

P.E.R.C. No. 90-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMILTON TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-246

HAMILTON TOWNSHIP EDUCATION
ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

The Public Employer Relations Commission finds that the Hamilton Township Board of Education violated the the New Jersey Employer-Employee Relations Act when it unilaterally reduced preparation time for kindergarten teachers to 230 minutes from the previous year's level of 330. The Complaint was based on an unfair practice charge filed by the Hamilton Township Education Association/NJEA.

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Docket No. CO-H-89-246

HAMILTON TOWNSHIP EDUCATION
ASSOCIATION/NJEA,

Charging Party.

Appearances:

For the Respondent, Clement F. Lisitski, P.A.
(Clement F. Lisitski, of counsel)

For the Charging Party, Eugene J. Sharp
NJEA UniServ Field Representative

DECISION AND ORDER

On March 1, 1989, the Hamilton Township Education Association/NJEA filed an unfair practice charge against the Hamilton Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq., specifically subsections 5.4(a)(1) and (5),^{1/} when, for the 1988-89 school year, it unilaterally reduced

^{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."

preparation time for kindergarten teachers to 230 minutes from the previous year's level of 330.

On April 18, 1989, a Complaint and Notice of Hearing issued. On April 28, the Board filed an Answer asserting that it followed the parties' past practice and that the Association waived any right to negotiate over the alleged change.

On May 31 and June 1, 1989, Hearing Examiner Susan A. Weinberg conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by August 24, 1989.

On October 20, 1989, the Hearing Examiner issued her report and recommendations. H.E. No. 90-18, 15 NJPER 667 (¶20272 1989). She found that the Board violated subsections 5.4(a)(1) and (5) when it unilaterally reduced kindergarten teacher preparation time below 300 minutes per week.

On November 20, 1989, after an extension of time, the Board filed exceptions. It claims that it has a managerial prerogative to allocate special subject teachers and to adjust the amount of kindergarten teacher preparation time accordingly; past practice sanctioned that right; it had negotiated teacher preparation time, and a settlement agreement of an earlier unfair practice charge should not have been considered.^{2/}

^{2/} The Board requested oral argument. It has fully briefed its argument and we therefore deny its request.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-10) are accurate. We incorporate them here.

Because teacher workload is mandatorily negotiable, an employer must negotiate before substituting pupil contact time for preparation time. N.J.S.A. 34:13A-5.3; Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973); Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Kingwood Tp. Bd. of Ed. v. Kingwood Tp. Ed. Ass'n, App. Div. Dkt. No. A-1414-84T7 (11/25/85).

The Board argues that it has a managerial prerogative to allocate special subject teachers. While allocation of special subject teachers is indisputably the Board's prerogative, this charge does not challenge that prerogative. Instead, it focuses on the amount of preparation time. That amount is an independent term and condition of employment which the Board must collectively negotiate rather than unilaterally set. Cf. Burlington Cty. Coll. Faculty Ass'n v. Burlington Cty. Coll., 64 N.J. 10 (1973); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-46-87T1, A-2433-87T1, A-2536-87T1 (1/24/90). Negotiations over most aspects of teacher workload undoubtedly involve some managerial or educational function. But the realization that negotiations over a term and condition of employment impacts on other school issues does not necessarily render the term and condition of employment not

mandatorily negotiable. Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980). To so hold "would all but eliminate the legislated authority of the union representative to negotiate with respect to 'terms and conditions of employment.'" Id. at 589. Negotiation over teacher preparation time impacts on other issues within a school district, but on balance, the effect on teachers' interests and the bargaining process outweighs any possible interference with governmental policy. Byram; Red Bank.

That the amount of preparation time is mandatorily negotiable does not end the inquiry. An employee organization can waive its right to negotiate over workload changes by acquiescing to similar unilateral changes. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (3/10/87). But such a waiver must be clear and unmistakable. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High Sch. Bd. of Ed., 78 N.J. 122, 140 (1978).

