teachers' unit into the clerical unit as compared with the Association's proposal which would amount to only \$71,000 (7T94).

At the conclusion of the February 4, 1988 negotiations session, the mediator asked the parties to develop new salary guides. The Board delivered their salary guides to the Association on February 11, 1988. The Association enlisted the assistance of the NJEA research division to help develop its guides. The Association advised the mediator that it had prepared guides and was ready to meet with the Board to present and explain them. No meeting was held. On February 23, 1988, the Board gave Panos a copy of its "fair and final offer." The Association had not provided the Board with a copy of its revised salary guide prior to that date (2T7-8).



In its February 23, 1988 cover letter accompanying its final offer, the Board indicated that the offer was being made as a package and that it would not unilaterally implement the offer. The offer included the Association's money-transfer proposal for the clerical unit, as it was understood by the Board on November 5, 1987 (CP-5). On February 26, 1988, the Board's offer was distributed to all members of the four negotiations units (CP-7). Sometime between the February 4, 1988 negotiations session and February 23, 1988, the date the Board provided the final offer to Panos, the Board received no information or communication from the Association suggesting that its understanding of the Association's money-transfer proposal was other than the way the Board understood it on November 5, 1987 (8T60-61; 8T129-130; 9T110).

Barbara Truex has worked for the Board for 25 years. Currently she is an Information Services Specialist in the personnel department (7T3). Truex has had other clerical assignments during her 25 years of Board employment. In or around 1980, Truex was a Corresponding Secretary for the Association (7T4). In approximately 1981, Truex was an Association building representative at the Ravine Drive School (7T5). Truex was Corresponding Secretary for the Association a second time in or about 1985-86 (7T69). Truex works in the central administration offices with Barbara Cholewa. Truex and Cholewa have known each other for approximately 15 years, are currently assigned to work stations in the same room and frequently socialize (7T96-97). On one occasion Truex socialized with Cholewa, Louise Fitzpatrick, Association Vice President, Maxine Kwatinetz, secretary

for Dr. Kenneth Hall, Superintendent of Schools, and Maryann Kammann, a member of the clerical unit. On one occasion Truex attended a gathering with Kammann, Cholewa and Fitzpatrick in Cholewa's home shortly after Cholewa had moved in. Truex has been in Cholewa's home two or three times (7T98-99).

Cholewa is an Administrative Assistant for Labor Relations/Personnel, works directly for Klavon, and assists him in labor relations and negotiations (8T94). Cholewa also works for Bruce Quinn, Board Secretary, and has assisted him in such negotiations-related functions as salary guide construction. Cholewa is present at negotiations sessions on behalf of the Board and attends caucus and negotiations strategy sessions with Board negotiators. She also types Board communications after negotiations sessions (8T95-97).

Louise Fitzpatrick is a teacher and was elected to the office of Vice President for the Association in 1987. Fitzpatrick served as the Association's Vice President during the times relevant to this matter.

Panos testified that Fitzpatrick was in possession of internal Board documents, including documents in the handwriting of Board Secretary Bruce Quinn. The folder containing such Board documents also contained material in Fitzpatrick's handwriting. Another teacher found the folder, noticed that it included negotiations materials, and thinking the folder belonged to Panos, returned it to her. The folder contained materials which the Board had never provided to the Association during the course of negotiations. Since the folder was

found at a photocopy machine at the high school, where Fitzpatrick works, rather than at the Central Administration Building where Quinn works, and the folder contained Fitzpatrick's handwritten notes, I find that the folder belonged to Fitzpatrick. However, neither Fitzpatrick nor Quinn testified about the folder. Consequently, there is no testimony about how the material came to be included in the folder. Accordingly, I do not find that Quinn or any other Board representative voluntarily provided items contained in the folder to Fitzpatrick (2T66-70).

After the Board issued its final offer, Truex discussed the offer with several secretarial employees including Ann Marino, Maryann Kammann, Ellen Shore and Pat Engel (7T100-101). On February 29, 1988, at approximately 7:30 a.m., Fitzpatrick telephoned Truex at home and asked Truex to help her circulate a petition (7T101-103). The petition urged Panos to call a meeting to explain the ramifications of the Board's offer and to allow unit employees to vote on it (7T103). When Truex arrived at work on February 29, 1988 at 8:30 a.m., she found an envelope containing the petition which she had spoken to Fitzpatrick about earlier that morning (7T109-111). The envelope contained enough copies for each school building (7T112). At approximately 10:30 that day, Truex took an early lunch period and drove to the five other school buildings (with the exception of the high school) in the district and delivered the petition to the secretarial employees. Truex did not go to the high school because Fitzpatrick told her that a secretary at the high school would circulate the petition there. It

took Truex approximately 45 minutes to go to each school. In one or two of the schools, Truex waited for the secretaries to sign the petition and then brought it back with her. At the other schools the secretaries returned the petition to her during their lunch hours (7T112-116). When Truex delivered the petition to the schools, she gave them to secretaries, not to Association building representatives. Truex did not tell anyone from the Association about the petition (7T116-117). When Truex returned to the Central Office, she did not display the petitions. Barbara Cholewa did not ask her about the petition and Truex did not know whether Cholewa was aware of it (7T118-119). At approximately 3 p.m. on February 29, Fitzpatrick stopped at central office on her way to the Association Executive Board meeting to pick up the petition forms from Truex and bring them to the meeting (7T119-120). At the Executive Board meeting, Fitzpatrick handed the signed petition to Panos. However, Panos refused to allow a vote among the clerical unit employees to determine whether they wished to accept the Board's final offer.

Louise Fitzpatrick is assigned to the high school (2T20). The school day at the high school begins at 7:45 a.m. First period begins at 8 a.m. and class periods are 40 minutes. Fitzpatrick's first class begins at 8:44 a.m. (CP-8).

On February 29, 1988, Louise Fitzpatrick was seen in the Lloyd Road Elementary School at approximately 9 a.m. Fitzpatrick does not normally pass the Lloyd Road School on her way to the high school (2T28). During the Association's Executive Committee meeting conducted

in the afternoon of February 29, committee members asked Fitzpatrick why she was seen at the Lloyd Road School that morning. Fitzpatrick responded that her car had broken down there (2T27; 4T94; 5T20; 5T64).

High school rules allowed teachers to leave the building during preparation and duty-free periods. Teachers wishing to leave the building during those periods were asked to check with an administrator and sign in and out at the front office (6T30). Teachers are not required to give a reason for leaving the building (6T31). Robert Nesnay has been the Principal at the high school for seven years. Twice during that time it came to Nesnay's attention that teachers had left the building during a free period without having first signed out (6T33). One instance involved Louise Fitzpatrick and occurred in March, 1988. Nesnay did not take formal disciplinary action in either situation (6T34-35).

Periods one and two at the high school coincided with the time Fitzpatrick spent at the Lloyd Road School. Fitzpatrick was free during first period and scheduled to teach a class during second period (CP-8). On the morning of February 29, 1988, Fitzpatrick contacted Kenneth Smith, Assistant Principal and Director of Vocational Education, and requested permission to be away from the high school during first period. Smith granted permission and reminded Fitzpatrick to sign in upon her arrival (6T125-126). Although Fitzpatrick did not arrive at the high school until after 9 a.m., she signed the attendance sheet showing a 7:45 a.m. arrival time (CP-19). While the normal procedure for teachers wishing to leave the building during their free

period is to sign out in the front office, Smith told Fitzpatrick that she need only sign the regular attendance sheet in his office (6T126). After the filing of this unfair practice charge, Nesnay and Smith discovered that Fitzpatrick had not returned to the high school for her second period class. Nesnay was not aware that Fitzpatrick was out of the building on February 29, until he was advised that this unfair practice charge was filed and involved a question of Fitzpatrick's whereabouts (6T86). Smith did not become aware that Fitzpatrick missed her second period class until Nesnay told him (6T127). Nesnay and Smith each spoke to Fitzpatrick about her absence. Fitzpatrick told them that she was detained at the Lloyd Road School (6T88; 6T127).

When Fitzpatrick asked Smith for permission to arrive after first period, she did not give Smith a reason for her request. Smith did not ask Fitzpatrick for a reason (6T128). Smith does not require teachers to give reasons when they ask to leave the building during a duty-free period (6T128). It was Nesnay's practice not to inquire into the reasons why Association officers sought permission to be away from the high school building. Since Fitzpatrick was an Association Vice President, Nesnay followed that practice for her absence on February 29, and never asked her during his investigation of the matter in March, 1988, why she went to the Lloyd Road School that day (6T91).

Fitzpatrick arranged to have another teacher cover her class during second period in the event that she did not return on time. This arrangement was made by Fitzpatrick and the other teacher and was not approved by Nesnay nor Smith (6T92; 6T127). Smith told Fitzpatrick

that she should have advised him of the arrangements she had made for class coverage, and Nesnay gave Fitzpatrick an oral warning (6T92; 6T127). Fitzpatrick's arrangement with the other teacher was contrary to school policy.

Nesnay was aware of other occurrences where teachers arrived at school late or left before the scheduled dismissal time. Occasionally, such incidents resulted in a class or study hall left uncovered by the assigned teacher. Such incidents occurred approximately two or three times per month (6T36-37). With the exception of one teacher who had received a written reprimand for being late to class over 30 times, Nesnay had never taken disciplinary or any other adverse action against an employee for tardiness (6T36-39). Nesnay has neither disciplined nor taken any other adverse action against a teacher who left school during the day without having signed in or out, or who privately arranged to have another person cover his/her class without notice to the administration (6T38-39).

On the morning of March 1, 1988, Truex asked Cholewa whether the Board would accept ratification of its final offer from the clerical unit, separate from the Association, and, if so, how the clerical employees should proceed (7T37; 7T134). Cholewa indicated that she did not know the answer but would try to find out. Truex initiated the questions to Cholewa and was not prompted by any Board representative (7T134). A few hours later Cholewa told Truex that the Board would accept ratification of its final offer by the clerical unit, on its own, provided that the clerical unit elected new

spokespersons, gave the Board a letter advising it that the clerical unit had ratified the offer and requested implementation of same, and appointed a person who was authorized to sign a memorandum of agreement (7T135). Cholewa received her information from Klavon (9T5).

On March 1, 1988, at about 4 p.m., approximately 45 clerical unit members met at a diner in order to discuss the Board's final offer (7T33-34). The employees expressed their concerns that the Board's budget would be voted down by the Township's residents as it had been in past years, and discussed the impact of such an event on the offer. Also discussed during the meeting was the concern that the composition of the school board would change after a school board election scheduled for April, 1988. The employees feared that a change on the Board might require negotiations to begin again (7T34-35). Truex advised the secretaries at the meeting of the Board's requirements for ratification of its final offer.

