P.E.R.C. NO. 88-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-87-244-134

EDUCATION ASSOCIATION OF MORRIS,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the Morris School District Board of Education violated the New Jersey Public Employer-Employee Relations Act when it implemented evening hours which unilaterally increased the work hours of guidance counselors, media specialists, and media aides represented by the Education Association of Morris.

P.E.R.C. NO. 88-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-87-244-134

EDUCATION ASSOCIATION OF MORRIS,

Charging Party.

Appearances:

For the Respondent, Wiley, Malehorn & Sirota, Esqs.
(Robert Goldsmith, of counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of counsel)

DECISION AND ORDER

On February 25, 1987, the Education Association of Morris ("Association") filed an unfair practice charge against the Morris School District Board of Education ("Board"). The charge alleges 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 it implemented evening hours which unilaterally

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."

increased the work hours of guidance counselors, media specialists and media aides.

On April 1, 1987, a Complaint and Notice of Hearing issued. On April 13, the Board filed its Answer. It admits that it instituted evening hours but contends that it had the contractual right and managerial prerogative to do so.

On June 25, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On December 17, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-28, 14 NJPER __ (¶_____ 1987). He found that the Board violated the Act when it unilaterally increased the work hours of the affected employees and did not negotiate compensation for the increased hours. He rejected the Board's managerial prerogative defense: he noted that the Board's right to determine that evening programs were necessary did not give it the unilateral right to determine the hours which employees should work and their compensation for the additional time. He rejected the Board's contractual defense because the contract did not clearly and unequivocally authorize the employer to set the evening work hours without negotiating hours or compensation. As a remedy, the Hearing Examiner directed that employees be compensated at the rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest. He recommended this remedy because this was the hourly rate negotiated for evening meetings, extra pay and hours worked in excess of the normal work day.

The Hearing Examiner informed the parties that exceptions were due on or before December 30, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission and in the absence of exceptions, I agree with the Hearing Examiner that the Board violated the Act by unilaterally increasing hours without compensation and I adopt his recommended remedy.

ORDER

The Morris School District Board of Education is ordered to:

A. Cease and desist from:

1. 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 Education Association of Morris over work hours and compensation for the evening program before the program's implementation.

2. Changing the work hours of unit members before negotiating with the Association.

B. That the Board take the following affirmative action:

1. Pay the affected employees for working the evening program at a rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest at the annual rate specified in R. 4:42-11.

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

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
January 20, 1988

APPENDIX "A"

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 Act, particularly by refusing to negotiate with the Education Association of Morris over the work hours and compensation for the evening program.

WE WILL cease and desist from changing the work hours of unit members prior to engaging in negotiations with the Association.

WE WILL pay the affected employees at the rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest at the annual rate specified by R. 4:42-11.

Docket No. CO-87-244-134

MORRIS SCHOOL DISTRICT BOARD OF EDUCATION
(Public Employer)

Dated _____

By _____
(Title)

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

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

H.E. NO. 88-28

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

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-87-244-134

EDUCATION ASSOCIATION OF MORRIS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Morris School District Board of Education violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused to negotiate over the work hours and compensation for an evening program.

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

H.E. NO. 88-28

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

In the Matter of

MORRIS SCHOOL DISTRICT BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-87-244-134

EDUCATION ASSOCIATION OF MORRIS,

Charging Party.

Appearances:

For the Respondent
Wiley, Malehorn and Sirota, Esqs.
(Robert Goldsmith, of Counsel)

For the Charging Party,
Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on February 25, 1987 by the Education Association of Morris (Association) alleging that the Morris School District Board of Education (Board) violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Association alleged that the Board refused to negotiate over changes in the workday and work hours of certain librarians, aides and guidance counselors employed by the Board, and refused to negotiate over compensation due to those changes.[2/] The Association alleged that the Board unilaterally implemented evening hours which affected employees in the above positions.

A Complaint and Notice of Hearing was issued on April 1, 1987. The Board filed an Answer on April 13, 1987 relying upon its March 24, 1987 statement of position and denied violating the Act. The Board admitted that it instituted evening hours affecting employees in the above positions, but argued that it had a managerial prerogative to assign employees in those titles to evening duty, and further argued a contractual defense: that the Board had the right to schedule the start and end of the workday.