We have examined the history of kindergarten teacher preparation time. While the amount of preparation time has varied from year to year, the Association had drawn a line beyond which it would not acquiesce. In 1986, when the Board reduced preparation time to 150 minutes from the previous year's level of 300 minutes, the Association filed an unfair practice charge alleging a unilateral reduction in preparation time. That charge was settled, but the Board knew that the Association did not accept the Board's unlimited right to set preparation time and that the Association demanded the continuation of at least 300 minutes of preparation

time per week. Accordingly, we find no waiver through acquiescence of the Association's right to negotiate reductions in kindergarten teacher preparation time below 300 minutes. Cf. Westinghouse Elec. Corp., 150 NLRB No. 136, 58 LRRM 1257 (1965) (employer lawfully acted unilaterally pursuant to established practice but union had right to negotiate for future changes in practice).

We specifically reject the Board's exception that the agreement to settle an earlier charge should not have been considered. The 1986 reduction was the first that brought kindergarten teacher preparation time below 300 minutes per week. The Association responded with an unfair practice charge and withdrew it when the Board agreed to restore 300 minutes the next year. This sequence of events is relevant not to prove the Association's earlier charge that the Board committed an unfair practice, but rather to disprove the Board's current defense that the Association acquiesced to the Board's unilaterally changing kindergarten teacher preparation time. The earlier charge and the settlement agreement support the Association's claim that it only acquiesced to a certain point. We make no judgment as to the legality of the Board's 1986 action.^{3/}

^{3/} N.J.A.C. 19:14-6.13(b) provides that offers of settlement shall not be admissible unless mutually agreed by all parties. That rule accords with Evid. R. 52 and a public policy that favors voluntary settlements of disputes. But evidence of offers of settlement is inadmissible only for the purpose of proving the liability of the one making the offer. Such evidence may still be admissible if it relates to some other fact in issue. Rynar v. Lincoln Transit Co., Inc., 129 N.J.L. 525 (E. & A. 1943); see also Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (1983).

The Board also asserts that it met its negotiations obligation because the parties reached agreement on kindergarten teacher preparation time during collective negotiations. But the record does not support that assertion. The Association proposed a specific daily amount of preparation time. The Board rejected the proposal. When the Board sent the Association its final contract understanding linking preparation time to the assignment of special subject teachers, the Association vigorously rejected it. The Board then reduced kindergarten teacher preparation time from 330 to 230 minutes per week. The parties continued to negotiate but no further understanding was reached and the contract remained silent on this issue. Neither the Association nor the Board was able to get the other to agree to its language. Thus we also find that the contract does not authorize the Board to reduce preparation time below 300 minutes per week.^{4/}

In sum, we find that the Board unilaterally reduced kindergarten teacher preparation time to 230 minutes from the previous year's level of 330 minutes. The Association did not waive its right to negotiate by acquiescing to similar reductions. Nor did

^{4/} Negotiations continued until January 1989; four months after the the Board reduced the preparation time. The Board had a duty to preserve the status quo during the course of successor contract negotiations. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Even if the contract ultimately gave the Board the right it claims, this uncompensated reduction in preparation time during successor negotiations breached that duty.

it contractually agree to allow the Board to implement this reduction. Accordingly, the Board violated subsection 5.4(a)(5) and, derivatively, subsection 5.4(a)(1).

ORDER

The Hamilton Township 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 to them by the Act, particularly by unilaterally reducing kindergarten teacher preparation time below 300 minutes per week.

2. Refusing to negotiate in good faith with the Hamilton Township Education Association concerning terms and conditions of employment of kindergarten teachers represented by the Hamilton Township Education Association/NJEA, particularly by unilaterally reducing their preparation time below 300 minutes per week.

B. Take the following affirmative action:

1. Grant additional preparation time equivalent to the time lost or negotiate in good faith with the Hamilton Township Education Association over offsetting compensation for the reduction in preparation time for kindergarten teachers in the 1988-89 school year.

