

P.E.R.C. NO. 86-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-200-45

EAST BRUNSWICK EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the East Brunswick Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally increased the workload of certified nurses by increasing their teaching assignments. The Commission finds that the Board had neither the managerial prerogative or the contractual right to do so and therefore was obligated to negotiate the increase with the East Brunswick Education Association.

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ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Pachman & Glickman, Esqs.
(Martin R. Pachman, of Counsel)

For the Charging Party, Ruhlman, Butrym & Friedman, Esqs.
(Richard A. Friedman, of Counsel)

DECISION AND ORDER

On February 28, 1984, the East Brunswick Education Association ("Association") filed an unfair practice charge against the East Brunswick Board of Education ("Board"). 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) and (5),^{1/} when it unilaterally increased the workload

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and

of certified nurses by increasing their teaching assignments and by failing to negotiate over preparation periods.

On September 14, 1984, a Complaint and Notice of Hearing issued. The Board then filed an Answer denying that it increased the number of teaching periods or failed to provide additional preparation time without negotiations. It further denies that the alleged increase violated the parties' collective agreement or practice.

On June 19 and July 10, 1985, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by October 4, 1985. The Association filed a reply brief.

On January 14, 1986, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-32, 12 NJPER ____ (¶ ____ 1986) (copy attached). He concluded that the Board violated subsections 5.4(a)(5) and, derivatively, (a)(1) by unilaterally assigning certain nurses additional teaching duties. He based this conclusion on the following facts: Before September 1982, nurses taught 3 classes per week in addition to their nursing duties. For 1982-83, their teaching duties were increased, after an accommodation was

1/ Footnote Continued From Previous Page

conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

reached between the parties, to between 6 and 9 classes per week. For 1983-84, nurses' teaching duties were again increased, this time to between 6 and 15 classes per week. For 1985-86, the workload returned approximately to the 1982-83 levels. The Hearing Examiner recommended that the Board be ordered to negotiate over compensation for workload increases in 1983-84 and 1984-85, and, if any, 1985-86. He also recommended that the Board be ordered to negotiate over compensation and preparation time for the rest of 1985-86, and over any future changes in workload.

On January 21, 1986, the Association filed exceptions. It contends that effective 1986-87, the Board should be required to return the nurses' workload to the status quo as it existed at the end of the 1982-83 school year.

On February 6, 1986, the Board filed exceptions. It excepts to the last sentence of finding no. 3 and all of finding no. 5. The Board also argues that: (1) the charge should be dismissed as untimely because the change occurred in September 1982; (2) it had a managerial prerogative to reassign nurses from the Health Services office to teaching duties; (3) the assignment was within the workload requirements for teachers set forth in the parties' collective agreement; (4) it did not to have schedule preparation time because nurses scheduled the balance of their work day; (5) compensation is not implicated because the two tasks are compensated on the same salary guide and (6) the Board is not obligated to negotiate in the absence of a demand.

On February 26, 1986, the Association filed a reply. It argues that the charge was timely filed; the Board increased workload and the Board had neither a managerial prerogative nor a contractual defense to do so unilaterally.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.^{2/}

The Board argues that because it first unilaterally increased the nurses' workload in 1982-83, the charge was untimely filed. We disagree.

The Association did not file a charge over that change because it reached an accommodation with the Board whereupon the workload was reduced. In September 1983, the Board increased the nurses' workload above the workload that existed after the accommodation. The Association then filed a timely charge within six months.

We now address the merits. N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with the majority representative concerning employees' terms and conditions of employment. A public employer may violate this subsection if it modifies terms and conditions of employment

^{2/} We specifically reject the Board's exceptions to findings no. 3 and 5. We modify finding no. 5 to show that for the Memorial School, the 1984-85 schedule was six and seven classes per week on an alternating basis.

without first negotiating in good faith to impasse or having a managerial prerogative or contractual right to make the change.

State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28. 11 NJPER 580 (¶16202 1985).