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."

2/ The titles Educational Media Specialists, and Educational Media Aides were used in the Charge along with the titles of guidance counselor and librarian. The issue here involves guidance counselors, librarians, and aides (Transcript p. 4), and the Educational Media title, I assume, is a more formal designation for the aides and/or librarians.

A hearing was held in this matter on June 25, 1987.[3/] Both parties submitted post-hearing briefs by November 9, 1987.

Upon the entire record I make the following:

Findings of Fact

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act. The Association represents the tiles and employees involved in this matter.

2. Prior to February 1, 1987 the normal working hours for librarians was 7:30 a.m.-2:30 p.m., but the librarians alternated opening the library at 7:15 a.m., and for the librarian opening the library the hours were from 7:15 a.m.-2:15 p.m. Three days a week the library closed at 3:30, and the librarians alternated who would stay until 3:30, and the librarian performing that duty worked 8:30-3:30 on that day (T11-T12). The workday for library aides was from 7:30 a.m.-3:00 p.m. daily (T13).

The workday for guidance counselors prior to February 1, 1987 was 7:40 a.m.-2:40 p.m., except in June when it was 7:35 a.m.-2:35 p.m. (T29). There is no evidence to suggest that prior to that time the employees ever worked a split workday, or worked evening hours other than two evening meetings each year (J-1, Art. B.7).

3/ The transcript from the hearing will be referred to as "T."

By letter of January 5, 1987 (R-2) the Board informed all guidance counselors that beginning the first week of February it was instituting evening hours on a trial basis for the guidance counselors in grades 7-12. Exhibit R-2 informed the counselors that the program would run through April, and that counselors had to be available for two nights per month from 7:00-9:00 p.m. The letter also asked for the counselors' input and suggestions for arranging the program and informed counselors that they could make some choice regarding the workday and compensatory time. The pertinent part of R-2 provides:

> The program will require counselors to be available two (2) nights per month from 7:00 to 9:00 PM. There will be flexibility for your choice of evenings, Tuesday through Thursday, and the manner in which time schedules may be arranged. Such arrangements may be individualized. You may choose to serve the two hours in addition to the normal work day and receive compensatory time at a mutually agreeable time and day. You may also choose to work a variable seven hour day to include the evening hours. I would also entertain your suggestion(s) for arranging time for evening hours providing it does not require extra pay.
>
> I must submit a department plan (which may be individualized) to your Principal for his approval. May I please have your input, in writing, from high school counselors by the close of school on Wednesday, January 7th? Specifically I need to know the evening(s) you choose and the manner in which you will arrange your time schedule. I will meet with Frelinghuysen counselors on Thursday to complete arrangements.

By letter of January 9, 1987 the Board informed all librarians and aides that beginning the first week of February it

was instituting evening hours on a trial basis at Morristown High School.[4/]

By letter of January 21, 1987 (R-1), Association President James Frendak criticized the Board for unilaterally deciding to modify the employees' hours; informed the Board that its actions violated the parties' collective agreement (J-1); and demanded that the Board immediately engage in negotiations over the proposed changes in the work hours prior to implementation (T87-T89).

3. The Board did not negotiate with the Association over those work hours because it believed that the contract permitted the change, and after February 1, 1987 the Board unilaterally implemented the new evening work schedules (T47, T50).

The evening hours for guidance counselors were 6:45-9:15 p.m. and took effect on Tuesday, February 24, 1987. Two counselors were to work each Tuesday for 12 weeks (T31-T32). Each counselor worked approximately three times over the 12-week period (T31).

On those relevant Tuesdays the affected counselors worked their normal workday of 7:40 a.m.-2:40 p.m., went home, and returned to work for the above evening hours. The following Wednesday those counselors who worked the previous evening still reported to work at 7:40 a.m. (T33).

4/ The January 9, 1987 letter was not offered into evidence; hence, I am unaware whether it contained language similar to the last two paragraphs in R-2 cited above, but I presume it did. But the Board's intent was to implement a two-hour evening program for the library one day a week.