It was Truex's idea to have a meeting among the clerical employees on March 1, 1988 (7T122). The meeting was organized by Truex, Kammann and Marino. Secretaries at the various schools in the district were advised by telephone of the time and location of the meeting. Truex invited Fitzpatrick to the meeting (7T123). Truex did not tell Cholewa of the meeting nor was Cholewa involved in any aspect of the meeting (7T123). Fitzpatrick attended the meeting as Truex's guest and not as an officer of the Association (7T124). Truex did not advise the Association of the meeting at the diner (7T122). No one from the Board suggested to Truex that she conduct such meeting. (7T36).



Toward the end of the secretaries' meeting, someone suggested they conduct a ratification vote on the Board's final offer (7T35). Truex convinced the secretaries not to conduct a vote at that time, since all of the secretaries in the unit had not been given notice that a ratification vote would be taken (7T127). Another meeting was scheduled for March 3, 1988, at 4 p.m., for a ratification vote on the Board's offer (7T38).

The clerical unit's practice was to meet apart from the other Association units when voting to ratify a negotiated agreement (7T36).

At the March 1, 1988 meeting at the diner, the clerical employees decided to follow the Board's conditions and to discuss ratification of the Board's final offer without Association participation (7T136). The secretaries decided to schedule another meeting and take a ratification vote on the Board's final offer. Consequently, Truex and Kammann returned to the central office on the evening of March 1 to type notices advising clerical employees that a ratification vote would be conducted on March 3, 1988, at 4 p.m. in the central office conference room (7T38-39; 7T131). The notices were reproduced on a duplicating machine at the central office and distributed to the secretaries through the interschool office mail (7T131). On either the evening of March 1 or the next morning, Truex saw Cholewa and told her that the clerical employees would be conducting another meeting to vote on the Board's final offer (7T132; 7T136).

On the morning of March 3, 1988, the secretaries were notified by the Association that it was conducting a meeting for the clerical unit on that day, at 4 p.m., at the Lloyd Road School. Consequently, the secretaries cancelled their meeting and attended the Association's. Approximately 45 clerical unit members attended the Association's meeting. Panos conducted the meeting (7T39). During the week of February 29, 1988, the Association conducted a number of membership meetings to discuss the Board's final offer. Panos ran those meetings. The Association neither authorized nor conducted a vote among the clerical unit members on the Board's final offer on March 3, 1988 (5T77; 7T142-144).

At the conclusion of the March 3, 1988 meeting, the clerical employees knew that the Association's President and Executive Committee would not recognize a vote by the clerical employees on the Board's final offer. Nevertheless, the clerical employees held their own meeting (not sanctioned by the Association) and took steps to fulfill the Board's conditions for a separate ratification of the final offer (7T143-144).

Maryann Kamman ran the clerical employees' meeting. No Association officers were present. An agenda was prepared earlier in the day by Kamman and Truex without the assistance of any other person. Attendance was taken: 38 out of 66 members were present (7T144-147). When a ratification vote was taken, Truex knew that the Board's economic proposal was greater than the fact finder's recommendation and the Association's transfer proposal (7T149).

The employees attending the March 3, 1988, clericals-only meeting, first elected a new negotiating committee to speak on its behalf. The committee consisted of Truex, Marino and Mary Powers. The employees then conducted a vote on the Board's final offer. Thirty clerical employees voted to accept the Board's final offer; eight voted to reject it (7T42-43). There are 66 dues paying clerical employees (7T146-147).

Pattie Mattern, a teacher and Association Recording Secretary, testified that following the Association's meeting on March 3, 1988, she and Panos spoke to three clerical employees in the Lloyd Road School parking lot (5T78). The three clerical employees told Mattern and Panos that while they were in the meeting with the other employees they (the three clerical employees) asked how many unit members were present. They were told that 31 clerical employees were at the meeting, counting themselves. The three employees then left the meeting (5T78).

I credit Truex's testimony that there were 38 clerical unit members at the meeting because she attended the meeting and was in a better position to know how many employees were present than the three clerical employees who had left. There is no indication in the record about how the three employees obtained their information. Moreover, Mattern's testimony about the conversation she had with the three clerical employees is hearsay which, while admissible, is subject to the residuum rule. The Association has not provided nonhearsay evidence corroborating this point. Truex, on the other hand, testified from personal knowledge.

Shortly after the clerical meeting, Truex telephoned Cholewa at central office. Truex knew that Cholewa frequently worked late during that period of time. Truex and Cholewa had not prearranged the phone call. During their phone conversation, Cholewa reminded Truex to draft a letter to the Board stating that a majority of the clerical unit employees ratified the Board's fair and final offer (7T150-153).

Around March 1, 1988, Cholewa advised Klavon that the secretaries might wish to ratify the Board's final offer independently of the Association (8T61). Klavon told Cholewa that he would check with legal counsel and get back to her. After consulting with the Board's attorney, Klavon told Cholewa that the Board would require some documentation that a meeting by the clerical unit was conducted, a quorum achieved, and that a majority of the employees voted in favor of the final offer. The Board also required that the unit elect representatives authorized to deal with the Board. Klavon also told Cholewa that the employees should be referred to the Association or the Public Employment Relations Commission for advice. Klavon made it clear to Cholewa that answers should be given only in response to specific questions initiated by the employees (8T64).

After Truex told Cholewa that the clerical employees ratified the Board's final offer, Cholewa told Klavon, who was also at central office. Klavon and Cholewa were pleased to hear that the secretaries voted to ratify the Board's final offer (8T142; 7T153). Later that evening, Klavon called some of the Board members to tell them of the secretaries' vote (8T142). Klavon took no action to assist the

secretaries in holding their March 3 meeting (8T142). Until March 1, 1988, the idea of a clerical ratification of the final offer not sanctioned by the Association had not been discussed by Board officers or its labor counsel (9T5).

Later in the evening of March 3, 1988, Truex and Marino spoke over the telephone and drafted a letter which they intended to give to the Board the next day. Truex and Marino received no assistance in drafting the letter (CP-9; 7T154).

On March 4, 1988, Truex arrived at work at 7 a.m. and typed the letter she and Marino composed the night before. Truex signed the letter and, at approximately 8 a.m., drove to Ravine Drive School for Ann Marino's signature and then to the Cliffwood School for Mary Power's signature. Truex returned to central office at or before 9 a.m.<sup>8/</sup> Truex placed the letter in an envelope and gave it to Cholewa. Cholewa put it on Bruce Quinn's desk (7T154-156). Truex sent copies of the letter (CP-9) to Panos, John Malloy, NJEA UniServ Representative, and Dennis Giordano, President of the New Jersey Education Association (7T58). Truex sent Panos a copy of the letter by certified mail. Although certified mail stickers are available at the post office without charge, a supply is kept at central office to save time that might be spent filling out forms at the post office. The cost of mailing a certified letter is collected by the postal service when the letter is posted. Maryann Kammann took CP-9 to the post

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<sup>8/</sup> Truex's normal workday is 9 a.m. to 5 p.m. (7T54).

office so the proper postage could be calculated. Truex gave Kammann money for the postage. The Board's central office postage meter was not used (7T55-57). Truex did not telephone Panos to advise her of the contents of the letter or what had occurred at the separate clerical unit meeting the evening before (7T158).

A meeting between the Board and certain secretaries was arranged for March 4, 1988, at approximately 3:30 p.m. Klavon, Quinn, Cholewa and Board labor attorney Gross attended the meeting for the Board. Truex, Marino and Powers attended the meeting for the secretaries (7T160-162). Truex took a late lunch so she could attend the meeting (7T66). Marino had arranged to take time off on the afternoon of March 4 to take care of personal business. She charged that time to compensatory time off. Marino told Truex that she was not sure she could attend the meeting due to the prearranged personal business. However, she arrived at Klavon's office at approximately 3:30 p.m. (7T161). Powers' workday ends at 3 p.m. (7T161).

On March 4, 1988, at around 9 a.m., Truex telephoned NJEA UniServ Representative John Malloy's office. Malloy is assigned to assist the Association (7T60). Malloy has assisted the Association in negotiations, grievances and other employment-related issues for approximately 20 years (10T3-4). Malloy was not in his office when Truex called. She asked that he call her back and at approximately 3:30 p.m. Malloy returned her call. Truex told Malloy that she was in a meeting with Klavon, Board labor attorney Gross, Quinn and Cholewa, and that the meeting was convened to sign a memorandum of agreement

implementating the Board's final offer. She told Malloy that the clerical unit, apart from the Association, ratified the Board's offer the night before and requested that Malloy provide her with legal assistance before signing the memorandum of agreement. Malloy told Truex that he did not believe legal assistance was necessary at that time. Malloy asked Truex if she had kept minutes of the March 3 meeting and whether the ballots from the votes that were taken were still available for inspection. Truex answered yes to both questions. Malloy told Truex that he would get back to her. Truex told Malloy that Panos was not at the meeting. Malloy expressed neither approval or disapproval of Truex's intention to execute a memorandum of agreement with the Board (7T60-61; 7T168-171).

Since Truex had not reached Malloy before the meeting with the Board, Truex, Marino and Powers were not expecting to be represented by an attorney when they met with the Board to sign the memorandum of agreement. Consequently, Truex told Cholewa earlier that day that she was concerned about signing the memorandum without having an attorney to advise her. Cholewa said she would relate Truex's concern to Klavon and the Board's labor attorney. Later that day, Cholewa told Truex that the Board would include a reopener provision in the memorandum which would allow the clericals to reopen negotiations in the event that any of the other collective negotiations units negotiated an improvement in benefits beyond that which was provided for in the clerical unit's memorandum of agreement. Cholewa did not indicate that, if the secretaries did exercise the reopener provision, the Board would treat the clerical unit more favorably (7T166-167).

The last collective agreement for the clerical unit included an article providing stipends for clerical employees. During the meeting to sign the memorandum of agreement, Truex told the Board representatives that its final offer did not refer to the stipends. The fact finder's report also made no reference to the stipends (CP13). Consequently, the Board agreed to make a hand written modification on the memorandum of agreement reflecting a 9% increase in the stipend for school years '86 through '88 and a 9.3% increase for school year 1988-89 (7T62-64; 7T165-166; CP-12).

Truex was eager to have the memorandum of agreement signed on March 4, 1988 because a Board meeting was scheduled for March 7. The ratification of the memorandum by the Board would conclude a long and difficult negotiations (7T160; 7T163-165).

The Association never authorized Truex, Marino or Powers to negotiate or execute a memorandum of agreement on behalf of the Association or the clerical unit (2T36-37). On the morning of March 4, 1988, Panos was told that the secretaries met on the preceding afternoon to vote on the Board's final offer (2T37-38).