The Board claims that it had a managerial prerogative to change the nurses' duties. We disagree.

The Board increased the nurses' workload by requiring them to teach more classes than they did following the 1982-83 accommodation. This uncompensated increase in workload involved a mandatorily negotiable term and condition of employment. Burlington Co. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Board of Education of Ramsey and Ramsey Teachers' Association, P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), affm'd App. Div. Dkt. No. A-4836-84T1 (2/6/86).

We reject the Board's argument that nurses are somehow unique and therefore exempt from the long series of Court and Commission decisions, cited by the Hearing Examiner, finding workload increases negotiable. (Slip opinion at 8-9, n.5). While this case might be factually different because it involves certified nurses, it is factually the same in that employee workload was increased.

The Board also argues that the increase in teaching time involved a non-negotiable educational policy decision. In Buena Regional Board of Education, P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979), we answered that argument:

[T]he present decision does not interfere with the Board's right to decide to increase pupil instructional time. However, once the Board decides to implement this decision by increasing the number of classroom teaching periods per day there is a change in workload which is mandatorily negotiable. Id. at 124. (footnote omitted).

The Board also claims that the Association waived any right to negotiate workload because nurses are teachers under the agreement and the increased teaching load was within the contractual limits for teachers. Our Supreme Court has held that any contractual waiver of statutory rights must be "clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122, 140 (1978). The parties' agreement does not contain such clear waiver language.

Nurses are included in the agreement's recognition clause, but not mentioned anywhere else. The Board argues that because the clause also states that the term "teacher" shall refer only to certificated personnel, and because nurses are certificated, they are subject to the agreement's workload limits for teachers. We read the relied-upon clause, however, to limit the "teacher" definition to include only certificated teachers. When the agreement was negotiated, moreover, nurses only had a minimal amount of teaching responsibilities. The vast majority of their time was dedicated to health services, and the agreement is silent with respect to workload limits for those duties. Under these

circumstances, we do not believe the workload limits for certificated teachers were meant to apply to nurses.

As for preparation periods, the nurses have never received them and the contract does not require them. Therefore, although the Association may negotiate for preparation periods, the Board did not violate the Act when it failed to provide them.

The Board also argues that it need not negotiate over compensation because nurses and teachers are paid the same. However compelling that argument may be, it does not remove the Board from its negotiations obligation. If the Board has a firm position that nurses not be compensated more than teachers it may pursue its position through negotiations.

Finally, the Board argues that it was not obligated to negotiate in the absence of an Association demand. It relies on Salem City Bd. of Ed., P.E.R.C. No. 84-153, 10 NJPER 439 (¶15196 1984). We disagree.

Section 5.3 states:

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

Unless the employee organization clearly and unequivocally waives its right to negotiate, the employer has the burden to seek negotiations on any proposed changes. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985).

As to remedy, the Hearing Examiner recommended the Board be ordered to negotiate, but deferred to the Commission for a

determination as to whether a status quo order is required. He was concerned about possible disruption of the curriculum schedule.

The Hearing Examiner found that the workload levels for 1984-85 closely approximated the levels for the base year 1982-83. The record closed before the start of the 1985-86 term and does not reveal what the workload levels were for 1985-86.^{3/} There are therefore no facts before us showing that when the parties begin negotiations the workload levels will not be at the 1982-83 levels. Thus, we decline to issue a status quo order.

ORDER

The East Brunswick 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 by unilaterally increasing the workload of elementary school nurses by assigning them extra, uncompensated teaching periods during 1983-84.

2. Refusing to negotiate in good faith with a majority representative of employees by unilaterally altering terms and conditions of employment of elementary school nurses by assigning them extra, uncompensated teaching periods during 1983-84.

