P.E.R.C. NO. 97-148

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-337

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act when it required directors and supervisors represented by the Irvington Administrators Association to work on days when inclement weather forced schools to close. The Commission finds that the Board had an obligation to negotiate before changing its existing practice of not requiring any administrator to report for work on days when the schools were closed for inclement weather. The Commission orders the Board to negotiate with the Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather; compensate those supervisors and directors who reported to work by granting them additional leave or paying them on a pro rata basis; restore leave time to those supervisors and directors who did not report to work and were compelled to use leave; and to post a notice of the violations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO.97-148

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-337

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Schwartz Simon Edelstein Celso & Kessler, attorneys (Nicholas Celso, III and Joseph R. Marano, of counsel; Joseph R. Marano, on the exceptions)

For the Charging Party, New Jersey Principals and Supervisors Association (Wayne J. Oppito, of counsel)

DECISION AND ORDER

On May 10, 1994, the Irvington Administrators Association filed an unfair practice charge against the Irvington Board of Education. The Association 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), (5) and (7),[1/] when it required directors and supervisors to work on days when inclement weather forced schools to close.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

On June 22, 1995, a Complaint and Notice of Hearing issued. On July 7, the employer filed an Answer denying that it had violated the Act and asserting that it had a managerial prerogative and contractual right to require the employees' attendance.

On November 1, 1995, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On November 13, 1996, the Hearing Examiner recommended that we find that the employer had violated subsections 5.4(a)(1) and (5) by unilaterally altering a negotiable employment condition when, although it had closed the schools due to inclement weather, it required supervisors and directors to report to work. H.E. No. 97-12, 23 NJPER 62 (¶28039 1996). She recommended that we order the employer to cease and desist from its unilateral action, post a notice of its violation, and negotiate with the Association over any proposed change in the existing practice affecting which unit employees would be required to work on days when schools were closed for inclement weather. The Hearing Examiner also recommended that the employer be ordered to restore any leave used by employees who did not report for work and to compensate employees who came in on those days by granting them additional leave or paying them additional pro-rated salary.2/

2/ The Hearing Examiner did not address the alleged violation of subsection 5.4(a)(7). The charging party did not prove a violation of this subsection. We will dismiss that portion of the Complaint.

On December 11, 1996, the employer filed exceptions. It asserts that the Hearing Examiner erred by: (1) not accurately describing the duties of central administrators and differentiating them from those of building principals; (2) not concluding that the employer had a managerial prerogative or contractual right under the work year and management rights' clauses to require the administrators to work on the three dates; and (3) not concluding that it was relieved of any duty to negotiate because the Association did not demand negotiations.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-7) with one modification. We modify finding no. 2 to state that some of the 22 vacation days available to 12-month employees may be taken at times other than the summer recess under Article XIII(c) of the agreement (J-1). We add that four of the supervisors and directors were charged one or two vacation days for absences on January 19, 20 or 21, 1994 (J-2). We also add that between 1959 and 1994, no administrator was required to report to work when schools were closed because of inclement weather (T13).3/

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and

---

3/ We find the Hearing Examiner's report adequately describes the differences between the job duties of building administrators and those unit members whose daily activities do not depend on the presence of students.

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

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

See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

The longstanding practice before January 1994 was not to require any administrators to report to work when schools were closed due to inclement weather. The employer does not dispute this practice or that it deviated from this practice without negotiations. It thus violated subsections 5.4(a)(1) and (5) unless we accept one of its defenses.4/

We agree with the Hearing Examiner that the employer had an obligation to negotiate before changing its existing practice of not requiring any administrator to report for work on days when the schools were closed for inclement weather. See Barnegat. Accordingly, we conclude that the Board violated subsection 5.4(a)(5) and, derivatively, subsection 5.4(a)(1) when it directed some of the employees represented by the charging party to report for work on January 19, 20 and 21, 1994. This case did not

---

4/ Absent a claim of contract repudiation, we need not decide whether a binding past practice existed or whether a past practice rose to an implied contractual right. See Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992).