The counselors did not receive any compensatory time or additional compensation for performing the evening work (T33, T101). The counselors had received R-2 and were aware therefrom that the Board offered them compensatory time for the evening work (T36-T37). But Leonard Contarino, Director of Guidance, received no response from the counselors to the offer in R-2 (T100). The counselors thought that the hours and compensation issue was being negotiated and they decided not to accept compensatory time in order to avoid jeopardizing the Association's status in negotiations (T37-T38).

The evening hours for the librarians and aides were on Tuesdays from 6:45-9:15 p.m. There were three aides and three librarians (T10). Beginning in February and lasting 12 weeks, the librarians and aides alternated working the Tuesday night shift for a total of four nights for each librarian and aide (T14-T15).

Librarians and aides worked their regular Tuesday hours of either 7:15-2:15 or 7:30-2:30, went home, and returned for the 6:45-9:15 shift (T16). After working the Tuesday evening shift, the librarian (and aides) still reported for work on Wednesday at 7:15 or 7:30 a.m. (T19). The librarians and aides received no compensatory time or additional monetary compensation for performing the evening work (T17).

The librarians, and presumably the aides, were aware that the Board was offering them some form of compensatory time for performing the evening work (T22-T24). The librarians understood

that the Board expected to give an equal amount of time off to the librarians who worked Tuesday evening. That time could either be or Tuesday or Wednesday (T22), but it was never made clear (T23).

The Board had actually intended to implement a compensatory time plan (T90), but did not do so because it believed that the Association instructed the employees not to accept compensatory time (T95). The Association President had advised the affected employees not to discuss compensatory time directly with the Board (T58).

4. The Board and Association are parties to a collective agreement effective from 1985-1987 (J-1). That contract contained the following relevant clauses:

> B.10 Certified Support Staff Work Cycle[5/]
>
> The normal work day for Certified Support Staff shall be seven (7) hours. The Board may regularly schedule varying start and end times for the work day of individual Certified Support Staff. Individual preferences will be considered in the development of work schedules.
>
> B.9 High School Provisions
>
> The Board agrees that the high school provisions shall be:
>
> (a) The in-school work day for high school teachers shall be from ten (10) minutes prior to the scheduled arrival of pupils for first period to ten (10) minutes after the last period of the school day inclusive of a duty free lunch period equal in time to the student lunch period.
>
> (b) Teacher Work Cycle. Teachers whose assignments require that they be in school for more than seven (7)

5/ The language in Art. B.10 originated in the parties' 1983-85 memorandum of agreement (R-3).

> hours, times the number of days in the cycle, shall be paid at the rate of 1/140 per hour of their monthly salary for each hour worked in excess of seven (7) times the number of days in the cycle. The teachers' work cycle shall include part (a) of High School Provisions.
>
> B.8 Extra Pay and/or Released Time. The practice of using a regular teacher as a substitute, thereby depriving him of his preparation period, is undesirable and shall be discouraged. In those cases where regular substitutes are not available, regular teachers who volunteer may be used as substitutes during their non-teaching time. In the absence of volunteers, a teacher may be assigned to serve as substitute. Volunteers and assigned teachers shall be paid at the rate of 1/140 per hour of their monthly salary for each hour worked. Such coverage shall be arranged by the principal of the school in question and shall be distributed as equitable as possible among the teachers in said school.
>
> B.7 Evening Meetings. Teachers may be required to attend no more than two (2) evening assignments or meetings each school year without additional compensation. Staff required to attend additional meetings shall be compensated at the rate of 1/140 of their monthly salary per hour for each meeting they attend.

The Board sought the inclusion of the B.10 language into the parties' agreement to provide it with greater flexibility in assigning certified support staff (T107). There was, however, no discussion during the negotiations leading to B.10 with respect to whether it applied to evening work (T49, T52-T53)(T109-T110, T114); nor was there any discussion about a split workday or a workday in excess of seven hours (T64, T114-T115).

The Association agreed to the B.10 language to deal with employees who either had to start or finish work before or after the time provided in J-1 (T49, T65). The Association thought that

situation applied only to employees at the high school (T49, T63-T64).

Analysis

The Board violated the Act by failing to properly implement the terms of the parties' collective agreement, and by failing to negotiate over the work hours and additional compensation for librarians, guidance counselors and aides prior to implementation of the evening program.