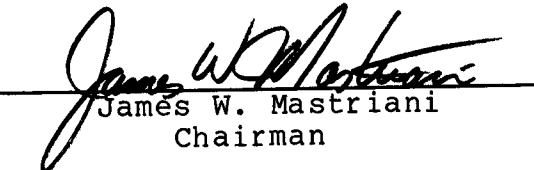
^{3/} One nurse testified that she was told that for 1985-86, nurses would teach up to 15 classes per week. We do not, however, know whether their actual workload exceeded the 1982-83 levels.

B. Take the following affirmative action:

1. Negotiate in good faith with the Association over compensation for increases in nurses' workload beyond the 1982-83 levels.
2. Negotiate in good faith with the Association over any future changes in nurses' teaching workload.
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.

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
April 18, 1986
ISSUED: April 21, 1986

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 employees in the exercise of the rights guaranteed them by the Act by unilaterally increasing the workload of elementary school nurses by assigning them extra, uncompensated teaching periods during 1983-84.

WE WILL NOT refuse to negotiate in good faith with a majority representative of employees by unilaterally altering terms and conditions of employment of elementary school nurses by assigning extra, uncompensated teaching periods during 1983-84.

WE WILL negotiate in good faith with the Association over compensation for increases in nurses' workload beyond the 1982-83 levels.

WE WILL negotiate in good faith with the Association over any future changes in nurses' teaching workload.

EAST BRUNSWICK 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 Street, Trenton, NJ 08608, (609) 292-9830.

H.E. NO. 86-32

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

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-200-45

EAST BRUNSWICK EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the East Brunswick Board of Education violated §§5.4(a)(5) and derivatively 5.4(a)(1) of the New Jersey Employer-Employee Relations Act when it unilaterally increased the workload of elementary school nurses by assigning them to teach additional health-related classes. The Hearing Examiner rejected statute of limitations and contractual defenses.

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

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Appearances:

For the Respondent
Pachman & Glickman, Esqs.
(Martin R. Pachman, of Counsel)

For the Charging Party
Ruhlman, Butrym and Friedman, Esqs.
(Richard A. Friedman, of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 28, 1984, by the East Brunswick Education Association ("Association") alleging that the East Brunswick Board of Education ("Board") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleged that the Board violated §§5.4(a)(1) and (5) of the Act by unilaterally increasing the workload of certified nurses

by failing to negotiate over increasing their class assignments, and by failing to negotiate over a preparation period.^{1/}

The Director of of Unfair Practices issued a Complaint and Notice of Hearing on September 14, 1984. The Board filed an Answer on September 27, 1984 denying the Charge. Hearings were held in this matter on June 19 and July 10, 1985 at which the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs which were received by October 4, 1985. The Association filed a reply brief on October 11, 1985.^{2/}

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

^{2/} The procedural history of this case shows that when the Complaint issued on September 14, 1984 the hearing was assigned to Hearing Examiner Nathaniel Fulk who scheduled a hearing for October 16, 1984. By letter dated September 24, 1984 Mr. Pachman's office advised Mr. Fulk that the parties had agreed to an indefinite postponement of the hearing pending completion of collective negotiations. Mr. Fulk approved the postponement on September 28, 1984. By letter dated February 5, 1985, Mr. Friedman requested Mr. Fulk to reschedule the hearing. On February 26, 1985, Mr. Fulk issued an order scheduling a prehearing for March 14, 1985. On April 9, 1985 he issued an order rescheduling the hearing for May 2 and 3, 1985. On April 12, 1985 Mr. Fulk resigned from the Commission. Pursuant to N.J.A.C. 19:14-6.4, this case was assigned to me on April 22, 1985. Since I was not available on May 2 and 3, 1985, the hearing was rescheduled for May 24, 1985. The parties then requested that the hearing be rescheduled for June 4, 1985, and then Mr. Pachman requested that the hearing be rescheduled for June 19, 1985.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing and consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The East Brunswick Board of Education is a public employer within the meaning of the Act.
2. The East Brunswick Education Association is a public employee representative within the meaning of the Act and represents certified nurses employed by the Board.
3. The record shows that in the 1981-82 school year the Board operated ten elementary schools: Central, Chittick, Bowne-Munro, Frost, Memorial, Irwin, Lawrencebrook, Smith, Warrensdorfer, and Webber; which were staffed by seven nurses. In the 1982-83 school year the Webber School was closed, and the seven nurses covered the remaining nine schools. In 1983-84 the Irwin School was closed and one nurse was hired, leaving eight nurses to cover eight schools (Transcript "T" 1 pp. 11-12, T 2 pp. 92-93).