2. Negotiate in good faith with the Hamilton Township Education Association regarding any future proposed reductions in kindergarten teacher preparation time below 300 minutes per week.

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

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Smith and Johnson voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration. Commissioners Reid and Ruggiero were not present.

DATED: Trenton, New Jersey
February 28, 1990
ISSUED: March 1, 1990

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 to them by the Act, particularly by unilaterally reducing kindergarten teacher preparation time below 300 minutes per week.

WE WILL cease and desist from refusing to negotiate in good faith with the Hamilton Township Education Association concerning terms and conditions of employment of kindergarten teachers represented by the Hamilton Township Education Association/NJEA, particularly by unilaterally reducing their preparation time below 300 minutes per week.

WE WILL grant additional preparation time equivalent to the time lost or negotiate in good faith with the Hamilton Township Education Association over offsetting compensation for the reduction in preparation time for kindergarten teachers in the 1988-89 school year.

WE WILL negotiate in good faith with the Hamilton Township Education Association regarding any future proposed reductions in kindergarten teacher preparation time below 300 minutes per week.

Docket No. CO-H-89-246

HAMILTON TOWNSHIP BD. OF ED.

(Public Employer)

Dated: _____

By: _____

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

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

APPENDIX "A"

H.E. NO. 90-18

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

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-246

HAMILTON TOWNSHIP EDUCATION ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Hamilton Township Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced preparation time for kindergarten teachers below 300 minutes per week.

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 finding of fact and/or conclusions of law.

H.E. NO. 90-18

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

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-246

HAMILTON TOWNSHIP EDUCATION ASSOCIATION/NJEA,

Charging Party.

Appearances:

For the Respondent, Clement F. Lisitski, P.A.,
David J. Strout, Esq.,

For the Charging Party,
Eugene, J. Sharp, UniServ Field Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 1, 1989, the Hamilton Township Education Association/NJEA ("Association") filed an unfair practice charge against the Hamilton Township Board of Education ("Board"), alleging violations of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4 et. seq., subsections (a)(1) and (5).^{1/} The charge alleges that the Board unilaterally decreased kindergarten teachers' preparation time for the 1988-89 school year.

^{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."

A Complaint and Notice of Hearing issued on April 18, 1989. On April 28, 1989, the Board filed an Answer denying it violated the Act. The Board asserted that the Association waived its right to negotiate the alleged change and that its own actions are consistent with past practice.

On May 31 and June 1, 1989, I conducted a hearing at which the parties examined and cross-examined witnesses, presented evidence and argued orally. Both parties filed post-hearing briefs, the last of which was received on August 24, 1989.

Upon review of the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated the following facts:

a. The total number of minutes per week of preparation time (non-student encounter time) for kindergarten teachers employed by Hamilton Township Board of Education during the 1985-86 school year was 300 minutes. This time was divided as follows:

150 minutes (1/2 hour per day) unassigned, prep time
150 minutes of time when "specials" were in the teachers' classrooms thereby relieving the teachers of duty. This "special" time was divided as follows:

Art	30 minutes per week
Music	30 minutes per week
Phys. Ed.	30 minutes per week
Speech Improv.	60 minutes per week

b. The total number of minutes per week of preparation time (non-student encounter time) for kindergarten teachers employed by Hamilton Township Board of Education during the 1986-87 school year was 150 minutes. This time was divided as follows:

150 minutes (1/2 hour per day) unassigned, prep time

c. The total number of minutes per week of preparation time (non-student encounter time) for kindergarten teachers employed by Hamilton Township Board of Education during the 1987-88 school year was 330 minutes. This time was divided as follows:

150 minutes (1/2 hour per day) unassigned, prep time
180 minutes of time when "specials" were in the teachers' classrooms thereby relieving the teachers of duty. This "special" time was divided as follows:

Art	60 minutes per week
Music	60 minutes per week
Phys. Ed.	60 minutes per week

d. The total number of minutes per week of preparation time (non-student encounter time) for kindergarten teachers employed by Hamilton Township Board of Education during the 1988-89 school year was 230 minutes. This time was divided as follows:

150 minutes (1/2 hour per day) unassigned, prep time
80 minutes of time when "specials" were in the teachers' classrooms thereby relieving the teachers of duty. This "special" time was divided as follows:

Art, Music or Phy. Ed. 80 minutes per week

e. The Board is a public employer within the meaning of the Act and the Association is a public employee representative within the meaning of the Act (TA7-8).^{2/}

I find:

2. On February 11, 1987, the Association filed an unfair practice charge against the Board alleging it violated subsections (a)(1) and (5) of the Act when it unilaterally reduced by 150 minutes the amount of preparation time (non-student encounter time) for kindergarten teachers (TA14).

^{2/} Transcript citation TA7-8 refers to the transcript of May 31, 1989 at pages 7-8. TB will refer to the transcript of June 1, 1989.

3. In settlement of that charge, the parties entered into the following agreement:

Settlement Agreement

In full Settlement of Docket No. CO-87-221 the Parties agree as follows:

- 1) The Board agrees to restore 150 minutes of preparation time to the full-time kindergarten teachers in school year 1987-1988.
- 2) The Association agrees to withdraw the charge (Docket No. CO-87-221).
- 3) This agreement is subject to ratification by the Board and the Association.

For the Board:
/s/William Davies, Sr.
Dated: 4/2/87

For the Association:
/s/Eugene McCann
Dated: 4/2/87

(CP-4, TA17, 24).

4. The agreement was ratified. The Association withdrew the charge and the case was closed (TA24).

5. In each year between the 1984-85 and the 1979-80 school years the Board unilaterally changed the amount of preparation time for kindergarten teachers (TB11, 41, 51, 58 and 81).

6. In the 1984-85 school year, kindergarten teachers had 330 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions and 60 minutes per week of unassigned time during each of the special classes of Art, Music and Speech (TA34-35).

7. In the 1983-84 school year, kindergarten teachers had 390 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions and 60 minutes per week unassigned time during each of the special classes of Art, Music, Library and Speech (TA35).

8. In the 1982-83 school year, kindergarten teachers had 420 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions; 30 minutes per week of unassigned time during each of the special classes of Physical Education, Music, Speech, Art and Library (morning session); and 30 minutes per week unassigned time during each of the special classes of Physical Education, Music, Speech and Art (afternoon session) (TB21-23, CP-8, CP-9).

9. In the 1981-82 school year, kindergarten teachers had 450 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions and 60 minutes per week of unassigned time during each of the special classes of Music, Speech, Library, Physical Education and Art (TB27-28, CP-10).

10. In the 1980-81 school year, kindergarten teachers had 330 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions and 60 minutes per week of unassigned time during each of the special classes of Music, Speech and Library (TB24, CP-10).

11. In the 1979-80 school year, kindergarten teachers had 330 minutes per week of preparation time: 150 minutes per week (1/2 hour per day) unassigned time between the morning and afternoon sessions and 60 minutes per week of unassigned time during each of the special classes of Music, Speech and Library (TB32-33, CP-11).

12. The collective negotiations agreement between the Board and the Association covering the period July 1, 1985 through June 30, 1988 stated: "all teachers shall receive a daily duty-free lunch period of at least thirty (30) minutes" (J-1, Art. X,F). The current agreement covering the period July 1, 1988 through June 30, 1991 contained the same provision (J-2, Art. V,G). No other provisions in either agreement refer to teacher preparation time and/or non-student encounter time.

13. Leonard Slota, Principal of the Shaner School, has been responsible for the operation of kindergarten classes for the past 19 years. Each year he decides which special subjects will be in the curriculum for the kindergarten classes and assigns the special subject teachers. These assignments vary from year to year (TB48).