The clerical unit memorandum of agreement was placed on the agenda for the Board's March 7, 1988 meeting. The Board routinely provides Panos with a copy of its agendas and gave her a copy of the agenda for the March 7 meeting (2T38). The agenda indicated that the Board would vote on ratification of the clerical unit agreement. On March 7, 1988, the Association prepared a letter notifying the Board that the Association had neither signed nor authorized the execution of



a memorandum of agreement with the Board, and that a ratification vote on the Board's final offer had neither been conducted nor authorized by the Association (CP10). The letter was hand delivered to Board President Richard Brown, Deputy Superintendent Klavon and Board Labor Counsel Malachi Kenney. Superintendent Kenneth Hall was also sent a copy of the letter. The parties stipulated that the letter was received before the Board meeting began (4T97-98). The Board ratified the memorandum during the meeting (2T40). Clerical unit employees received retroactive paychecks by the end of March, 1988, pursuant to the agreement (7T174).

The Board's and Association's practice is to draft separate memoranda of agreement for each of the four Association collective negotiations units. Panos, as President, calls separate meetings and each unit takes a separate ratification vote (1T45).

The Association's internal operations are governed by their Constitution and Bylaws (CP3). Prior to this matter, the Association had never given the Board a copy of its Constitution and Bylaws (3T61-62). Truex had a copy of the Association's Constitution and Bylaws and reviewed them before the March 1, 1988 meeting at the diner (7T47; 7T127-128). The Association's Bylaws require that the negotiating team consist of tenured employees, one of whom must be the Association president (CP3, Bylaws, Article 1, Section 1 and Article 2, Section 6). The Constitution and Bylaws do not specifically address the matters of the appointment of negotiations teams nor the ratification procedure for the four units' proposed collective agreements.

On March 7, 1988, at 7:00 a.m., the Association conducted a meeting for the custodians unit to give unit members the opportunity to vote on the Board's final offer. Panos called and conducted the meeting. The Association recommended the Board's final offer and the custodians voted to accept it (2T41-42).

At around noon that same day, Panos conducted a ratification meeting for the bus drivers. The Association recommended the the Board's final offer and the bus drivers voted to accept it (2T42-43). Vice President Shaw hand delivered a letter to Board President Brown, Klavon and the Board's labor attorney indicating that the Association had conducted ratification votes accepting the Board's final offer for the custodians and bus drivers units (2T43-44; CP14). The Board knew that the custodians and bus drivers units ratified its final offer before the March 7, 1988 Board meeting (2T44).

The Board did not vote on ratification of the bus drivers and custodians units on March 7, 1988 because it insisted upon first having a signed document -- either a Memorandum of Agreement or a complete contract -- setting forth the parties' agreement (9T95-97; 3T168).

After March 7, 1988, a dispute arose between the Board and the Association on the need for a formal written document detailing the parties' agreement for the bus drivers and custodians. The Association believed that it need only to "...accept the package [of the Board's final offer] for its terms to be implemented." (CP-5; CP-21) The Board offered to prepare a memorandum of agreement to sign that evening, but Shaw indicated that he was not authorized by the

Association to execute such a document. (9T30) On March 18, 1988, the Association hand delivered copies of a complete collective negotiations agreement for the bus driver and custodians units to the Board (4T56; CP-20). The Board advised the Association that it would not be able to finish reviewing the collective agreements delivered by the Association before its March 21, 1988 meeting (9T105-106).

On March 21, 1988, the Association hand delivered a memorandum of agreement for the bus drivers and custodians units to the Board prior to the scheduled meeting (CP-22). The memorandum incorporated, unchanged, the language contained in the Board's final offer as it pertained to the bus drivers and custodians units (CP-22). The memorandum was signed by Association representatives Panos and Mattern and Association labor counsel Blunda. After he received the memorandum, Klavon called the Association office and indicated that there was no attached wage sheet showing the actual wages unit employees were to receive in each year of the contract (9T35). Klavon arranged to personally go to the Association office so Association officers could sign the wage sheet. On the afternoon of March 21, 1988, Klavon met with Panos, Shaw and Mattern in the Association office. Klavon presented a wage sheet for only the bus drivers unit and Panos and Mattern signed the sheet (9T36-37).<sup>9/</sup>

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<sup>9/</sup> Klavon testified that while he was at the Association office to have the bus drivers wage sheet initialed, he told the Association representatives that the Board would ratify a

During the Board meeting on March 21, 1988, the Board added handwritten changes to the memorandum. It modified paragraph 8 (Just Cause) and the signature page. The handwritten modification underneath the Board's signatures on the signature page limited the coverage of the memorandum to the bus drivers unit (R-4, Attachment J). The handwritten modifications made to R-4 were unilaterally made by the Board, without the Association's knowledge or agreement (9T39-40). On March 21, 1988, the Board ratified the modified memorandum of agreement for the custodians unit (R-4, Attachment G). The memorandum was also signed by three employees in the custodians unit.

During the week of March 7, 1988, after the Board ratified the memorandum of agreement for the clerical unit, two custodians sought Barbara Truex's assistance in preparing a letter to the Board naming custodial unit members as spokespersons. Truex refused the custodians' request for help (7T174). On March 17, 1988, the custodians met in a conference room in the Central Administration Building and elected

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9/ Footnote Continued From Previous Page

separate memorandum of agreement signed by three custodial unit members and Board representatives at its meeting that night (9T37). Panos, Shaw and Mattern testified that Klavon did not mention anything pertaining to the custodians unit. Klavon did not bring a custodians unit wage sheet to the Association office. While this testimonial conflict exists, I find, in the context of this matter, no need to resolve it in order to reach a determination. Moreover, even assuming arguendo that the Association was aware of the Board's intention to ratify a memorandum of agreement signed by three custodial unit members, Panos' comment that the Association would see the Board "in court" establishes that the Association never acquiesced to the Board's action (9T37).

three custodial employees to execute a memorandum of agreement with the Board. The custodians advised the Board of this action by a letter dated March 17, 1988 (CP-15). A copy of the letter was sent to Panos, certified mail, and showed a return address of Crest Way, the location of Central Administration Building. The certified mail sticker came from the supply maintained in the Central Office by the Board.<sup>10/</sup> The March 17 meeting conducted by the custodians was not authorized by the Association, nor did the Association authorize any custodial employees to speak or act on its behalf (2T57-58). No representative of the Board suggested that the custodians conduct such meeting or assisted with its scheduling (9T23-24).

On March 3, 1988, Shaw went to Fitzpatrick's second period classroom to deliver a letter from the Association requesting that she resign from the vice presidency. A substitute teacher was covering Fitzpatrick's class (4T94-95). Shaw was unable to locate Fitzpatrick during second period (4T104). Shaw testified that he was aware of instances where teachers, realizing that they would be late to or absent from a class, would make informal arrangements for class coverage with another teacher (4T102). Such informal arrangements occurred without consultation with the administration (4T102). Shaw knew of no occasion on which a teacher was disciplined for informally arranging coverage for a class (4T102). Shaw did not know if the

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<sup>10/</sup> The certified mail sticker on the custodians' letter to Panos is number P-535 040 093 (CP-15). The certified mail sticker used on the letter Truex sent to Panos is number P-535 040 089 (CP-9).

substitute covering Fitzpatrick's second period class was assigned by the administration or was there by some informal arrangement worked out between the substitute and Fitzpatrick (4T103).

The Board did not pay a substitute on March 3, 1988, to cover any of Fitzpatrick's classes (6T44-46). Principal Nesnay did not know that Fitzpatrick did not teach her second period class on March 3, 1988, nor did he know that Fitzpatrick had privately arranged for a substitute teacher to cover that class (6T94-95).

Patty Mattern's classroom was next to Fitzpatrick's (5T56; R-7). Mattern's schedule provided for preparation time during the second period. During her second period preparation period, Mattern normally stayed in a small office at the end of the hallway which, with the door open, allowed her to observe the entrance way to Fitzpatrick's classroom. Mattern testified that she observed Fitzpatrick arriving late to class an average of three or four times per week (5T95). While Mattern never reported Fitzpatrick's latenesses to an administrator, she was aware of three instances that Assistant Principal Rebarick saw Fitzpatrick arriving late to class during school year 1987-88 (5T95-96).

Since Shaw could not deliver the Association's letter requesting Fitzpatrick's resignation he gave it to Mattern to give to Fitzpatrick. Mattern found Fitzpatrick during fourth period in

Assistant Principal Smith's office (5T61).<sup>11/</sup> Smith's office consists of a suite of four rooms. Mattern saw Fitzpatrick in one of the rooms with another teacher (5T61). Fourth period is a duty-free period for Fitzpatrick, thus she is not assigned to any particular location in the building (5T91). Assistant Principal Smith does not recall seeing Fitzpatrick in his office suite that day (6T134-137; 6T139). Fitzpatrick did not use Smith's offices more frequently than other teaching staff (6T140).

Prior to school year 1987-88 no rules existed at the high school about signing in or out at the beginning or end of the school day. However, beginning in the 1987-88 school year, teachers were required to sign in when they reported to school in the morning and to sign out when they left the building at the end of the day. Three areas were established for teachers to sign an attendance sheet: the main office, Rebarick's office in the north corridor, and Smith's office in the south corridor of the high school building. When the sign-in rule first went into effect, teachers were asked to sign their names and the times they arrived and departed. The procedure was later modified to require teachers only to show their times of arrival and departure for each school day (6T5-8). Every Friday afternoon, the

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<sup>11/</sup> Mattern testified that she believed that the date that she delivered the Association's letter seeking Fitzpatrick's resignation was March 2, 1988. The evidence establishes that Fitzpatrick was absent that day (R-13A-C). While Mattern was obviously mistaken regarding the date that she delivered the letter, her testimony regarding the events which occurred comport with Shaw's testimony and is otherwise credible.

sign-in sheets from Rebarick's and Smith's offices would be sent to Nesnay for a cursory review (6T13-14). If Nesnay noticed that a teacher was not signing in or out, he would informally remind the teacher to comply with the rule (6T15). During the second half of the school year, Nesnay was more thorough in reviewing the sign-in sheets (6T54). He began issuing informal memoranda to teachers who did not sign in or out every day, reminding them to comply with the school policy (6T18; 6T55; R-6; R-10a-i; R-10k). Of the 12 teachers who received memoranda from Nesnay, seven are not considered Association activists (6T19-20).

Nesnay sent Mattern and Panos memoranda requesting that they make appointments with him to discuss their failure to comply with the sign-in/sign-out rule (R-8; R-10j). Nesnay also scheduled a meeting with Danny Russell, a teacher, about the rule (6T59).

Nesnay initially sent Mattern a memorandum reminding her to sign in and out. Mattern did not respond to this memorandum, because she was complying with the rule (5T62). Nesnay later sent Mattern a second memorandum asking for a meeting about the sign-in policy (R-8). On March 29, 1988, Nesnay and Mattern met (5T63). Nesnay discovered that Mattern was signing in and out on a different sheet than the one on which her name was typed (6T58). Nesnay and Mattern discussed the legibility of Mattern's signature on the sign-in sheets.