School nurses perform a variety of medical functions including administering hearing tests, vision tests, height and weight screening, scoliosis screening, tuberculosis screening and others (T 1 pp. 14-15). They are responsible for administering first aid and maintaining all of the students' health records. As

indicated by their job description, Exhibit R-12, nurses are also expected to teach health. The record shows that prior to 1982-83 the nurses had a teaching class load of three 30-minute classes per week, or a total of 1-1/2 hours of teaching per week (T 1 pp. 12, 168).

On March 3, 1982 Director of Athletics, Charles King, provided Dennis Clancy, then Assistant Superintendent for Curriculum and Instruction (he is currently Superintendent) with the results of a health survey (Exhibit R-1). The survey concluded that nurses should be utilized as much as possible in providing health instruction. As a result of that survey the Board unilaterally increased the nurses' teaching class load in late September or early October of 1982 (T 1 p. 77). The nurse at Frost School, Delores Susik, for example, had her class load increased to nine classes per week (4-1/2 hours per week)(T 1 p. 17), and the nurse at Chittick School, Nancy Wilson, had her class load increased to 14 classes per week (7 hours per week)(T 1 p. 111). Despite the workload increase the Board did not provide preparation periods or increased compensation (T 1 pp. 21, 115-117).^{3/}

^{3/} Wilson testified that she was given a preparation period in 1982-83 (T 1 p. 114), but explained that she took time from the performance of her other duties as the prep time (T 1 p. 115). The Board did not assert or establish that it gave Wilson or any other nurse prep time in 1982-83. Consequently,

In contemplation of filing a grievance over the workload increases, Association President Richard Petersen requested a meeting with Clancy to discuss the matter (T 1 p. 78). The meeting was held on November 23, 1982 between Petersen/the nurses and Clancy/nursing supervisor Siebel (T 1 pp. 18, 65, 70, 77-78). The meeting was not a negotiations meeting and did not result in any formal agreement (T 1 pp. 71, 80-82, 125; T 2 pp. 88, 93), but, as a result of the meeting, Clancy reduced Susik's teaching load to six classes per week, and Wilson's teaching load to an average of seven classes per week (T 1 pp. 19, 65, 69, 112). As a result of the reduction in workload for those nurses the Association chose not to file a grievance (T 1 p. 81), nor did it file an unfair practice charge.

4. Clancy testified that, during the summer of 1982, he and other administrators developed a guideline that nurses should provide 1-1/2 hours of health instruction per day (a total of 15 classes per week)(T 2 pp. 57-58). Clancy explained that the 1-1/2 hours was a maximum, and not every nurse would be required to teach that many classes (T 2 pp. 61-62). Clancy further explained that the schedules would be developed by the school principals, but that the nurses would work out their schedules with their principals (T 2 pp. 62-63). There is no question, however, that the principals made

3/ Footnote Continued From Previous Page

since Wilson actually used time from her other duties as prep time, she was never actually given prep time to compensate for her increased workload.

the final scheduling decisions (T 2 p. 64). Both Petersen and Clancy testified that the 1-1/2 hour per day guideline was not negotiated (T 1 p. 81, T 2 pp. 88, 93).^{4/}

5. On January 7, 1983, Clancy sent a memorandum (Exhibit R-10) to the elementary principals regarding the establishment of regularly scheduled health classes for the school nurse. On July 18, 1983, King sent a memorandum (Exhibit R-6) to the principals on the same topic. On September 13, 1983 Clancy sent another memorandum (Exhibit CP-1) to the principals officially establishing the 1-1/2 hours per day guideline for health instruction by nurses.