involve a managerial decision, prompted by inclement weather closings, to change the school calendar in order to open schools on school recess days. See Edison Tp. Bd. of Ed. and Edison Tp. Ed. Ass'n, NJPER Supp.2d 66 (¶47 App. Div. 1979), certif. den. 82 N.J. 274 (1979), rev'g P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978); Middletown Tp. Bd. of Ed. and Middletown Tp. Ed. Ass'n, P.E.R.C. No. 96-30, 21 NJPER 392 (¶26241 1995). Rather, this employer had already determined that schools were to be closed on the days in question. The Hearing Examiner appropriately relied upon Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) and Newark Bd. of Ed., P.E.R.C. No. 94-81, 20 NJPER 79 (¶25035 1994). Cf. Marlboro Tp., P.E.R.C. No. 97-102, 23 NJPER 174 (¶28087 1997) (declining to restrain arbitration of grievance seeking compensation for unit members required to remain at work when other employees were dismissed early without loss of pay).

The Hearing Examiner also correctly explained why the Association had no obligation to raise this issue in contract negotiations. The Board did not announce during contract negotiations that it intended to change the practice in question and the only notice the Association had of that intent was when its members were summoned to work on the morning of the first of three consecutive days when schools were closed for inclement weather. The departure from the practice was a fait accompli and presented no opportunity for the Association to demand

negotiations. Further, since we have found no prerogative to alter the practice of not requiring administrators to report to work on snow days, the Association had no duty to demand negotiations over compensation issues.

The Hearing Examiner properly analyzed and rejected the employer's asserted contractual defenses. We also reject the employer's "parity" argument. A demand to conform the working conditions of all employees in a single negotiations unit is not an attempt to enforce an illegal parity agreement. The parity concept necessarily involves at least two negotiations units and two separate agreements with the same employer. See City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255, 256 (¶4130 1978).

In the absence of any specific exceptions, we adopt the Hearing Examiner's proposed remedy.

ORDER

The Irvington Board of Education is ordered to:

A. Cease and desist:

1. From interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate with the Irvington Administrators Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather.

2. Refusing to negotiate with the Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather.

B. Take this action:

1. Compensate those supervisors and directors who reported to work on January 19, 20 and/or 21, 1994 by granting them additional leave or paying them on a pro rata basis.

2. Restore leave time to those supervisors and directors who did not report to work on January 19, 20 and/or 21, 1994, and were compelled to use leave.

3. Negotiate in good faith with the Association over whether there should be a change in the practice of attendance by supervisors and directors during days when schools are closed due to inclement weather.

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

5. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Ricci were not present.

DATED: June 19, 1997
Trenton, New Jersey
ISSUED: June 20, 1997

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate with the Irvington Administrators Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather.

WE WILL cease and desist from refusing to negotiate with the Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather.

WE WILL compensate those supervisors and directors who reported to work on January 19, 20 and/or 21, 1994 by granting them additional leave or paying them on a pro rata basis.

WE WILL restore leave time to those supervisors and directors who did not report to work on January 19, 20 and/or 21, 1994, and were compelled to use leave.

WE WILL negotiate in good faith with the Association over whether there should be a change in the practice of attendance by supervisors and directors during days when schools are closed due to inclement weather.

Docket No. CO-H-94-337

IRVINGTON BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 97-12

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-337

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 (a)(1) and (5) by unilaterally altering a negotiable past practice when it required the supervisors and directors to report to work on January 19, 20 and 21, 1994, when schools were otherwise closed due to inclement weather. The Board's unilateral change of the past practice violated its duty to negotiate over negotiable terms and conditions of employment, and, derivatively, interfered with the supervisors' and directors' exercise of rights guaranteed to them by the Act.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 97-12

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-337

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Schwartz Simon Edelstein Celso & Kessler, attorneys
(Nicholas Celso, III, of counsel)

For the Charging Party, New Jersey Principals and Supervisors Association
(Wayne J. Oppito, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 10, 1994, the Irvington Administrators' Association filed an unfair practice charge against the Irvington Board of Education alleging that the Authority violated subsections 5.4(a)(1), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act")[1/] when it required certain directors and supervisors to

---

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

Footnote Continued on Next Page

report to work on days when the Irvington public schools were closed due to inclement weather. The Board denies that it violated the Act and asserts that it had a managerial prerogative and contractual right to require the directors' and supervisors' attendance.