After auditing the sign-in sheets, Nesnay found that Panos had not been following the policy (2T80-81). Since Nesnay did not see Panos in the hallways, he did not speak informally with her about her



failure to sign in and out (6T56-57). Panos was hospitalized when the directive was issued at a teachers' meeting on the day before school began in September, 1987, so she was never officially told that she, like the other teachers, had to use the sign-in sheets on a daily basis. During her meeting with Nesnay, Panos agreed to use the sign-in sheets. Nesnay and Panos met again and discussed Panos' habit of signing in and out at the same time. Nesnay wanted Panos to sign in when she arrived, and sign out when she left. Panos complied with Nesnay's request (2T81-82).

Nesnay did not send a memorandum to Fitzpatrick about signing in and out (6T60). Assistant Principal Smith was responsible for reviewing the sign-in sheets kept in his office. He reviewed the sheets a few times each week (6T116-117).

During the first half of the school year, Smith became aware that Fitzpatrick was signing in and out for the week on Friday afternoons. Smith spoke to Fitzpatrick and her sign-in practices improved for a while. However, Smith concedes that he did not continue to check the sign-in sheets as frequently as he should have (6T117-118). In addition to Fitzpatrick, Smith had given oral reminders to a number of other teachers. Teachers' compliance with the sign-in procedure was variable (6T129-130).<sup>12/</sup> Neither Nesnay nor

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<sup>12/</sup> Significantly, sign-in sheets from Mr. Smith's office (CP-17a-h) show that a number of teachers, Fitzpatrick among them, were not signing in and out on a daily basis and/or were signing in and out at the same time. This practice demonstrates that there existed a relatively wide spread lack of adherence to the established administrative directive.

Smith took any adverse action against any teacher who did not comply with the sign-in/sign-out procedure.

Bonnie Sachs, a social studies teacher and Association building representative at the high school, testified that she saw a secretary and an aide place election campaign literature supporting Fitzpatrick's candidacy for Association office in the teachers' mailboxes at the high school (5T23). The Association has the right to place materials in teachers' mailboxes, and it is not unusual to find Association members exercising that right (5T45). Sachs did not know whether the aide and the secretary were placing the campaign literature in the mailboxes during their break time, or whether the administration had any involvement in assisting the distribution of Fitzpatrick's electioneering material (5T46-47).

Between November 5, 1987 and February 4, 1988, the Board and the Association did not meet in face-to-face negotiations. The Commission assigned a super-mediator to help the parties conclude negotiations. Panos met with the mediator in early December, 1987, to discuss the status of negotiations (1T69-70). As a result of that meeting, Panos sent the mediator copies of the teacher and clerical scattergrams and salary guides which had been prepared by the Association (CP-32). Subsequently, there were several phone calls between the mediator and Panos, and between the mediator and the Board's labor attorney. On December 31, 1987, Board attorney Kenney asked the mediator to schedule a joint negotiations session (CP-33). On January 12, 1988, Panos asked the mediator to give her dates for a

joint negotiations session (CP-34). On or about January 14, 1988, the mediator and the Board's attorney talked about scheduling a negotiations session on January 21, 1988 (CP-4). On January 18, 1988, the Board's attorney told the mediator that the Board team was available on January 21 (R-15).

On January 20, 1988, at approximately 10 a.m., the mediator called Panos at the high school. Since Panos was teaching a class at the time of the call, the secretary in the high school office took a message requesting Panos to return the mediator's call, and placed the message in her mailbox (10T150). The mediator and Panos did not communicate on January 20, 1988. On the morning of January 21, 1988, Panos found the mediator's message in her mailbox at the high school. Panos contacted the mediator and advised him that the Association was unable to meet on such short notice (4T15).<sup>13/</sup>

On the morning of January 20, 1988, Klavon and Kenney had a telephone conversation about the possibility of a January 21, 1988 joint negotiations session meeting. Kenney told Klavon that he had just gotten off the phone with the mediator and that the mediator was unable to reach Panos to confirm the January 21 session. Believing that the January 21 meeting was in jeopardy, Klavon and Kenney viewed

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<sup>13/</sup> While there is some conflict between Panos' testimony given during cross-examination on August 22, 1988 and her testimony given during rebuttal on November 16, 1988, I find on the basis of the physical evidence presented as CP-35 and taking into account that the testimony given during cross-examination was from the witness' memory of events which occurred over eight months ago, I find that it is reasonable to reconcile the witness' testimony as set forth above.

Panos' unavailability as a stalling tactic (8T12; 8T103). Klavon and Kenney decided that Klavon should meet with the two Association Vice Presidents, Shaw and Fitzpatrick, on January 20, 1988, to discuss the resumption of negotiations (8T12; 8T23). Klavon and Kenney thought that by meeting with the Association's Vice Presidents, Klavon could enlist their support in urging Panos to agree to a negotiations date (8T12; 8T115; 8T117; 8T119). Since Klavon believed that Panos was attempting to delay negotiations, he did not want her at the January 20 meeting. He did not attempt to contact her about the meeting (8T20; 8T103-104).

On January 20, 1988, Shaw was sick and did not report to school. Klavon called Shaw at home and suggested they meet in Klavon's office later that day. Shaw said he was too ill to meet with Klavon in his office. Shaw also declined Klavon's invitation to meet at a restaurant near Shaw's home. Klavon told Shaw he wanted to meet with him and Fitzpatrick (8T10-11). At Klavon's request, Shaw agreed to be available later that day for a conference telephone conversation with Klavon and Fitzpatrick. At approximately 12:45 p.m., Shaw called Panos and told her of Klavon's phone call. She advised Shaw to talk with Klavon when he called back (4T89).

Klavon met with Fitzpatrick in his office and told her that the purpose of the meeting was to establish negotiations dates (8T13). Fitzpatrick agreed to attend the meeting, but she requested that high school building representatives David Beadle and Bonnie Sachs also attend (8T14; 5T5; 4T90). Klavon agreed to Fitzpatrick's request,

contacted the high school, and had Sachs and Beadle released and sent to his office.

Klavon and Fitzpatrick waited for Sachs and Beadle to arrive. Upon their arrival Sachs and Beadle were directed to Cholewa's office (5T10). After a short time, Sachs and Beadle met with Fitzpatrick and Klavon. Realizing that the meeting involved Association business, Sachs asked Klavon if Panos would be attending. Klavon indicated that Panos was following her own, private agenda and was causing a problem by delaying negotiations (5T12; 8T15). Klavon got Shaw on the phone. Klavon gave each person in his office four letters which he cited as evidence showing that Panos was avoiding negotiations (R-15). Klavon then left the room to give Fitzpatrick, Sachs, Beadle and Shaw an opportunity to caucus. Sachs, Shaw and Beadle decided that R-15 did not demonstrate that Panos was attempting to delay negotiations. Fitzpatrick disagreed and said that R-15 did indicate that Panos was not negotiating (4T92; 5T16). Shaw suggested that those in the room get dates from Klavon and promise to deliver them to Panos (5T16). Klavon was called back to the room. When Klavon returned he told the employees that by holding this meeting he might be subjecting himself to an unfair practice charge (8T22). Klavon also told the four Association people that he had nothing to gain by causing division and his only gain could be from a strong Association (4T93). The meeting concluded without Klavon proposing specific negotiations dates for the individuals to take back to Panos. Klavon told Sachs that his purpose in holding the meeting was not to establish negotiations dates, but to

obtain the Association's support in urging Panos agree to dates to be proposed. Klavon said he would contact the Association later to establish specific meeting times (8T17).

On January 13 and January 21, 1988, Klavon and Panos conducted face-to-face meetings about matters unrelated to negotiations dates. Klavon did not propose specific dates during either of those meetings (10T148-149; 1T71-72).

Superintendent Kenneth Hall had several general conversations with Louise Fitzpatrick about the status of negotiations and other issues during the 1987-88 school year. Hall recognized Fitzpatrick's role as an Association Vice President during these conversations (10T39-40). Hall spoke to Fitzpatrick after negotiations sessions and Board meetings. Hall and Fitzpatrick had two or three telephone conversations; Hall initiated one or two of them (10T54; 10T60). During their conversations, Hall encouraged Fitzpatrick to use whatever influence she had in the Association to help bring about a settlement (10T41). Fitzpatrick told Hall that she was going to conduct some meetings among the members of the Association. Hall assumed that Fitzpatrick was conducting such meetings to garner support among the membership and the leadership for a settlement of the ongoing negotiations (10T45-46). Hall did not initiate the subject of meetings and did not encourage Fitzpatrick to take any particular course of action (10T50; 10T57).

Mattern saw Hall and Fitzpatrick leaving together after a joint negotiations session (5T83; 5T155). During the negotiations

session, Fitzpatrick's car had been vandalized (5T156). Mattern also testified that she was told by another Association member that Fitzpatrick had been seen sitting next to Mrs. Brenner, a Board member, and Mrs. Primack, an administrator, at a concert held at Red Bank, New Jersey. The concert was open to any member of the public with a ticket and was not a school activity (5T156-158). In late May, 1988, Mattern observed Fitzpatrick leaving Klavon's office. An Association officers' meeting which Fitzpatrick, as an officer, could have attended, was occurring simultaneously. Mattern saw only Fitzpatrick in Klavon's office. Mattern did not know whether Klavon was in the office at that time (5T84; 5T158-159). During a break in the next to the last joint negotiations session, Mattern saw Fitzpatrick enter a room situated such that an observer cannot see from the hallway what is occurring inside. At the end of the break, Mattern watched one of the Board's attorneys lean into the room and motion to Fitzpatrick to leave (5T84).

In June 1988, the Board and the teachers unit agreed on a contract. The agreement differed from the Board's final offer in that the parties agreed to a four-year rather than a three-year term of agreement and included a fourth year economic program. The salary guides finally adopted also differed from the Board's final offer (10T55-57).

As set forth above, Mattern's and Fitzpatrick's classrooms were in the same vicinity (R-7). Mattern testified that she thought that Fitzpatrick was treated differently from other teachers. For that reason, Mattern decided to watch Fitzpatrick closely (5T164). Mattern

conceded that the only preferential treatment afforded to Fitzpatrick which she observed was from Assistant Principal Rebarick (5T166).<sup>14/</sup>

During the March 3, 1988 Association meeting with the clerical unit, two or three police cars and a police van were parked in front of the Lloyd Road School (2T106; 5T83). The police did not interfere with the meeting and were gone before it concluded (5T154-155). On March 24, 1988, the Association held a meeting with the teacher's unit and found the policeman standing in the vicinity of the meeting. The policeman indicated that he was directed to be present for the teacher's meeting and for a school dance (2T108). Board Secretary Bruce Quinn requested the police presence at each of the Association's meetings (2T109; 5T83).