As a result of R-10, R-6, and CP-1, the Board in the Fall of 1983 (1983-84) unilaterally changed the teaching load of certain nurses from what had been unilaterally established in 1982-83. The Board did not negotiate the 1983 changes (T 1 pp. 86-87; T 2 p. 88), nor did it provide additional compensation or a preparation period for the increased workload (T 1 pp. 23, 119). As a result of the 1983 changes the Association filed the instant Charge. The record also reflects that in the Fall of 1984, the Board made further

^{4/} Susik testified that, as a result of the November 23, 1982 meeting, the 1-1/2 hour per day teaching load standard was developed (T 1 p. 51). However, Susik testified that the scheduling issue was not resolved at that meeting (T 1 p. 71), and she never testified that the Association agreed to the 1-1/2 hour per day standard. In view of Clancy's admission that the 1-1/2 hour per day standard was not negotiated (T 2 p. 93), and in view of Susik's testimony that the scheduling issue was unresolved, I do not give any weight to her testimony that the November meeting resulted in the 1-1/2 hour per day standard.

unilateral changes in the teaching workload of certain nurses as compared to what they taught in 1983-84. The Board did not negotiate over those changes (T 1 pp. 85-87, 103-104), nor did the Board provide preparation time or additional compensation (T 1 p. 26).

Based upon both testimony and stipulations the record shows the nurses teaching load for 1982-83, 1983-84, and 1984-85 as follows (T 1 pp. 21-26, 118, 122, 168-169):

	<u>1982-83</u>	<u>1983-84</u>	<u>1984-85</u>
<u>Frost School</u>	9/82-11/82 9 classes per wk 11/82-6/83 6 classes per wk	13-1/2 classes per week average	9 classes per week 2 weeks in September 6 classes per week 9/83-6/84
<u>Chittick School</u>	9/82-11/82 14 classes per wk 11/82-6/83 7 classes per wk average	15 classes per wk	11-1/2 classes per wk average
<u>Central School</u>	9 classes per wk	11 classes per wk	9 classes per wk
<u>Bowne-Munro School</u>	6 classes per wk	6 classes per wk	6 classes per wk
<u>Memorial School</u>	7 classes per wk	13 classes one wk 7 " " " on alternating basis	6 classes one wk 5 " " " on alternating basis
<u>Smith School</u>	7 classes per wk	13 classes per wk	8 classes per wk
<u>Warrendorfer School</u>	7 classes per wk	8 classes per wk	8 classes per wk
<u>Irwin School</u>	6 classes per wk	school closed	school closed
<u>Lawrencebrook School</u>	No information provided		

6. The Board and Association were parties to a collective agreement (Exhibit J-1) effective July 1982-June 1984. On October 15, 1984, the parties reached a Memorandum of Agreement (Exhibit J-2) leading to a collective agreement effective July 1984 through June 1987. The parties stipulated that J-2 did not contain any substantive change regarding the nurses or nurses' duties as compared to J-1 (T 1 p. 28). The facts also show that there is nothing in J-1 concerning the nurses' workload (T 1 p. 87, T 2 p. 101). Article 10 of J-1 concerns "Hours and Workload," and there is no mention of the nurses in that Article. Section E(3) of Article 10 provides as follows:

E. The following constituted guidelines for the administrators concerned with scheduling practices as they now exist. Administrators shall make reasonable effort to arrange teachers' schedules to comply with these established guidelines.

3. Elementary Teachers, excluding kindergarten teachers shall be assigned five thirty (30) minute preparation planning periods per week and should teach continuously for no more than two (2) hours end thirty (30) minutes.