A Complaint and Notice of Hearing was issued on June 22, 1995. The Board filed an Answer on July 7, 1995, denying it violated the Act. On November 1, 1995, I conducted a hearing at which the parties examined witnesses and introduced exhibits.[2/] Post-hearing briefs were received by March 20, 1996. Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Board and Association have an expired collective negotiations agreement, effective from July 1, 1992 through June 30, 1995 (J-1). The Association represents all "Principals, Assistant Principals, Vice-Principals, Supervisors and Directors

---

1/ Footnote Continued From Previous Page

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; and (7) Violating any of the rules and regulations established by the commission."

2/ The transcript citations "1T-" refers to the transcript developed on November 1, 1995. Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" and "R" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits.

in the Irvington School District" (J-1). Article XIII states, in relevant part:

> (a) It is agreed that all 10-month employees as defined in this agreement and covered under the terms of this agreement, shall continue to work at their regular job five (5) school days following the close of the regular school session at the end of the school year, or no later than June 30th, whichever comes first.
>
> (b) It is further agreed between the parties that on one-half day sessions as scheduled by the Board of Education, all members of the Administrators' bargaining unit shall remain in the district two (2) hours beyond the teachers' departure.
>
> (c) Twelve (12) month employees covered under the terms of this agreement shall be entitled to twenty-two (22) working days for their vacation period...
>
> ...The Supervisors of Outdoor Education and Health Services, Director of Government Programs and Supervisors of Government Programs shall be permitted to take unused vacation days when school is in session with advanced written permission of the Superintendent.

The agreement (J-1) also contains a management rights clause:

> The Board...retains and reserves unto itself..the right:
>
> (e) To determine the class schedules, the hours of instruction and the duties responsibilities and assignments of teachers and other employees...and the terms and conditions of employment.
>
> The exercise of the foregoing powers...shall be limited only by the specific and express terms of this agreement...
> (J-1, page 3, Article II)

2. Supervisors and directors are assigned to district-wide programs and work twelve (12) months; principals and vice/assistant

principals are assigned to one school and work ten (10) months (J-1, T67, T84-T85). Supervisors and directors have offices in schools or in the auxiliary buildings at 660 Stuyvesant Avenue and 160 Orange Avenue (T92). Only the director of staff development is located at the central office at 1150 Springfield Avenue (T91-T92). Their clerical support is at the central office (T95). Twelve (12) month employees (supervisors and directors) work the school year plus the summer, except when schools are closed due to recess or holiday periods, and, these employees may take up to 22 vacation days in the summer only (T65-T66).

3. On January 19, 20 and 21, 1994, schools were closed due to inclement weather (T14). On those days, Superintendent Rogers Lewis, through the district's telephone "snow chain," required the District's twenty-one (21) supervisors and directors to report to work (T14, T57).[3/] None of the principals or assistant principals were required to report to work on January 19, 20 or 21, 1994 (T14). Some of the supervisors and directors took vacation or personal leave and most reported to the central office conference room (J-2, T63).

4. Schools were also closed due to inclement weather on January 4 and 26, 1994; on February 9 and 11, 1994, and on March 3, 1994 (T14). On those dates, no unit members were required to report to work (T14-T16, T55-T57).

3/ The "snow chain" is a method of notifying all employees by telephone that schools are closed because of inclement weather (T54, T80, T83, T99).

5. Prior to 1994, when schools were closed due to inclement weather, no unit members were required to report to work (T13, T54, T59, T79, T86, T97).

6. A spring recess was included in the 1993-94 school calendar, but was cancelled to make up for days lost to the snow emergencies that year (T88). No one received extra compensation for working the cancelled spring recess (T88).

7. Claire Scholz has been supervisor of family life and intellectually gifted since 1989 (T54). Scholz is a member of the Association's unit. She reports to an assistant superintendent and supervises family life education, intellectually gifted and academically accelerated programs (T67, T71-T72). Scholz was required to report to work on January 19, 20 and 21, 1994. She was unable to obtain most of her materials which were in her office at the Mount Vernon Avenue School (T68-T69). On those days, Scholz was only able to attend to minor aspects of her normal work and performed clerical payroll duties on January 19, 1994 (T60, T68-T69).

8. Barbara Williams is the director of government programs and grants and a member of the Association's unit (T78). Williams was required to work on January 19, 20 and 21, 1994. Before the 1993-94 school year, she was not required to report to work when schools were closed due to inclement weather (T79).

9. George Taylor was the supervisor of industrial arts and home economics from 1987 until his retirement in June 1994 (T86).