The Managerial Prerogative Defense

The Board made a common error; it failed to distinguish between its managerial right to determine that evening programs were needed and its right to assign personnel, and the right of the employees to negotiate, through their labor organization, over work hours and compensation. In its March 24, 1987 statement of position/Answer, the Board stated that the major educational policy it intended to implement was:

> to provide access to guidance counselors for working parents who are not available during the workday to meet and discuss the development of their children and to provide extended access to the media center for interested and motivated students.

In that same Answer the Board stated that its decision to "assign" the particular guidance and library staff to periodic evening duty was a managerial prerogative. While the determination of policy and the assignment of personnel are managerial prerogatives, Ridgefield Park Bd.Ed. v. Ridgefield Park Ed.Assn., 78 N.J. 144 (1978); Ramapo-Indian Hills Ed.Assn. v. Ramapo-Indian Hills Reg. H.S. Dist.,

Bd.Ed., 176 N.J. Super. 35 (App. Div. 1980)(Ramapo), hours of work and compensation for that work are mandatorily negotiable. Englewood Bd.Ed. v. Englewood Teachers Assn., 64 N.J. 1, 6-7 (1973); Burlington Cty. Coll. Faculty Assn. v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Bernards Twp. Bd.Ed. v. Bernards Twp. Ed.Assn., 79 N.J. 311 (1979); Woodstown-Pilesgrove Reg. School Dist. Bd.Ed. v. Woodstown-Pilesgrove Reg. Ed.Assn., 88 N.J. 582 (1980)(Woodstown); In re IFPTE Local 195 v. State, 88 N.J. 393 (1982)(Local 195); In re Mt. Laurel Twp., 215 N.J. Super. 108 (App. Div. 1987)(Mt. Laurel).

In Local 195, the Court held that in order to determine whether an issue was negotiable it must balance the competing interests of the employer and employees and consider "the extent to which collective negotiations will impair the determination of governmental policy." Local 195 at 402.

Where negotiations over work hours would significantly interfere with the employer's implementation of a managerial prerogative, and where the educational goal is the dominant concern, there is no obligation to negotiate over hours, Local 195, Woodstown, Ramapo, but there still is an obligation to negotiate over compensation. Ramapo. In contrast, where the educational goal is not the dominant issue, and where the negotiations would not significantly interfere with the implementation of managerial policy, the work hours are negotiable. Local 195, Woodstown. See also New Jersey Sports & Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

The Court in Local 195 established 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 403-404]

In applying these standards I find that, apart from the Board's contractual defense, the Board was obligated to negotiate with the Association over the work hours and the compensation for the evening work prior to the implementation of the evening program. In considering the first standard in Local 195 it is undisputed that the work hours of a workday intended to include an evening program, and compensation for evening work, intimately and directly affect the instant employees. The second standard in Local 195 does not apply because there are no statutes or regulations preempting negotiations over the relevant issues herein.

In applying the third standard under Local 195, I am persuaded that negotiations over the evening work hours would not significantly interfere with the Board's policy determination. The Board's stated policy determination, as set forth in its Answer, was

to make guidance counselors available to parents in the evening, and to make the library accessible to students in the evening. The Association did not seek to negotiate over the decision to create an evening program, or over the assignment of employees to perform the work; it only sought negotiations over the hours the employees should work and their compensation. Such negotiations would not significantly interfere with the determination of the Board policy.

Since the implementation of the Board's policy would not be significantly affected by negotiating over the evening work hours and compensation therefor, I find that the dominant concern here is the right of the Association to negotiate over work hours and compensation.

In its post-hearing brief the Board argued that the decision in City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985)(Newark) controlled in this matter. Newark involved a substantial change in a police work schedule. The Commission held that a grievance over the change in schedules was not arbitrable.

The Board also relied upon the court decision in Teaneck Bd.Ed. v. Teaneck Teachers Assn., 94 N.J. 9, 14 (1983)(Teaneck); Ramapo; and, Mainland Reg. Teachers Assn. v. Mainland Reg. School Dist. Bd.Ed., 176 N.J. Super. 476 (App. Div. 1980)(Mainland). In Teaneck the Court held that the appointment of a basketball coach involved hiring and was a non-negotiable subject. In Ramapo, a board of education combined a music teacher position and band leader extracurricular position into one full-time position and established

the hours of work and salary. The Court held that the decision to create the new position could not be separated from the hours required to perform the duties assigned therewith. The union was restrained from negotiating over the hours, but could negotiate over compensation. In Mainland the court held that employers could unilaterally assign teachers to extracurricular positions, and further held that negotiations over compensation was unnecessary because of provisions in the parties' collective agreement. The court in that case did not specifically rule upon the negotiability of work hours.