Analysis

The law in this State is well established that a substitution of a teaching period (which encompasses increased pupil contact time) for a non-teaching period is an increase in workload, and teacher workload is mandatorily negotiable. Burlington Co. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); Red Bank Bd. of Ed. v. Warrington, 138 N.J.Super. 564 (App. Div. 1976); In re Byram Twp. Bd. of Ed., 152 N.J.Super. 12 (App. Div. 1977); In re Maywood Ed. Assn., 168 N.J.Super. 45 (App. Div. 1979), pet. for

certif. den. 81 N.J. 292 (1979); In re Kingwood Twp. Bd. of Ed. v. Kingwood Twp. Ed. Assn., App. Div. Dkt. No. A-1414-84T7 (Nov. 25, 1985); In re City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. A-954-79 (1980), pet. for certif. den. 87 N.J. 310 (1981); In re 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); In re Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981) aff'd App. Div. Dkt. No. A-3380-80T2 (3/16/82); In re Buena Reg. Bd. of Ed., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979) (Buena Regional I); In re Buena Reg. School District, P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985) (Buena Regional II).^{5/}

The facts in Buena Regional I and II are similar to the instant case. In both matters the Board increased the number of teaching periods thereby increasing workload. The Commission held that although the Board had the right to increase pupil instructional time, it was required to negotiate the workload increase.

In Buena Regional I the Commission explained that:

^{5/} See also In re Wanaque Borough Dist. Bd. of Ed., P.E.R.C. No. 80-13, 5 NJPER 414 (¶10216 1979); In re Wanaque Borough Dist. Bd. of Ed., P.E.R.C. No. 82-54, 8 NJPER 26 (¶13011 1981); In re Wharton Bd. of Ed., P.E.R.C. No. 83-85, 8 NJPER 570 (¶13262 1982); In re East Newark Bd. of Ed., P.E.R.C. No. 83-123, 8 NJPER 373 (¶13171 1982); In re Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1982); In re Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶15312 1984); In re Kingwood Twp. Bd. of Ed., P.E.R.C. No. 85-94, 11 NJPER 219 (¶16084 1985).

Whether the change is from a non-teaching, supervisory duty period or a preparation period, there is still a net increase in the number of teaching periods per day....The additional teaching period, unlike the other types of duty, generates further precedent and subsequent work in terms of additional class preparation, correction of tests and homework, preparation of report cards, other administrative paper work, etc. Accordingly, the Commission concludes that any decision which would result in a change in the number of classroom teaching periods per day must be negotiated as it directly relates to workload. 5 NJPER at 124.

In the same case, the Commission responded to the Board's argument that the change involved basic educational policy:

...[T]he present decision does not interfere with the Board's right to decide to increase pupil instructional time. However, once the Board decides to implement this decision by increasing the number of classroom teaching periods per day there is a change in workload which is mandatorily negotiable. The crucial point is that the Board still retains the ability to accomplish its objective of increasing pupil instructional time through numerous other methods, including the hiring of additional teachers, which do not affect the working conditions (i.e., workload) of its employees. The Board also is free to propose as a mandatorily negotiable subject a change from a duty period to an additional teaching period in negotiations for a successor agreement and has no obligation to give in on this point. 5 NJPER at 124.

In applying the instant facts to the established law it is obvious that by unilaterally assigning certain nurses additional teaching duties in 1983-84, 1984-85, and possibly 1985-86, the Board unilaterally increased their workload thereby violating §5.4(a)(5) of the Act. Just as in the Buena Regional matters, the Board here unlawfully increased the nurses' teaching duties. The Board had the right to determine that more instructional time for pupils was needed in health-related subjects, and that those subjects should be

taught by nurses who are certificated as teachers. But the Board could have hired additional nurses to teach the additional courses and thereby not increased the nurses' teaching workload. In deciding to assign the additional teaching load to existing nurses, however, the Board was required to negotiate over the workload increase.

The Board's statute of limitations defense and contractual defense lack merit. The changes in the nurses' teaching load in 1982-83 and 1983-84 were distinctly different from one another, and there is no clear and unmistakable waiver in J-1 or J-2 to justify the change.