Sachs and Mattern testified that Susan Salko, a teacher at Ravine Drive School, heard Sumner Clarke, Principal at the school, tell employees to sign the petition circulated by Louise Fitzpatrick requesting the Association to conduct a vote on whether or not to accept the Board's final offer (5T21; 5T80). Mattern testified that she was told the same thing by Mrs. Messina, a teacher at Ravine Drive

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<sup>14/</sup> Mattern also testified concerning one situation in which Assistant Principal Smith could be considered to have given Fitzpatrick preferential treatment. Smith, Rebarick and Mattern were in the special education office, which is in the vicinity of Fitzpatrick's classroom. A teacher came into the office and reported that Fitzpatrick was not in the classroom after the class period had begun. In response to the teacher's question regarding Fitzpatrick's attendance at school that day, Rebarick went into Fitzpatrick's classroom, took attendance, and sent the students to the library. This incident took place in front of Mr. Smith (5T59-60; 5T166-167).



School (5T81). Mattern and Sachs allege that Clarke also told the employees that the Board's final offer was the best deal the employees would get from the Board and, consequently, should be accepted (5T52; 5T80).

Periodically, Clarke called faculty meetings. Negotiations were never discussed at the meetings (9T120-121). Clarke did discuss negotiations informally with members of the faculty when he met them in the hallways or in the teacher's lounge (9T122). Clarke recalls telling Salko and others that he thought negotiations could be promptly completed if both negotiating teams were provided with a large meal and then locked in a room without a lavatory and required to remain there until a settlement was reached (9T123). Clarke thought that idea was colorful and humorous and repeated it several times to different employees. (9T123-124). During a discussion in the faculty lounge about the Board's final offer, Clarke said that when the Board made an 8% salary increase offer to the administrators, he was happy to "take the money and run." (9T125-126).

Clarke was aware that certain employees in his building might circulate a petition about negotiations. He was unsure where he heard about the petition. He thought he might have heard it from another administrator at a meeting or from his secretary, Ann Marino (9T127-129). Clarke was unaware that the petition was in the Ravine Drive School until the day after the petition had been circulated there (9T124; 9T127). Clarke did not discuss the petition with central administration (9T129). Clarke did not suggest to staff members that

they should accept or reject the Board's fair and final offer (9T130).<sup>15/</sup>

Approximately five years ago, the parties were involved in an arbitration involving teacher Carol VanDusen. As the result of the VanDusen arbitration, the Board has implemented a policy requiring the administration to provide teachers called into meetings which might ultimately result in discipline or other adverse action with a written notice setting forth the reason(s) for the meeting and advising the employee that she/he is entitled to be accompanied by an association representative (8T26-28). The parties refer to these meetings as investigatory interviews. No record of an investigatory interview is kept by the administration or placed in a teacher's file when no discipline or other adverse action results.

On April 8, 1988, Robert Nesnay advised Carol Bucco that he wished to conduct an investigatory interview about her absence from school on March 30, 1988 (R-11). As a Board of Education member in another school district, Bucco sought permission first from Nesnay and later from the Board, to be granted three professional days to attend the National School Boards Association convention. Nesnay and the Board denied Bucco's request. The Board suggested that she attend the convention for two days, charging the time against her two personal

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<sup>15/</sup> I credit Clarke's testimony. Neither Sachs nor Mattern were present during any conversation that Clarke had with the staff of Ravine Drive School. Sachs' and Mattern's information is based solely on what Salko and Messina reported to them and their interpretations of what was said (5T50-52; 5T151-153).

leave days. Bucco requested and was granted the use of her two personal days in order to attend the convention on March 28 and 29, 1988. Bucco called in sick on March 30, 1988. Nesnay became suspicious of Bucco's absence because March 30 was the same day that he and the Board had previously denied Bucco's request for time off. Since Bucco was subject to discipline in the event the investigatory interview showed that she had improperly taken off on March 30, Nesnay, with Klavon's support, sent Bucco a notice of investigatory interview (6T28-29; 8T34-37). Bucco satisfied Nesnay that her absence was legitimate, consequently, no disciplinary or other adverse action was taken against her (8T37-38).

On March 8, 1988, Nesnay sent Leon Britton an investigatory interview notice about allegations that Britton harassed another teacher (R-12). Louise Fitzpatrick complained to Nesnay that Britton threatened her because of her lack of support for the union (6T66). Nesnay, after consultation with and the support of Klavon, decided that it was appropriate to conduct an investigatory interview with Britton because the allegations, if true, could have resulted in Britton's termination (6T26-27). Fitzpatrick refused to reduce her allegations against Britton to writing and Britton denied threatening her (8T33). Consequently, the Board terminated its investigation of Britton and no discipline or other adverse action was taken against him (8T33-34). Fitzpatrick was not called for an investigatory interview relative to her allegations concerning Britton (9T50).

On April 8, 1988, Wayne Smith and Marilyn McCarron were given notices of an investigatory interview about their personal absences on April 7, 1988 (R-2; R-3). The Board and the Association had scheduled a grievance arbitration after school on April 7, 1988. Although absent from school, Smith and McCarron attended the arbitration hearing. Seeing Smith and McCarron at the hearing, Nesnay requested, and was given permission by Klavon, to conduct investigatory interviews to determine the legitimacy of their absences. Smith and McCarron submitted doctors' notes and no disciplinary or other adverse action was taken against them (8T41-42).

On March 17, 1988, Ruthann Etzkorn was given a notice that an investigatory interview would be conducted about allegations that Etzkorn harassed and intimidated a fellow staff member (CP-28). Etzkorn teaches at the Lloyd Road School. On March 16, 1988, Etzkorn was told about a sign placed on a secretary's desk in the Lloyd Road School's main office (10T116). The next day Etzkorn came to school with her camera, took one picture of the sign, and went to the faculty lounge (10T101-102). A few minutes later, Ethel Stanger, the secretary upon whose desk the sign was placed, entered the faculty lounge and confronted Etzkorn about her taking the picture (10T102). Stanger was angry, upset, and out of control when she confronted Etzkorn (10T116). Etzkorn remained calm and explained to Stanger that the picture would be used as evidence to demonstrate that the administration was showing favoritism by allowing her to leave her sign up (10T104-105). Shortly after Stanger left the faculty lounge, Etzkorn changed the lens on her

camera, returned to the office and took a second picture showing Stanger with the sign on her desk (10T106-107; 10T123).

Etzkorn never complained to Mrs. Whiting, the Lloyd Road School Principal, about Stanger's conduct in the faculty lounge. Instead, Stanger called Barbara Cholewa (9T53).

Cholewa told Klavon Stanger's story. On the basis of Stanger's complaint, Klavon directed Whiting to convene an investigatory interview (9T65-66). During the interview, Klavon directed Etzkorn to surrender to the Board all negatives and pictures showing the sign on Stanger's desk (CP-30). Since the film taken by Etzkorn was lost, the Board decided to discontinue any further investigation into the matter and no discipline or other adverse action was taken by the Board against Etzkorn (8T46-47). The Board never conducted an investigatory interview with Stanger (9T61-62).

Whiting was not aware of the confrontation between Etzkorn and Stanger at the time of its occurrence. When Whiting became aware of the incident, she directed Stanger to remove the sign from her desk (9T98-100).

In or about March, 1988, Nesnay, with Klavon's approval, requested that Anthony Crego attend an investigatory interview about Crego's request to rescind his application for a sabbatical leave for the following school year (9T43-44). Nesnay conducted the investigatory interview because (a) the type of sabbatical leave for which Crego sought approval at the time he submitted his application differed from the type of sabbatical leave described on Crego's request

to rescind the leave application (8T79-80), and (b) Nesnay heard rumors that Crego was never serious about his application for sabbatical leave and applied solely to harass the administration because the administration announced the names of the individuals who would receive sabbatical leaves, one day early (6T73-74; 8T79). During the investigatory interview Crego offered a letter explaining that the course of study in the program he intended to pursue during his sabbatical leave was of a nature that included both types of activities reflected in his application for the leave and in his request for rescission (8T82). Consequently, the Board did not pursue the matter further and it took no disciplinary or other adverse action against Crego (8T82).

Panos has been president of the Association for over 20 years and also served as chairperson of the negotiating team during that time (1T42). As Association President, Panos has negotiated nine collective agreements with the Board (1T44). Prior to this round of negotiations, a single Association negotiating team has always negotiated with the Board for the four Association units (1T44). The parties have always entered into memoranda of agreement before entering into final contracts. The Association President, among others, has always been a signatory to the memoranda of agreement (1T44). The Association President and Recording Secretary sign the final collective agreement after it has been ratified by the membership (1T45). During Panos' presidency, she has handled grievances and attends arbitrations on behalf of the Association (1T46-47).

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in relevant part:

Representatives designated or selected by public employees for the purpose of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit. (emphasis added).

In State of New Jersey (Department of Law and Public Safety), I.R. No.

83-2, 8 NJPER 425, 427 (¶13197 1982) the Commission said:

The exclusivity principle is a cornerstone of the Act's structure for regulating the relationship between public employers and public employees. In Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409, 426 (1970)("Lullo"), the New Jersey Supreme Court explained why:

However, the major aim [the equitable balance of bargaining power] could not be accomplished if numerous individual employees wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would service disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests. See Chamberlain, Labor, 197 (1958). Obviously parity of bargaining power between employers and employees could not be reached in such a framework. So the democratic principle of majority control was introduced on the national scene, and the representative freely chosen by a majority of the employees in an appropriate unit to represent their collective interests in bargaining with the employer was given the exclusive right to do so. 29 U.S.C.A. §159(a). Thus this policy was built on the premise that by pooling their economic

strength and acting through a single representative freely chosen by the majority, the employees in such a unit achieve the most effective means of bargaining with an employer respecting conditions of employment. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 18 L.ed. 2d 1123 (1967); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684, 88 L.ed. 1007, 1101 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332, 338, 88 L.ed. 761, 678 (1944). Experience in the private employment sector has established that investment of the bargaining representative of the majority with the exclusive right to represent all the employees in the unit is a sound and salutary prerequisite to effective bargaining. Beyond doubt such exclusivity -- the majority rule concept -- is now at the core of our national labor policy. NLRB v. Allis-Chalmers Mfg. Co., *supra*, 388 U.S. at 180.

In short, exclusivity promotes labor stability by discouraging rivalries among individual employees and employee groups and by avoiding the diffusion of negotiating strength which results from multiple representation. *Id.* at p. 429. See also, Red Bank Regional Ed. Assn. v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122 (1978).

Given Lullo's recognition of the fundamental importance of the exclusivity principle in public sector labor relations and the debilitating effects of departure from this principle, it is clear that a majority representative [...] suffers harm when the employer permits a separate, uncertified organization to act on behalf of employees for purposes exclusively reserved to the certified employee representative. See also United Steel-Workers of America, AFL-CIO v. NLRB, and The Dow Chemical Co., 536 F.2d 550 (1976); Dade County PBA v. Metropolitan Dade County, 8 Fla. PERC #13153; Genesee Community College, 9 N.Y. PERB #3005 (1976).

In Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944), the employer recognized the union after determining that a majority of its employees designated the union as their bargaining



representative. Two days later an employee committee approached the employer and indicated that if the employer granted its wage demand, the employees would abandon the union. A few days later, the employer met with the employee committee and advised it that the employer would grant the wage increase requested. The employee committee advised the other employees that the employer agreed to the requested wage increase and the employees then agreed to abandon the union. The employer and the union had previously scheduled its first negotiations session for that same day. Before the negotiations session had begun, the employees told the union that they no longer wished the union to represent them. During the meeting between the employer and the union, the employer indicated that it no longer believed that the union represented a majority of the employees and refused to negotiate.

The Supreme Court found that when the employee committee contacted the employer, they had not yet repudiated the union, and did not do so until after it had concluded negotiations with the employer. While the employee committee negotiated with the employer, the employees held themselves out as union members.

The Supreme Court held that the employer violated the NLRA when it negotiated with the employee committee at a time when negotiations were pending with the exclusive representative. The Supreme Court said:

bargaining carried on by the employer directly with employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained,...

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...[O]rderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to...a [timely] revocation. And it is the fact here...that the employees did not revoke their designation of the union as their bargaining agent at any time while they were themselves negotiating with [the employer]...[14 LRRM at 584]

The Court went on to state:

[The employer] was not relieved from its obligations [to negotiate with the majority representative] because the employees asked that [it] be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent [citation omitted], or the employees suggest the conduct found to be an unfair practice [citation omitted], at least where the employer is in a position to secure any advantage from these practices [citation omitted]. [14 LRRM at 585]

In Independent Stave Co. v. N.L.R.B., \_\_\_ F.2d \_\_\_, 60 LRRM 2406 (1965), the NLRB certified the Coopers International Union of North America ("International") as the exclusive representative of certain employees employed by Independent Stave Co. ("Stave"). Local 42 of the Coopers International Union of North America ("Local 42") was affiliated with International. Since receipt of its certification, International has conducted the negotiations with Stave. Local 42 has also participated in these negotiations. On June 26, 1963, Stave met with Calvert, vice president of International, for negotiations. On July 11, 1963, the parties met for the second negotiations session. Calvert and the attorney for International attended and both served as spokespersons. Not having reached agreement, the parties scheduled

another session for the following day. On the morning of July 12, before the negotiations session began, Local 42 officers met with Calvert and told him they wanted to propose a lower wage increase than had been proposed previously by International. After conferring with International's president on the telephone, Calvert informed the Local 42 officers that International would not participate in the negotiations of the lower wage proposal. Consequently, the July 12 negotiations session with Stave was only attended by Local 42 officers.

The President of Local 42 served as spokesperson during the July 12 session, and told Stave that Calvert would not attend due to the disagreement between Local 42 and International. Knowing that International was not participating in the negotiations, Local 42 and Stave proceeded with the session.

On July 13, 1963, Stave and Local 42 conducted another negotiations session. On July 15, still not having reached an agreement, Stave gave Local 42 a letter setting forth its "final offer." Stave did not inform International of the "final offer" or send it a copy of the letter.

On July 16, 1963, the President of International sent a telegram to the Presidents of Stave and Local 42 advising that no collective bargaining agreement between Stave and Local 42 can become effective until approved by International. On July 16, 1963, the membership of Local 42 ratified the contract, and on July 18, Stave and Local 42 executed it. Thereafter, Stave asked Local 42 to present the agreement to International.

International became aware of the agreement when Local 42 sent it a copy for approval. On August 1, 1963, International rejected the contract, declared it null and void and so advised Stave by letter. International also demanded that Stave resume negotiations with it.

The court found that since 1955, International had been the certified bargaining agent for Stave's employees and the employees never revoked the certification. The court held that International never abandoned its status as exclusive bargaining representative. Also, Stave was well aware of the disagreements over the conflicting wage demands sought by International and Local 42. Indeed, the court said, "...an employer may not ignore [the] differences [between International and Local 42] to the complete disregard of the certified bargaining agent." 60 LRRM at 2412. See also, Quaker State Oil Refining Corp. v. N.L.R.B., 270 F.2d 40 (3rd Cir.), 44 LRRM 2297 (1959), cert. den. 361 U.S. 917, 45 LRRM 2249 (1959). Stave ignored the July 26 telegram sent by International's President disavowing any agreement reached by Stave and Local 42 until the terms of such agreement were approved by International. Finally, Stave's employees had not decertified International as their bargaining agent.<sup>16/</sup> For the reasons set forth above, among others, the court found that Stave

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<sup>16/</sup> In this case, Professional and Clerical Employees, ILGWU, filed a representation petition (Docket No. RO-89-17) on September 1, 1988. PACE seeks to represent the employees in the clerical unit currently represented by the Association. No representation petitions were filed with the Commission between the expiration of the last agreement in June 1986 and March 4, 1988, the date Truex signed a memorandum of agreement with the Board.

violated §§8(a)(5) and (1) of the N.L.R.A. by refusing to negotiate with the certified representative.

Township of Rockaway, H.E. No. 82-14, 7 NJPER 627 (¶12280 1981) rejected on other grounds P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982)("Rockaway"), presents a situation very similar to the facts here. Morris Council No. 6, N.J.C.S.A. ("Council 6") was the exclusive collective negotiations representative for employees in Rockaway Township's ("Township") four collective negotiations units. Since 1976, when Council 6 was certified as the majority representative of employees included in of the four units, Betty Lisovsky had been its president. Negotiations between the Township and Council 6 resulted in four separate collective agreements. Lisovsky always appointed the members of the negotiations team. The same negotiations team negotiated the contract for each of the four units.

In or about September, 1979, Lisovsky appointed a team to negotiate a successor agreement. Although Lisovsky was not formally a member of the team, she attended all but one of the negotiations session. Council 6's attorney also attended most of the negotiations session.

The first negotiations session between the Township and Council 6 for a successor agreement took place on April 29, 1980. The parties conducted several sessions over the next six months but did not reach agreement. On November 5, 1980, a majority of the members of Council 6's negotiations team requested a meeting with the Township's negotiations representatives and entered into a memorandum of agreement.

On November 13, 1980, Council 6's attorney sent the Township a letter advising that no agreement between the Township and Council 6 is valid unless approved and signed by President Lisovsky. The Township agreed to forward the agreement to Council 6's attorney for review and Lisovsky's signature.

In May, 1981, Lisovsky obtained a copy of the agreement from a unit member and discovered that it had been signed by one of the employees appointed to the negotiations team. On June 23, 1981, Council 6's attorney sent a letter to the Township indicating that the Township still had not delivered a copy of the agreement for any of the four units. The letter also stated that Council 6 had knowledge that one of the agreements had been signed by an individual not authorized to sign on behalf of Council 6.

On June 26, 1981, the Township sent Council 6 a copy of the agreement for each of the four units. All of the agreements were signed by a member of the negotiations team who was included in the corresponding unit. None of the employees who signed the agreement was either a Council 6 officer or member of its Board of Trustees.

Collective negotiations agreements prior to the 1980-82 agreements had been signed by negotiations team representatives of the various units; Lisovsky never signed the prior agreements.

The Hearing Examiner found that the Township committed a technical violation of §5.4(a)(1) and (5) of the Act when, after being notified on November 13, 1980, that it must deal with Lisovsky in order to validate the collective agreements, it executed the agreements

without Lisovsky's approval and signature anyway. The Hearing Examiner said:

...[I]t is basic to the obligation to negotiate in good faith on the part of a public employer that it deal with the representatives designated by the public employee representative. While it is true that in prior negotiations members of the negotiations team had executed the agreements on behalf of Council No. 6, in the instant negotiations it is crystal clear that both the attorney and the President of the Charging Party repeatedly directed the Township to submit the agreements for review and signature to the attorney and the President, respectively. The members of the negotiations team herein involved were neither officers nor members of the Board of Trustees (Directors) of Council No. 6. Lisovsky alone was an officer of Council No. 6, albeit the President, who was vested with the authority to appoint the members of negotiations team for Council No. 6 and was obviously vested with the authority to execute the agreements on behalf of Council No. 6 [Id. at 7 NJPER 629]

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Since both the attorney for Council 6 and its President repeatedly made clear to the Township on and after November 13, 1980 that the Township was to deal solely with the attorney and the President in the matter of reviewing and executing the four collective negotiations agreements, the Township acted at its peril in dealing with the members of the negotiations team either individually or collectively. [Id.]

Rockaway went before the Commission. Council 6 advised the Commission that it was willing to approve and sign the agreements negotiated by its negotiations team and only continued to challenge the Township's failure to submit the agreements to its President. The Commission found the dispute to be moot and dismissed the Complaint. However, in dicta, the Commission found the Township to have committed a technical violation of §5.4(a)(5) of the Act when it failed to deal with Council 6's President and attorney. Id. at 8 NJPER 118.

Applying the above-cited cases to this matter, I find that the Board violated §5.4(a)(5) and, derivatively, (a)(1) when it entered into negotiations with employees in the clerical and custodial units and not with the Association's officially designated spokespersons. Neither the clerical nor the custodial employees ever repudiated membership in the Association. Indeed, Truex specifically told the Board that the Association continued as the majority representative and the only change was that she was now speaking on its behalf. Whether Truex spoke on behalf of a majority of unit members or not is irrelevant. Medo Photo Supply, 14 LRRM at 584.

Panos has been President of the Association for over 20 years. Except for a brief illness in the last round of negotiations, Panos has always conducted negotiations as a primary spokesperson and chairperson of the Association's negotiations team. She attends lower level grievance hearings, and arbitration hearings. The Board has consistently negotiated with and recognized Panos as the spokesperson for the bus drivers and teachers units. Accordingly, both on the basis of historical and current events, the Board was very well aware of Panos' leadership role in each of the four collective negotiations units. Thus, as in Medo Photo Supply Corp., *supra*, the Board may not go behind the Association's officially designated representative in order to negotiate with the employees directly -- even if, as here, the employees request such negotiations.

The Board knew or should have known that Panos, consistent with the 20 year practice, was the Association's officially designated



representative. During the time Panos has served as President, she has always been one of the signatories of the memorandum of agreement reached at the conclusion of negotiations. Even assuming that Panos' status as spokesperson for the clerical unit became clouded after Truex told the Board that a majority of clerical unit members elected a new negotiations team, the issue was certainly clarified when Panos, as Association president, notified the Board that the Association disavowed any memorandum of agreement reached between the Board and the clerical unit (CP-10). The Board knew some of the employees in the clerical unit were dissatisfied with some of the positions taken by Association officials, yet ignored those differences to the complete disregard of the certified negotiations agent. The employees with whom the Board entered into the clerical and custodial memoranda of agreement were not officers of the Association.

The Board cites Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983) ("Mt. Olive"), in support of its position that in entering into the memorandum of agreement with the three clerical employees, no violation of the Act occurred. In Mt. Olive, the superintendent met with certain employees in an attempt to resolve a grievance concerning a reduction in work hours for bus drivers. The superintendent conducted two meetings: the first on August 3, 1982, and the other in late fall. Both meetings were attended by a recognized shop steward.