The cases relied upon by the Board are not applicable here. Teaneck, Ramapo and Mainland deal with the assignment to extracurricular positions and/or the creation of and assignment to a position. Work hours were not negotiable in Ramapo because they were inseparable from the creation of a new position, but compensation was negotiable. The instant case does not concern the assignment to an extracurricular position or the creation of a new position; it concerns the increase in the hours and workload of guidance counselors, librarians and aides.

Newark does not apply here for two reasons. First, it involves a change of work schedules, not an increase in work hours. Second, any unilateral right of the Board to establish the work hours for the instant evening program does not equate with the overriding public policy considerations that existed in Newark affecting the City's ability to deliver police services.

Even though some police cases may result in a municipality's ability to unilaterally change work schedules, police work schedules are not per se managerial prerogatives. Mt. Laurel, Borough of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985). In Mt. Laurel the Court held:

> The critical issue is whether a negotiated agreement will "significantly interfere" with the managerial prerogative to determine government "policy."...This is a fact intensive determination which must be fine tuned to the details of each. 215 N.J. Super at 114.

See also Twp. of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd App. Div. Dkt. No. A-4801-85T7 (4/2/87).

Here negotiations over the work hours for the evening program would not significantly interfere with the policy the Board was seeking to implement. The policy determination was the decision to have an evening program. Unlike Mainland, the issue here was not over whether the Board could assign the employees to do the evening work, it was only a question of negotiating over the hours of work and compensation. Negotiations over work hours may have had some effect upon whether the employees worked from 6:30-9:00 as opposed to from 6:45-9:15 or some other variation, or it may have resulted in some negotiated change in the regular workday work hours for those employees working in the evening, but it would not have "significantly" interfered with the Board's ability to implement the actual policy. There was not enough interference to counterbalance the Association's right to negotiate over work hour changes.

In Wright v. Bd.Ed. City of East Orange, 99 N.J. 112 (1985) the State Supreme Court said that in determining whether interference was "significant" it would focus upon the extent to which "students and teachers are congruently involved." 99 N.J. at 121. Here there was no direct "congruent" relationship between the guidance counselors and students during the evening hours since the evening guidance program was intended to make counselors available to parents, and there was only a minimal relationship between the librarians and students during the evening program because librarians were not engaged in teaching during that program. The library was open just to give students access to the materials in the library. Thus, any possible interference occasioned by negotiating over the workhours for the evening program was not significant.

I find that the holding in East Brunswick Bd.Ed., P.E.R.C. No. 86-109, 12 NJPER 352 (¶17132 1986); Buena Reg. School Dist., P.E.R.C. No 86-3, 11 NJPER 444 (¶16154 1985); Liberty Twp. Bd.Ed., P.E.R.C. No. 85-37, 10 NJPER 572 (¶15267 1984); and Buena Reg. Bd.Ed., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979) are the controlling law in this case. Those cases hold that an employer is not entitled to increase workload or work hours without negotiations. The Board obviously increased the employee's workload and work hours by requiring them to work the evening program. The Board's assertion in its post-hearing brief that the impact on counselors, aides and librarians was minimal is absurd. This was a

significant increase in the employees' work hours which, absent the contractual defense, was not negotiated over and not compensated for. Thus, the managerial prerogative defense must fall.

The Contractual Defense

The Board's assertion that it had a contractual right to set the hours and compensation for the evening program, and that it complied with the parties' collective agreement, is without merit. While a public employer meets its negotiations obligation when it acts pursuant to the language in its collective agreement, Pascack Valley Bd.Ed., P.E.R.C. No. 81-66, 6 NJPER 554, 555 (¶11280 1980), the Commission will not find a contractual waiver of a majority representative's right to negotiate unless the parties' collective agreement clearly and unequivocally authorizes the employer to make the particular change(s). 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); Deptford Bd.Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82).