14. In the 1988-89 school year, Slota reduced by 100 minutes the amount of time special subject teachers were assigned to the kindergarten classes. He made this change because of the unavailability of special subject teachers. Slota determined the best use of the available special subject teachers was in grades other than kindergarten (TB50).

15. Kindergarten teachers officially received their special subject schedules on the first day of school in September 1988 (TA41, TB49). Sometime in September or October, the kindergarten teachers approached Slota with their concerns about the preparation time reduction. The teachers proposed increasing the special subject time for the kindergarten classes (TA41, TB51). Slota replied that this could not be done because it would require increasing the amount of time the special subject teachers were employed by the district (TB52).

16. Sandra Santamaria is a kindergarten teacher and first vice president of the Association (TA44). In November 1988, Santamaria, several other kindergarten teachers, members of the Association grievance committee and Slota met to discuss the kindergarten teachers' loss of preparation time^{3/} (TA42, TB52-53). Several proposals were addressed but the dispute over the loss of preparation time was not resolved (TA43, TB53-54). In following one suggestion, Slota revised the special subject teachers' schedules, requiring them to teach on successive instead of alternate weeks. This change went into effect on January 1, 1989 (TB53-54).

^{3/} Santamaria testified that she attended this meeting in her capacity as a kindergarten teacher and not as the Association vice president. She further stated that Slota knew she was there in that capacity (TA44-45). In the absence of any evidence suggesting that she appeared other than as a concerned teacher, I credit her testimony.

17. In February 1989, Slota spoke with Carla Hockenbury, Association president, regarding the preparation time dispute. No resolution was reached (TB55, 73).

18. On March 16, 1988, negotiations began for the current agreement (J-2) (TB102).^{4/} The Association's initial written proposal to the Board stated: "All teachers shall be guaranteed at least one (1) planning period per day during instructional time equivalent to at least (1) teaching period" (R-1, ¶H)(TB84, 104). The Association wanted the provision because some teachers had less than a full instruction period for a preparation period each day (TB125).

19. Paragraph H had been discussed since the beginning of negotiations. Throughout negotiations, the Association made specific demands for precise amounts of preparation time, which the Board rejected (TB107). These discussions also involved comparisons of preparation time available to kindergarten and other elementary teachers (TB109).^{5/}

^{4/} Superintendent Carl Scheetz and Association president Victor Hudson differed about when negotiations began. Scheetz thought they began in the fall of 1987 (TB95). Hudson stated they started at the end of January 1988 (TB123, 127). I credit the Board's chief spokesperson, Phillip Geiger. Geiger's recollection of the precise date was refreshed on the witness stand after he reviewed his negotiations notes.

^{5/} Geiger testified that on April 20, 1988, after the parties agreed on a number of other items, the Association withdrew paragraph H from the bargaining table (TB108). Scheetz also

20. Based on what Geiger perceived to be the "final understanding" between the parties on the Working Conditions Article, he forwarded a written document containing these proposals to the Association's chief spokesperson, Mary Ellen Starn, on August 19, 1988 (TB108, R-2). Paragraph F of that document states: "When the regular classroom teachers' students are assigned a special area teacher (art, music and physical education) they [sic] will be provided a planning period equal to the length of the instructional period" (R-2).

21. Sometime before September 1, 1988, Geiger received the same document back from Starn (TB109). Starn drew a large wavy line through paragraph F and wrote "No!" next to it in the right margin (TB105, R-2). Geiger interpreted the notation to mean that Starn had emphatically rejected the paragraph (TB106).^{6/}

22. In November 1988, Geiger and Association representatives again met to discuss the preparation time issue. This meeting was held because kindergarten and elementary teachers

5/ Footnote Continued From Previous Page

believed that the proposal had been withdrawn. He testified that all items in R-1 were discussed and if they did not appear in the new contract they had been "dropped or traded" by the Association (TB87). I do not credit this testimony. It is evident that the parties continued to discuss the preparation time proposals after April 1988. (See finding of fact no. 22 supra.)