Holding that the Board committed no violation of the Act, the Commission found that the superintendent knew that the shop stewards

were present at each meeting and the stewards previously participated in negotiations. Further the superintendent reasonably believed that he was dealing with duly authorized representatives of the union. The union never disavowed the authority of its stewards to represent employees at initial discussions of informal grievances -- a function, the Commission found, well within the customary authority of shop stewards. Thus, the Commission concluded that the shop stewards had the apparent authority to represent employees on behalf of the union.

This case is distinguishable from Mt. Olive. While Truex attended negotiations between the Board and the Association, she was there only as an observer and never took an active role. Moreover, during the approximately two years of ongoing negotiations, Truex attended only two sessions. Neither Truex nor the other clerical signatories of the memorandum was a recognized Association official, nor did they hold any other status with the Association. Truex's actions were not of a nature such that the Board could reasonably and legitimately perceive her as exercising customary authority. Finally, yet importantly, unlike the actions of the union in Mt. Olive, here the Association took clear and unequivocal steps to disavow Truex's actions.

Accordingly, I find that the Board violated §5.4(a)(5) and, derivatively, (a)(1) when it dealt with clerical and custodial employees directly, rather than with the Association. See Independent Stave Co.; Township of Rockaway.

I now address the bus drivers unit. Panos, on behalf of the Association, called and conducted a ratification vote among the bus

drivers and they accepted the Board's final offer. The Association maintained that it need only advise the Board that it, on behalf of the bus drivers unit, had accepted the Board's final offer to conclude negotiations in that unit. However, the Board insisted that the parties execute a memorandum of agreement, consistent with their longstanding practice, to conclude negotiations. Ultimately, the Association drafted a memorandum of agreement covering the bus drivers unit, ratified it, and presented it to the Board for ratification. During the Board meeting to discuss the ratification, the Board unilaterally modified the memorandum. The Board then ratified the modified memorandum. The Association was neither informed of the modifications nor agreed to them. Such a unilateral change in the terms of a negotiated agreement which has already been ratified by one of the parties, violates §5.4(a)(5). See Passaic Valley Water Commission, H.E. No. 84-61, 10 NJPER 372 (¶15174 1984), adopted P.E.R.C. No. 85-4, 10 NJPER 487 (¶15219 1984).

On January 20, 1988, Klavon conducted a meeting in his office with Shaw,<sup>17/</sup> Fitzpatrick, Beadle and Sachs. Shaw and Fitzpatrick were Association vice-presidents and Beadle and Sachs were high school building representatives for the Association. Klavon called this meeting because he believed that Panos was obstructing negotiations. Klavon's purpose was to recruit the assistance of Shaw, Fitzpatrick, Beadle and Sachs in urging Panos to agree to an early resumption of negotiations.

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<sup>17/</sup> Shaw participated via telephone.

In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission said:

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. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action...may be initiated to halt or remedy the other's actions. [Id. at 503.]

I find no violation of the Act as the result of Klavon's meeting with the Association's officials. Clearly, Klavon was critical of Panos. He believed Panos was responsible for delaying negotiations. However, criticism of a union official is not tantamount to undermining the certified representative. Id. Whether Klavon's assessment of Panos' actions about the establishment of negotiations dates was accurate or not is irrelevant. Camden Fire Department, H.E. No. 82-34, 8 NJPER 181, 183 (¶13078 1982), adopted P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982). Klavon made no threat of reprisal or force or promise of benefit to the employees during the course of the meeting. See Spotswood Bd. of Ed., H.E. No. 85-43, 11 NJPER 382 (¶16139 1985) adopted P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985). For most of the meeting, Klavon did not even attend, but allowed the

employees to speak privately among themselves. If Klavon's real objective was to undermine the Association, I do not believe he would have gone about it by meeting with four Association officials, three of whom were clearly supportive of the current Association leadership.

The Association argues that the Board gave support, advice and assistance to certain clerical employees in violation of the Act. Such support included time off; use of Board equipment, stationery, and postage supplies; and providing police support at clerical meetings. I find no violation.

The facts establish that the clerical employees conducted meetings during non-work time. The secretaries' meeting at the diner was convened after school. None of the three clerical employees who signed the memorandum of agreement with the Board attended the signing meeting during work time. Other clerical meetings were held during the employees' lunch periods.

There was testimony concerning an aide and a secretary placing campaign literature supporting Fitzpatrick in teachers' mailboxes. The Association did not establish that those employees were distributing the literature during work time or the Board otherwise supported or encouraged that activity.

While the clerical employees did use postage supplies and perhaps some paper and envelopes, there is no evidence that the Board knowingly or unlawfully gave the secretaries such materials. The facts show that the secretaries, as is typically the case, had access to such materials and "helped themselves." The postage supplies were regular

certified mail and return receipt stickers available at any post office, free of charge. For convenience, the secretaries used the supply kept at the Board office. Such minimal use of supplies, without the employer's knowledge, does not constitute unlawful support and assistance on the part of the Board.

On March 3, 1988, the clerical employees held a meeting. During the meeting, police were parked in front of the school. The police were called by the Board but did not interfere with the meeting and left before the meeting concluded. The facts do not lead to the conclusion that the Board provided police support for the clerical employees. The evidence does not establish why the police were called. There was no testimony that the police were used to surveil protected activity. Since the police left the school area before the meeting concluded, and before anyone in the meeting was even aware of their presence, they were not used to intimidate. Consequently, on the evidence, I find no violation of the Act.

The Association argues that the Board rewarded individual secretarial employees with greater benefits than had been contained in either the fact-finder's recommendation or the Board's final offer. I find no evidence to support the allegation that particular clerical employees received greater benefits than other clerical employees.

Clerical employees, unit-wide, did receive more money than had been recommended by the fact-finder. That resulted, however, from an offer initiated by the Association at the negotiations table. The parties were involved in a substantial amount of discussion regarding

the transfer of money from the teachers' unit to the clerical unit. In effect, the parties jointly put the fact-finder's recommendation on the clerical unit salary increase to the side while they pursued the money transfer proposal.

Regarding the Board's final offer, it is important to note that it was just that -- an offer. Basic principles of contract law hold that an offer may be accepted or rejected. While a counter-offer serves as a rejection of the offer, the offeree is always free to make a counter-offer, which is what occurred here. The clerical employees, unfamiliar with the negotiations process and acting without the assistance of counsel, did not so much ask the Board to change its offer, as to clarify it by including language covering the treatment of the stipends already included in the prior collective agreement. The Board agreed to add a reopener provision in order to accommodate the clericals' concern about their inexperience with the negotiations process. The inclusion of these provisions in the memorandum of agreement does not represent a violation of the Act. A change from the final offer should not be confused with the unilateral implementation of terms and conditions of employment which differ from an employer's last best offer presented to employees after going through the Act's dispute resolution process. In the latter instance, only the last best offer, as stated, can be unilaterally implemented. See, City of Jersey City, 3 NJPER 122 (1977).

The violation of the Act in this case occurred, as previously found, because the Board did not negotiate with the Association, the

majority representative. As a result, it never reached agreement with the majority representative when it implemented the terms and conditions of employment contained in the memorandum it executed with the clerical employees. In light of the negotiations with the clerical employees and the additions made in the memorandum, albeit minor, the Board cannot successfully argue that it was merely implementing its last best offer. Accordingly, I find that in implementing the memorandum of agreement it reached with the clerical employees, the Board violated §5.4(a)(5) by unilaterally changing the terms and conditions of employment of clerical employees.

The Association alleges that the Board violated the Act by encouraging, supporting and assisting Fitzpatrick in her attempts to undermine the Association. The Association cites numerous examples of such alleged Board support.

The Association claims that the Board provided Fitzpatrick with time off in order to circulate petitions favorable to the Board and to assist secretaries to circumvent the Association. Fitzpatrick went to the Lloyd Road School on February 29, 1988, during class periods one and two. Fitzpatrick had a duty free period during first period. She received advance permission to be out of the high school for first period and was told by the Assistant Principal to sign in upon her arrival. Teachers are allowed to go out of the building during duty-free periods and are not required to state a reason for such requests. It was the principal's practice not to ask Association officers the reason for wanting to leave the school building.



Fitzpatrick did not return to the high school on February 29, until the end of the second period. She privately arranged with another teacher to cover her class. The high school administration was unaware of Fitzpatrick's absence from second period until several weeks after its occurrence. Fitzpatrick's second period absence and private arrangement to obtain teacher coverage was contrary to policy. The high school principal orally warned Fitzpatrick concerning such conduct. On March 3, 1988, Fitzpatrick privately arranged for a substitute teacher to cover her second period class. The high school administration did not know that Fitzpatrick did not teach her second period class and made private arrangements for coverage. The evidence shows that the administration has never disciplined a teacher who privately arranged for another teacher to cover a missed class.

There is testimony that Fitzpatrick was frequently late for class. The facts show that only one employee, who was late 30 times, was disciplined for tardiness. The administration was aware that Fitzpatrick was late only three times. No disciplinary action was taken against Fitzpatrick for tardiness. While Fitzpatrick may have gotten away with policy breaches on a somewhat more frequent basis, the facts show that the reason for this was because the administration was unaware of her activities and not because of Board support, encouragement or assistance. Nor do the facts provide a basis to find that the Board supported, encouraged or assisted Fitzpatrick in undermining the Association.

The Association also claims that the Board supported, encouraged and assisted Fitzpatrick by providing her with confidential Board negotiations materials, dealing with her directly, and meeting with her privately during and after negotiations sessions. I find that the facts do not support these allegations.

The only evidence adduced on the claim that the Board gave Fitzpatrick confidential negotiations materials was that Fitzpatrick possessed a file containing Board documents, some of which were handwritten by Board Secretary Quinn. However, no evidence was presented establishing that Quinn or other Board representatives gave Fitzpatrick the documents contained in the folder. While the means by which Fitzpatrick came into possession of the materials in the folder remains a question, the Association has not established that it was provided by the Board.

The Association claims that the Board dealt with Fitzpatrick directly and met with her privately during and after negotiations session. During school year 1987-88, Superintendent Hall had a number of conversations with Fitzpatrick. These conversations took place after negotiations session, Board meetings or on the telephone. Once, after Fitzpatrick's car was vandalized, Hall drove Fitzpatrick home from a negotiations session. The evidence shows that, among other topics, Hall and Fitzpatrick spoke about negotiations during some of these conversations, albeit on a general level. During one conversation, Fitzpatrick told Hall that she was going to conduct meetings among Association members presumably to obtain membership

support for the resolution of negotiations. Hall did not raise the topic of membership meetings and did not encourage Fitzpatrick to take any particular course of action. It is reasonable to assume, and I find, that conversations between high ranking administrators and officers and representatives of employee organizations take place all the time -- especially during ongoing collective negotiations. The mere conduct of such a conversation does not violate the Act. The evidence shows that nothing more occurred here than communications between the Board's superintendent and the Association's vice president about a number of issues of mutual interest, one of which was negotiations.