Taylor was not required to report to work on days schools were closed due to inclement weather prior to the 1993-94 school year (T86). Taylor was required to report to work on January 19, 20 and 21, 1994 (T86-T88).

10. Brenda Smiley has been the Board's director of human resources since 1992. In her first year Smiley stated that no unit members were required to report to work when schools were closed due to inclement weather (T97).

ANALYSIS

Has the Board violated the Act by requiring the Association's supervisors and directors to report to work on January 19, 20 and 21, 1994, when schools were closed due to inclement weather? The Association asserts that the Board altered the parties' binding past practice that did not require unit members to report to work on days when schools were closed due to inclement weather. The Board argues that past practice does not control the issue; that it had a managerial prerogative to require the directors and supervisors to report to work on a regularly scheduled workday; that supervisors' and directors' work is not related to student attendance; that the agreement provides that supervisors' and directors' work year is twelve months; and that the Association waived its claim to compensation for employees who worked on the days at issue, having never raised the issue during collective negotiations.

I find that the parties have a binding past practice concerning the attendance of unit members on inclement weather days when schools are closed. Unpersuaded by the Board's defenses, I conclude that the Board violated subsection 5.4 (a)(1) and (5) of the Act, when it required certain unit members' attendance on January 19, 20 and 21, 1994, without prior negotiations.

The Act requires that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." N.J.S.A. 34:13A-5.3.

A "past practice" concerning a term and condition of employment is a pattern of conduct implied from parties' mutual behavior. Caldwell-West Caldwell Bd. Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in pt., rev'd in pt., 180 N.J.Super. 440 (App. Div. 1981). Normally, when an agreement is silent on a negotiable issue, a past practice on that issue is accorded the same status as a term found in the parties agreement. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982); Watchung Borough, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981). The facts demonstrate a past practice of not requiring supervisors and directors to report to work on days when schools were closed due to inclement weather. The unrebutted testimony of all witnesses, including the Board's witness, was that the Board had never required attendance by supervisors and directors on inclement weather days when schools were closed. Generally, a public employer is obligated to negotiate

with a majority representative before changing a mandatorily negotiable past practice.

In Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J.. 582 (1980), the Court first discussed the balancing test for determining whether a matter is a mandatorily negotiable term and condition of employment:

> Logically pursued, these general principals -- managerial prerogatives and terms and conditions of employment -- lead to inevitable conflict. Almost every decision of the public employer concerning its employees impacts upon or affects terms and conditions of employment to some extent. While most decisions made by a public employer involve some managerial function, ending the inquiry at that point would all but eliminate the legislated authority of the union representative to negotiate with respect to "terms and conditions of employment." N.J.S.A. 34:13A-5.3. Conversely to permit negotiations and bargaining whenever a term and condition is implicated would emasculate managerial prerogatives. [Id. at 589].
>
> The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration. Thus, these matters may not be included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment. See, Maywood Bd. of Ed. v. Maywood Ed. Ass'n, P.E.R.C. No. 78-23, 3 NJPER 377 (1977), recon. P.E.R.C. No. 78-37, 4 NJPER 6 (¶4003 1978), aff'd in pt., rev'd in pt., 168 N.J. Super. 45 (App. Div. 1979), 5 NJPER 171 (¶10093 App. Div. 1979),certif. den. 81 N.J. 292 (1979)
>
> On the other hand, a viable bargaining process in the public sector has also been recognized by the

> Legislature in order to produce stability ... When this policy is preeminent, then bargaining is appropriate. Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, then negotiation would be proper even though the cost may have a significant effect on a managerial decision to keep the schools open more than 180 days. [Id. at 591].

While a public employer has a right to determine when to offer governmental services, the work schedules of individual employees are severable and mandatorily negotiable. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973).

Disputes over work schedules are mandatorily negotiable only where the result would not significantly interfere with a school board's ability to meet an educational goal. A balancing is required. In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), the Supreme Court further articulated the standards for determining whether a subject is mandatorily negotiable:

> ...a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. Id. at 404-405.

In Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985), the Court added that "significant interference" in school board cases focuses on the extent to which students and teachers are congruently involved. See also Woodstown-Pilesgrove.