The Motion to Dismiss

The Board's argument that the instant case was untimely filed because the change complained of occurred in the Fall of 1982, not the Fall of 1983, is not persuasive. There were separate unilateral acts by the Board that are relevant in this case.

The Board first unilaterally changed the nurses' teaching load in 1982-83 from that which existed prior thereto. The Association was aware of that change but did not file a grievance or charge over that change. The Association did meet with, but not negotiate with, the Board regarding that change and it subsequently acquiesced in--and thereby accepted--that change. Although the Association might not agree, I find that by accepting the 1982-83 nurses' teaching load as corrected after the November 1982 meeting, the Association thereby accepted a change in the parties' prior

practice of only three 30-minute teaching periods per week. The nurses' teaching load that was imposed in November 1982, therefore, became the parties' practice.

In the Fall of 1983 (and again in the Fall of 1984) the Board unilaterally changed the teaching load of all but one nurse from that which existed in 1982-83. It was that change in September/October of 1983 that, I believe, gave rise to the filing of the instant charge on February 28, 1984 which was well within the six-month statute of limitations period. If in the Fall of 1983 there had been no change in nurses' teaching load from that which existed in 1982-83, I doubt the Association would have filed a charge, and I certainly would have sustained the Motion and recommended that the Charge be dismissed. The Association clearly waived its rights regarding the 1982-83 changes, but it did not waive its rights regarding the 1983-84 and 1984-85 changes, or any changes that occurred in 1985-86. The Motion to Dismiss is therefore denied.

The Contractual Argument and Preparation Period

Although teacher workload, and the workload of other unit members, is clearly set forth in Article 10 of J-1, there is no mention therein of nurses' workload. Similarly, while Article 10, Sec. E(3) provides preparation periods for elementary teachers, there is no mention of preparation periods for nurses. The Board argued that since J-1 did not prevent the scheduling of additional teaching periods then it was entitled to assign the additional

classes without workload negotiations. I do not agree. Since an increase in instructional time is an increase in workload, and since workload is a mandatorily negotiable subject, then a waiver of an increase in workload is a waiver of negotiable rights. The law in this State is well settled that a contractual waiver of a majority representative's right to negotiate will not be found absent clear and unmistakable language in the parties' agreement. Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); In re State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); In re Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Docket No. A-1818-80T8 (May 24, 1982); In re Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 11 NJPER ____ (¶_____ 1985). There is no such clear waiver language in J-1 or J-2 to justify the Board's position.

Since the contract is silent as to the nurses' workload and preparation periods then past practice must apply. The past practice as to workload has already been discussed infra, and the evidence shows that nurses have never received a specific preparation period. I find that there is nothing in J-1 and J-2 to require nurses to receive prep time, but the Association is certainly entitled to negotiate for prep time, as well as compensation, during its negotiations over workload increase.

In its post-hearing brief the Board argued that nurses do not need a preparation period since they could utilize some of their non-teaching duty time for that purpose. It also argued that the

nurses' additional teaching duties did not increase its workload. I disagree. As I previously stated, the workload increase as a result of the increase of pupil contact time resulting from the substitution of a teaching period for non-teaching duties is mandatorily negotiable. Byram, supra; Dover, supra; Bayonne, supra; Newark, supra; Bridgewater, supra; and Buena Regional I and II. The Board's argument that nurses do not need preparation time is not a defense to this Charge, rather, it is an argument the Board is entitled to make during negotiations over the workload increase.

Remedy

The Association requested a three-part remedy. 1) a return to the status quo as it existed for 1982-83, 2) an order to negotiate concerning compensation for the increases, and 3) an order to negotiate prior to any future workload increases.