6/ Hudson confirmed that he and Starn reviewed and rejected paragraph F of the Board's proposal. He testified that it was rejected because it did not agree with the Associations's original proposal (TB126-127).

objected to a reduction in the number of special subject teachers assigned to their classrooms since the beginning of the school year (TB111).

23. In December 1988, the parties reached a tentative agreement on the successor contract. Neither paragraph H nor paragraph F were included in the agreement. (See finding of fact no. 12, supra.) Ratification occurred in January 1989 (TB96). The agreement was signed on May 5, 1989 by the Association and on May 24, 1989 by the Board (J-2).

ANALYSIS

Teacher work hours and work load are mandatorily negotiable subjects and, normally, a unilateral increase in pupil contact or duty time resulting from a reduction in preparation time violates the Act. See Burlington Cty. College Faculty Assn. v. Bd. of Trustees, 64 N.J. 10 (1973); Maywood Ed. Assn., 168 N.J. Super. 45 (App. Div. 1979), pet. for cert. den. 81 N.J. 292 (1979); Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. The Warrington, 138 N.J. Super. 564 (App. Div. 1976); Kingwood Tp. Bd. of Ed. v. Kingwood Tp. Ed. Assn., App. Div. Dkt. No. A-1414-84T7 (11/25/85); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd App. Div. Dkt. A-3380-80T2 (3/16/82); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Dkt. No. A-2060-78 (2/20/80); City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Dkt. No. A-954-79 (1980), pet. for cert. den. 87 N.J. 310 (1981).

The Board argues that it negotiated preparation time before September 1988. Specific provisions regarding preparation time were exchanged. The record shows however, that as late as the end of August 1988, the Board received what it termed an "emphatic" Association rejection of its preparation time proposal. Further, in November (after the reduction had been implemented) meetings continued between the Board and the Association on the preparation time issue. The contract was not ratified or signed until well after the change had been made. I find that the issue of preparation time was neither resolved by the parties nor withdrawn by the Association.

An employer is normally precluded from altering the status quo while engaged in negotiations for a successor agreement. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975), appeal dism. as moot (June 24, 1976), pet. for rehrg. denied (July 16, 1976), App. Div. Docket No. A-8-75), pet. for cert. den. (Sept. 28, 1976), Supreme Ct. Docket No. 12,919. In this case, the status quo was 300 minutes or more per week of preparation time for kindergarten teachers. (See discussion of the established past practice, infra.) In September 1988, while negotiations for the successor agreement were in progress, preparation time was reduced to 230 minutes per week.

Accordingly, I find that the Board did not satisfy its negotiation obligation before implementing the preparation time reduction and violated subsections (a)(1) and (5) of the Act when it altered the status quo during negotiations.

The Board alternatively argues that the Association waived its right to negotiate over the change. A majority representative may waive its right to negotiate changes in student contact time or work load. A waiver can come in different forms, but must be clear and unequivocal. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). When an employee organization declines the opportunity to negotiate after being notified of proposed changes or if it has routinely permitted the employer to make similar changes, it may have waived its right to negotiate over what would otherwise be mandatorily negotiable subjects. South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87); Rutgers University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982).

An established practice is a term and condition of employment which is not enunciated in the parties' agreement but arises from the mutual consent of the parties, implied from their conduct. Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part 180 N.J. Super. 440 (1981). In this case, an established practice exists allowing the Board to make annual adjustments in kindergarten teachers' schedules. The current practice allows the Board to increase or decrease the number of special subject teachers assigned to kindergarten classrooms. When special subject teachers are in the classrooms, kindergarten teachers have a preparation period. Thus, the Board has been permitted to unilaterally change the amount

of instructional or duty periods assigned to kindergarten teachers by increasing or decreasing these preparation periods.^{7/} The Board made the adjustments based on its determination of the most effective placement of special subject teachers. Changes in the special subject assignments have been unilaterally made by the Board for at least the last ten years.