Applying the Woodstown-Pilesgrove and Local 195 standards, I find that the issue of reporting to work on inclement weather days intimately and directly affects the work and welfare of supervisors and directors and neither party identified a statute or regulation preempting negotiations on that subject. Local 195's third test assumes that negotiation on matters affecting the work and welfare of public employees will always impinge to some extent on the determination of governmental policy. Thus, the requirement that the interference be "significant" balances the interests of public employees against the interests of public employers. When the dominant issue involves a significant interference with the determination of governmental policy, there is no obligation to negotiate. When the dominant issue involves the employees' interest in their terms and conditions of employment, the legislative policy favoring negotiation prevails. Verona Bd. of Ed., P.E.R.C. No. 86-91, 12 NJPER 196 (¶17074 1986)

In this case, the employees' interest in negotiating concerning the requirement to report on inclement weather days is the dominant issue. The instant change does not involve students, teachers or even days when schools are in session. Wright v. City of East Orange Bd. of Ed. Nor have any specific facts been adduced

to show why the Board needed to change the practice regarding reporting during snow days without first negotiating with the Association.[4/]

The Board's managerial prerogative argument is unpersuasive. The Board argued, for the first time in its post-hearing brief, that it is a "special needs district" and is required by law to expend funds wisely. It asserts that requiring attendance on regularly scheduled work days fulfills that duty, especially where the work is not dependent on student attendance. The Board proffered testimony that the supervisors and directors in question were not "building" personnel and that the performance of their duties did not require the presence of students. However, at least one witness stated that on the days at issue she was unable to perform her regular work because she could not obtain most of her materials which were housed in a closed school in her office. She performed clerical payroll-type duties. Many of the supervisors and directors' primary offices are located in buildings that were closed on January 19, 20 and 21, 1994. The Board did not rebut this testimony or present any evidence demonstrating how negotiations over attendance on inclement weather days would significantly interfere with educational policy. No explanation was offered for

---

4/ An employer's obligation to negotiate over a term and condition of employment does not mean that an employer must agree to a proposal or that it is bound to that term during subsequent collective negotiations. In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977)

why the Board first required directors and supervisors to report to work on inclement weather days in 1993-94. No explanation was offered for why the supervisors and directors were not required to work on any of the other five (5) days that schools were closed due to inclement weather (January 4 and 26, 1994; February 9 and 11, 1994, and March 3, 1994). The same educational policy reasons would appear to apply, yet none of the affected employees were required to attend work or use leave on those five days. The Board has not proved the validity of its claimed need to have supervisors and directors report on snow days. Given all these facts, I am persuaded, by a preponderance of the evidence, that the dominant issue here involves the employees' terms and conditions of employment.

The Board's argument that the Association waived its right to demand compensation for attendance during snow days because it never raised the subject during negotiations is specious. The Association is entitled to rely on the consistent past conduct of the Board in not requiring attendance of half of its unit on inclement weather days.

The Board argues that under the parties' management rights clause it has the right to unilaterally determine unit members' attendance on inclement weather days as part and parcel of its right to determine the calendar and work year. I agree that the Board has a right to determine the calendar and work year. But I disagree with the Board's assertion that the parties' agreement, J-1, permits

it to make any unilateral attendance policy changes without negotiating. The Board's reliance on the management rights article (Article II) is without merit. For this clause to operate as a waiver of a negotiable right, it must be clear from the wording of the clause that it covers that right. See, Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd NJPER Supp.2d 118 (¶98 App. Div. 1982); Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. Ed., 78 N.J.. 122, 140 (1978); State of N.J., P.E.R.C. No. 77-40, 3 NJPER 78 (1977). The language relied upon by the Board is not a waiver; J-1 is silent regarding the attendance practice, and does not suggest that changes in past practices need not be negotiated.

Even if the Board were found to have a non-negotiable right to require the supervisors' and directors' attendance on snow days, the issues of when, and if, employees should receive paid time off, or extra compensation for time worked, are severable and mandatorily negotiable. Vacation, sick and personal days, as well as premium pay for work performed when others are excused are forms of compensation available to employees through the collective negotiations process. See, e.g., Woodbridge Tp. P.E.R.C. No. 88-88, 14 NJPER 250 (¶19093 1988)(extra compensation for emergency snow holiday granted to other employees is mandatorily negotiable); Weehawken Tp., P.E.R.C. No. 81-104, 7 NJPER 146 (¶12065 1981)(compensatory time for employees who must work when others are excused by executive order is mandatorily negotiable) Recently, in

Newark Bd. of Ed., P.E.R.C. No. 94-81, 20 NJPER 79 (¶25035 1994) the Commission found mandatorily negotiable a dispute over compensation for unit members who were compelled to use personal days for two inclement weather days, and extra compensation for those who worked those days.