Although the Commission has the authority to issue and did, in fact, issue a return to the status quo in Buena Regional II and Dover, for example, I do not believe that I should do the same in this case at this time. I note that the Commission's decision in Buena Regional II issued on July 2, 1985 which was just after the completion of the 1984-85 school year. In its decision the Commission stated that:

We trust that the parties will be able to resolve this matter through negotiations before the 1985-86 school year starts. 11 NJPER at 445.

Thus, the Commission in that case was aware that although it ordered a return to the pre-1984-85 status quo, it was not,

because of the timing of the decision, affecting any existing instructional or curriculum schedule, and it was aware that the parties had two months to negotiate over the workload for 1985-86 prior to the start of school. I believe that Buena Regional II left open the question of whether the Commission would order a return to status quo in this type of case during a school year which could unduly disrupt the curriculum schedule. I believe it is for the Commission to decide as a policy question whether a status quo order is necessary in this case.^{6/}

The Association, however, is entitled to a posting; an order to the Board that it negotiate over compensation for the additional workload that nurses worked in 1983-84 and 1984-85, and 1985-86 (if there was a change that year,) and negotiate over compensation and prep time for the remainder of 1985-86 (if there was a change that year); and an order to the Board that it negotiate with the Association over any future workload changes.

Based upon the entire record I make the following:

Conclusions of Law

The Board violated §§5.4(a)(5) and derivatively 5.4(a)(1) of the Act by failing to negotiate over the increase in the nurses' teaching workload.

^{6/} I also note that there are no facts in the record to show that the nurses' teaching load for 1985-86 was increased in comparison to their teaching load in 1982-83. Since the hearing ended on July 10, 1985, prior to the start of the school year, it was not possible to obtain that information at that time. The parties' briefs were submitted between September 20 and October 11, 1985, but there was no indication that the 1985-86 nurses' teaching load was increased.

Recommended Order

I recommend that the Commission ORDER:

A. That the Board cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed by the Act by unilaterally increasing elementary school nurses' workload by assigning them extra, uncompensated teaching periods during 1983-84 and 1984-85, and possibly 1985-86.

2. Refusing to negotiate in good faith with the Association by unilaterally altering terms and conditions of employment of employees represented by the Association by unilaterally assigning extra, uncompensated teaching periods to elementary school nurses.

B. That the Board take the following affirmative action:

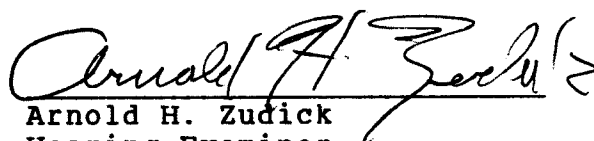
1. Negotiate in good faith with the Association over compensation for the nurses' workload increase in 1983-84 and 1984-85, and for 1985-86 if similar workload increases were made that year.

2. Negotiate in good faith with the Association over compensation and preparation time for the remainder of 1985-86 if there were any increases made in the nurses' teaching workload that year.

3. Negotiate in good faith with the Association over any future changes in the nurses' teaching workload.

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 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.

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


Arnold H. Zudick
Hearing Examiner

Dated: January 14, 1986
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 employees in the exercise of the rights guaranteed by the Act by unilaterally increasing elementary school nurses' workload by assigning them extra, uncompensated teaching periods during 1983-84 and 1984-85, and possibly 1985-86.

WE WILL cease and desist from refusing to negotiate in good faith with the Association by unilaterally altering terms and conditions of employment of employees represented by the Association by unilaterally assigning extra, uncompensated teaching periods to elementary school nurses.

WE WILL negotiate in good faith with the Association over compensation for the nurses' workload increase in 1983-84 and 1984-85, and for 1985-86 if similar workload increases were made that year.

WE WILL negotiate in good faith with the Association over compensation and preparation time for the remainder of 1985-86 if there were any increases made in the nurses' workload that year.

WE WILL negotiate in good faith with the Association over any future changes in the nurses' teaching workload.

EAST BRUNSWICK 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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618, Telephone (609) 292-9830