The Board argues that the past practice allows it to make any changes in the amount of kindergarten teacher preparation time. The Association argues that it acquiesced to unilateral Board action only within certain limitations. The record shows that since 1979, with the exception of the 1986-87 school year and the 1988-89 school year which is the subject of this charge, the amount of kindergarten teacher preparation time did not fall below 300 minutes per week. When it dropped to 150 minutes in the 1986-87 school year, the Association responded by filing an unfair practice charge. Although the charge was not litigated, the Board agreed in a settlement to restore the lost preparation time in the next school year (1987-88). The instant charge ensued when the preparation time again dropped below 300 minutes to 230 minutes per week.

I find that the parties' past practice permitted the Board to unilaterally assign 300 minutes per week or more of preparation time to kindergarten teachers. Accordingly, the Association waived

^{7/} Although nothing in the record suggests what assignments the kindergarten teachers received in lieu of the special subject preparation time, I presume that the reduction resulted in an increase in either instructional or duty time.

its right to negotiate over changes in the amount of kindergarten teachers' preparation time exceeding 299 minutes per week. However, once the Board assigned less than 300 minutes per week, a bargaining obligation arose. Bethlehem Tp. Bd. of Ed., 13 NJPER 712 (¶18265 1987).

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

CONCLUSIONS OF LAW

The Hamilton Township Board of Education violated subsections 5.4 (a)(1) and (5) when it failed to negotiate with the Association prior to reducing kindergarten teachers' preparation time to 230 minutes per week and when it unilaterally implemented that change during negotiations for a successor agreement..

RECOMMENDED ORDER

I recommend that the Commission ORDER the Hamilton Township Board of Education to :

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

2. Refusing to negotiate in good faith with the Hamilton Township Education Association concerning terms and conditions of employment of bargaining members, specifically the amount of preparation time below 300 minutes per week for kindergarten teachers.

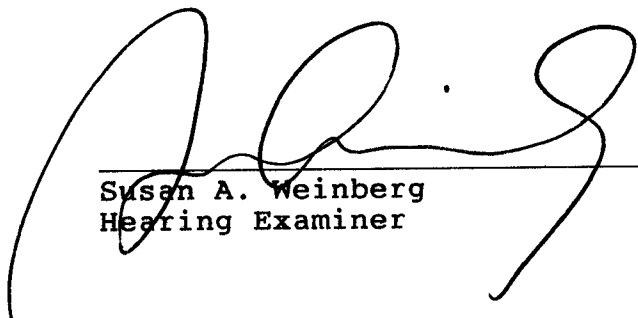
B. Take the following affirmative action:

1. Negotiate in good faith with the Hamilton Township Education Association regarding compensation for the reduction in preparation time below 300 minutes per week for kindergarten teachers in the 1988-89 school year.

2. Negotiate in good faith with the Hamilton Township Education Association regarding any future proposed reductions below 300 minutes per week of preparation time for kindergarten teachers.

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 with this order.



Susan A. Weinberg
Hearing Examiner

Dated: October 20, 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL cease and desist from refusing to negotiate in good faith with the Hamilton Township Education Association concerning terms and conditions of employment of bargaining members, specifically the amount of preparation time below 300 minutes per week for kindergarten teachers.

WE WILL negotiate in good faith with the Hamilton Township Education Association regarding compensation for the reduction in preparation time below 300 minutes per week for kindergarten teachers in the 1988-89 school year.

WE WILL negotiate in good faith with the Hamilton Township Education Association regarding any future proposed reductions below 300 minutes per week of preparation time for kindergarten teachers.

Docket No. CO-H-89-246 Hamilton Township B/E
(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.