In May, 1988, after the filing of this unfair practice charge, Fitzpatrick was seen leaving Klavon's office at a time she would have been attending an Association officers' meeting. However, the observer did not know whether Klavon was even in the office at the time. There was also hearsay testimony that Fitzpatrick was seen at a public concert with a member of the Board and an administrator. There is no evidence that their attending the concert together was anything other than social. The mere fact that Fitzpatrick may have an out-of-school social relationship with individuals whose jobs may align them with the management side of the negotiations table is not the basis of a per se violation of the Act.

At a break during negotiations, Fitzpatrick was seen entering a room that was situated in a manner such that one could not see into the room from the hallway. At the end of the break, one of the Board's attorneys leaned into that room and motioned Fitzpatrick to leave.

Taking these incidents concerning Fitzpatrick individually or jointly, I find no substance to the allegation that the Board encouraged, supported and assisted Fitzpatrick. The evidence presented by the Association is based on hearsay, double hearsay and pure speculation. Some of the incidents occurred after the filing of the charge. Accordingly, I hold that the evidence does not show that the Board encouraged, supported or assisted Fitzpatrick in undermining the Association and find no violation of the Act.

The Association alleges that the Board retaliated and discriminated against Association representatives and supporters due to their exercise of protected activity. The Association cites incidents involving the high school administration conducting investigatory interviews with Panos and Mattern regarding the sign-in/sign-out policy, Bucco concerning the use of sick leave, Britton concerning Fitzpatrick's allegation that he threatened her, McCarron and Smith regarding their attendance at an arbitration hearing on a day when they were both absent from school due to illness, Etzkorn concerning the confrontation she had with a clerical employee at the Lloyd Road School, and Crego regarding the circumstances under which he withdrew his request for sabbatical leave. I find that in each case the Board acted reasonably and properly in conducting the investigatory interviews.

In each of the above-cited incidents, there existed a legitimate, factual basis for conducting an investigatory interview. Had the investigation indicated employee wrongdoing, the involved

employee would have been subject to discipline. The parties' collective agreement, as interpreted by the VanDusen arbitration, requires the administration to follow certain procedural steps any time it wishes to meet with an employee regarding a matter which may lead to discipline. The Board followed the procedure as required. Had the Board failed to follow the contractually mandated procedure and then determined that disciplinary action was appropriate, it might have been precluded from taking such action as the result of a procedural violation of the collective agreement.

The Association argues that its officers and active supporters who were called for investigatory interviews were discriminated against by the Board because the Board did not conduct investigatory interviews with the other staff who filed complaints. The Association points out that while Britton and Etzkorn were required to attend investigatory interviews, Fitzpatrick and Stanger were not.

I find no unlawful disparate treatment here. The Board already had information provided to it by complainants Fitzpatrick and Stanger. Neither Fitzpatrick nor Stanger were the focus of possible disciplinary action when the Board interviewed Britton and Etzkorn. Further, the VanDusen arbitration arose out of a contract provision in the teachers unit. Consequently, Stanger, an employee in the clerical unit, had no contractual right to the investigatory interview procedure. Accordingly, until the focus of the investigation shifted, no reason existed for the Board to conduct an investigatory interview with Fitzpatrick or Stanger.

Some extra comment is warranted on the situation involving the sign-in/sign-out procedure at the high school and the allegation that Panos and Mattern were detrimentally treated as compared with Fitzpatrick. I have previously held that the Board was justified in calling in Panos and Mattern for an investigatory interview. While Fitzpatrick was never called for an investigatory interview, Assistant Principal Smith did speak to her about complying with the procedure and there was temporary improvement. However, the facts show that administrative control over the sign-in/sign-out procedure was slipshod. A number of teachers, in addition to Fitzpatrick, were not complying with the policy and no evidence was adduced to show whether or not these employees were Association activists or whether they were called for investigatory interviews. Accordingly, I find that the evidence is insufficient to establish that Panos and Mattern were disparately treated as compared with Fitzpatrick or because of their participation in protected activity.

The Association alleges that the Board violated §5.4(a)(3) of the Act by singling out Association representatives and active supporters to attend investigatory interviews. The evidence shows that no discipline or other adverse action was taken against these employees by the Board. In Tp. of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986) the Commission held that an employer does not violate §5.4(a)(3) of the Act where there is no evidence that the employer's action ever actually resulted in adverse consequences. Accordingly, I find that the Board did not violate §5.4(a)(3) of the Act.

The Association argues that by conducting investigatory interviews with only Association representatives and active supporters, the Board committed an independent violation of §5.4(a)(1) of the Act.

An employer violates §5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial operational justification. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18059 1987); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The tendency of the employer's conduct and not its result or motivation is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd. App. Div. Dkt. No. A-1642-82T2 (12/8/83). I have already found that the Board had a legitimate operational reason for conducting each of the investigatory interviews. The investigatory interview process is not inherently coercive. The evidence shows that the problems investigated by the Administration during the interviews were either immediately or subsequently resolved on a fairly amicable basis. I can discern no unlawful signal being sent to employees by the Board's conduct of the investigatory interviews. Accordingly, I find no independent violation of §5.4(a)(1).

The Association contends that the Board violated §5.4(a)(2) of the Act. While motive is not an element of a subsection (a)(2) violation, there must be a showing that the acts complained of actually interfered with (or dominated) the formation, existence or

administration of the employee organization. See Morris, The Developing Labor Law, at 279 (2nd ed. 1983), citing Garmen Workers (Bernard Altman Texas Corp. v. NLRB), 366 U.S. 731 (1961). ("There is no basis for a finding of a §8(a)2 violation without evidence of its realization."). See also State of New Jersey (Trenton State College), H.E. No. 87-74, 13 NJPER 570 (¶18209 1987), adopted P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987).

I find that the Board's actions did not raise to the level of a subsection (a)(2) violation. The facts firmly establish that during all relevant times the Association, through its leadership, continued to exist and administer the employee organization. Although the Board wrongfully entered into a memorandum of agreement with unauthorized representatives, the facts show that no claim was ever made that the employee organization representing the clerical unit was other than the Matawan Regional Teachers Association. There is no evidence that the Board recognized any employee organization to represent employees in the four units other than the Association.

The Association alleged a violation of §5.4(a)(7). However, no evidence has been introduced showing that the Board violated any of the rules or regulations established by the Commission.

#### REMEDY

In its brief, the Association asks for compensatory damage in the amount of \$106,000, representing the money transferred from the teachers unit to the clerical unit. However, at the beginning of the hearing, the Association stated that the transfer of such money was not



being challenged in this litigation and that it was not seeking to recover that money for the teachers unit (1T16). Consequently, it would be inappropriate at this time to modify an important premise upon which this litigation was conducted.

In its brief, the Association seeks an order declaring void the memorandum of agreement executed by the Board and the three custodial employees. On August 23, 1988, the Association made, and I granted, a motion to amend its unfair practice charge regarding the custodians and bus drivers units. In its motion, the Association stated that it was not requesting that the terms of the agreement between the custodians unit and the Board be set aside (5T169). Thus, this matter was litigated in light of the Association's statement made at the time of the motion. Accordingly, I decline to void or modify the custodians terms and conditions of employment effected in accordance with the memorandum of agreement executed on or about March 7, 1988.

I have found that the Board unlawfully entered into and implemented a memorandum of agreement for the clerical unit. The Board also acted unlawfully when it unilaterally modified the bus drivers memorandum of agreement. Normally, it would be appropriate to at least order the rescission of such agreements and direct the parties to negotiate. However, in light of the agreement between the Board and the teachers' unit which contemplates the transfer of the approximately \$106,000 to the clerical unit, and the fact that the duration of both units' memoranda of agreement runs only until June 30, 1989, I find an

order rescinding the agreements and ordering negotiations at this time would not promote labor stability. Accordingly, I decline to recommend rescission of the clerical or bus drivers units memoranda of agreement.

#### CONCLUSIONS OF LAW

(1) The Matawan-Aberdeen Regional School District Board of Education violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, (a)(1) when it negotiated with unauthorized individuals from the clerical and custodians unit rather than the designated Association representatives.

(2) The Board violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally changed the terms of a negotiated agreement with the bus drivers unit which had already been ratified by the Association.

(3) The Board violated N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally implemented the terms and conditions of employment contained in the memorandum of agreement it executed with the clerical employees.

(4) The Board did not violate the Act when, on January 20, 1988, Michael Klavon conducted a meeting with Association officers and representatives without Association President Panos.

(5) The Board did not violate the Act since it did not provide assistance, support, encouragement or greater benefits to Louise Fitzpatrick or certain clerical employees.

(6) The Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (a)(3) of the Act by requiring Association representatives and active supporters to attend investigatory interviews.

(6) The Association did not prove by a preponderance of the evidence, that the Matawan-Aberdeen Regional School District Board of Education violated any other section of the New Jersey Employer-Employee Relations Act as alleged in its unfair practice charge.

RECOMMENDED ORDER

I recommend that the Commission order the Matawan-Aberdeen Regional School District Board of Education to:

A. Cease and desist from:

(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically by dealing directly and entering into negotiations with certain clerical and custodial employees rather than officially designated representatives of the Matawan-Regional Teachers Association.

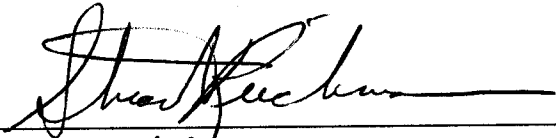
(2) Refusing to negotiate in good faith with the Matawan Regional Teachers Association concerning the terms and conditions of employment of the employees included in units it represents, specifically by (a) dealing directly and entering into negotiations with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association, (b) unilaterally changing the terms of a negotiated agreement which had already been ratified by the employees in the bus drivers unit, and (c) unilaterally changing terms and conditions of employment of employees in the clerical unit by implementing the terms

of a memorandum of agreement which was not negotiated with or agreed to by the Matawan Regional Teachers Association.

B. Take the following affirmative action:

(1) 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.

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

  
\_\_\_\_\_  
Stuart Reichman  
Hearing Examiner

DATED: May 30, 1989  
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 them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically by dealing directly and entering into negotiations with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association.

WE WILL NOT refuse to negotiate in good faith with the Matawan Regional Teachers Association concerning the terms and conditions of employment of the employees included in units it represents, specifically by (a) dealing directly and entering into negotiations with certain clerical and custodial employees rather than officially designated representatives of the Matawan Regional Teachers Association, (b) unilaterally changing the terms of a negotiated agreement which had already been ratified by the employees in the bus drivers unit, and (c) unilaterally changing terms and conditions of employment of employees in the clerical unit by implementing the terms of a memorandum of agreement which was not negotiated with or agreed to by the Matawan Regional Teachers Association.

Docket No. CO-H-88-222Matawan-Aberdeen Reg. School Dist. Bd. of Ed.  
(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.