The Board argues that it should not pay extra when the days in question were regularly scheduled work days for twelve month employees and the supervisors and directors were paid their contractual rate for those days. This appears to be some form of contractual defense. But the parties' agreement does not support this claim. The contract is silent as to attendance during inclement weather days In the absence of a precise contract provision, past practice controls.

The Board also argues that the Association is attempting to achieve illegal parity with the teachers through the automatic extension of a negotiated benefit (post-hearing brief, pg. 15). However, the days at issue were paid days off for the remainder of the unit's membership and for all other employees but managerial executives. The Board unilaterally granted a paid day off (a benefit) to those employees who did not report to work. Compensation for days off is a negotiable issue. Provisions granting benefits that are unilaterally conferred, rather than negotiated by other units, are not illegal parity clauses and are mandatorily negotiable. See, Wanaque Bor., P.E.R.C. No. 82-42, 7 NJPER 613 (¶12273 1981) Examples include giving all employees a day

off upon declaring a legal holiday, extra pay for working employees when other employees enjoy a legal holiday, and compensatory time for employees working when other employees are excused by executive order. Wanaque, Watchung Bor., P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981) and Weehawken Tp., P.E.R.C. No. 81-104, 7 NJPER 146 (¶12065 1981). See also Woodbridge Tp., supra.

Based on the above, I conclude that the Board did not prove that the contract controlled this issue, that it had a managerial prerogative to make the change, that the Association had waived its right to demand negotiations, or that there was no enforceable past practice. I find, therefore, that the Board violated subsection 5.4(a)(5) and, derivatively, (a)(1) by unilaterally changing the past practice concerning supervisors' and directors' attendance on days when schools are closed due to inclement weather.

Accordingly, based upon the entire record and the above analysis, I make the following:

CONCLUSIONS OF LAW

The Irvington Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by unilaterally altering a negotiable past practice when it required the supervisors and directors to report to work on January 19, 20 and 21, 1994, when schools were otherwise closed due to inclement weather.

RECOMMENDATIONS

I recommend the Commission find that the Irvington Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by requiring the supervisors and directors to report to work on January 19, 20 and 21, 1994, when schools were otherwise closed due to inclement weather.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, specifically by refusing to negotiate in good faith with the Association over the issue of attendance by supervisors and directors during days when schools are closed due to inclement weather.

B. That the Board take the following affirmative action:

1. Compensate those supervisors and directors who reported to work on January 19, 20 and/or 21, 1994 by granting them additional leave or paying them on a pro rata basis; restoring leave to those who did not report to work on January 19, 20 and/or 21, 1994, and were compelled to use leave.

2. Negotiate in good faith with the Association over whether there should be a change in the past practice of attendance by supervisors and directors during days when schools are closed due to inclement weather.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice 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.

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

Elizabeth J. McGoldrick
Hearing Examiner

Dated: November 13, 1996
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

H.E. NO. 97-12

WE WILL cease and desist from interfering with, restraining or coercing our supervisors and directors in the exercise of the rights guaranteed to them by the Act by refusing to negotiate with the Association in good faith over our decision to change the past practice concerning the attendance of supervisors and directors during snow days in January 1994.

WE WILL compensate those supervisors and directors who used leave or reported to work on January 19, 20 and/or 21, 1994.

WE WILL negotiate in good faith with the Association over whether to change the past practice concerning the attendance of supervisors and directors during snow days in January 1994.

Docket No. CO-H-94-337

Irvington Board of Education
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

H.E. NO. 97-12

WE WILL cease and desist from interfering with, restraining or coercing our supervisors and directors in the exercise of the rights guaranteed to them by the Act by refusing to negotiate with the Association in good faith over our decision to change the past practice concerning the attendance of supervisors and directors during snow days in January 1994.

WE WILL compensate those supervisors and directors who used leave or reported to work on January 19, 20 and/or 21, 1994.

WE WILL negotiate in good faith with the Association over whether to change the past practice concerning the attendance supervisors and directors during snow days in January 1994.

Docket No. CO-H-94-337

Irvington Board of Education
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93