The Board apparently believes that the language in section B.10 authorized it to set the evening work hours without negotiations over the hours and compensation. Even assuming that the Board's interpretation of B.10 is correct, the Board violated §5.4(a)(5) of the Act because it did not even follow the B.10 language. That clause provided for a 7-hour workday, and even if the Board could split the workday and unilaterally set evening hours, there was nothing in B.10 or any other part of J-1

authorizing the Board to increase the workday from 7 to 9 1/2 hours without negotiations over the additional work hours and compensation therefor. The Board's argument that it intended to give the employees compensatory time or alter their workday either on the Tuesday the employees worked evenings or the following Wednesdays, is not a defense or sufficient excuse for working the employees 9 1/2 hours on a single day without first negotiating with the Association. At the very least, in order to comply with B.10 the Board had the responsibility, regardless of the employees' preferences, to make certain that employees did not work beyond seven hours in one day; otherwise, employees were entitled to additional compensation pursuant to section B.9(b) of J-1.

Even if the employees had been given compensatory time to be taken later, or if they were given off 2 1/2 hours on the following Wednesdays, the Board would still have violated the seven-hour workday provisions in J-1 since nothing entitled the Board to unilaterally increase the workday. The Board's assertion that it was the Association's fault that the Board did not give the employees compensatory time on Tuesdays (or some other day) because the employees were told not to negotiate with the Board, is without merit. First, the Association has every right to caution its members against negotiating directly with the Board. An employer's direct dealings with represented employees is unlawful. Newark Bd.Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). Second, nothing in the last sentence of B.10 authorized the Board to decide

the type or method of compensation for employees who worked more than seven hours in one day.

B.10 did not authorize an increase in hours; it only authorized the Board to vary the start and end times of the workday for certified staff. The intent of that language must be determined in order to know what kind of changes the Board was actually authorized to make.

Such a determination must begin by reviewing the rules of contract construction and parol evidence. Those rules generally provide that when a contract clause is clear on its face, and the intent of the parties can be discerned by a mere reading of the language, parol evidence (evidence outside the language of the contract) will not be admissible to change or vary the clear terms of the agreement. Casriel v. King, 2 N.J. 45 (1949); Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293 (1953); Cherry Hill Bd.Ed, P.E.R.C. No. 8-13, 8 NJPER 444 (¶13209 1982), aff'd App. Div. Dkt. No. A-26-82T2 (12/23/83). But where the intent of the parties cannot readily be determined by a reading of the contract, outside evidence is admissible to give effect to the language in the agreement.

The intent of some of the B.10 language is clear. The clause applies only to "certified" support staff. Although librarians and guidance counselors are certified, the library aides are not. Thus, rgardless of any contractual right the Board may have had to vary the hours and unilaterally establish evening work

hours, it could only have applied to certified employees. The Board's unnilateral change of hours for library aides, therefore, was not protected by J-1 and constituted a violation of the Act.

The intent or meaning of the last sentence of B.10 is also clear. It means that the Board must consider the preferences of individual certified staff members when it develops work schedules. But nothing in that language gives the Board the right to determine how, or to what extent, employees will be compensated for working more than seven hours in one day.

The only language in B.10 where the intent is unclear is that part concerning the Board's right to vary the start and end times of the workday. The Board assumed that said language entitled it to split the workday, create evening hours, and require a certified staff member to work in the day and evening hours. The Association argued that said clause was never intended to allow such a radical change in the established workday. Since the parties' intent could not be determined by the language on its face, parol evidence was admissible to assist in determining the intent of the parties. That evidence showed that there has never been a split workday or a regular evening program, and that the parties did not contemplate evening hours or negotiate over them in the negotiations leading to J-1. The evidence further shows that the B.10 language was originally agreed upon to deal with employees who had to start or finish their workday at times other than those set forth in J-1. The librarians, for example, roated starting early or ending late to open and close the library.

Having considered all the facts, I conclude that the language in B.10 was never intended to allow the Board to radically alter the workday, split the workday into day and evening sections, or to unilaterally fix work hours for an evening program. The workday had historically been seven hours straight, and there was no reason to believe that the parties agreed that the Board could unilaterally create a split workday. Thus, the Board did not have a viable contractual defense to its actions; Having found that the evening work hours and compensation therefor was negotiable, I recommend that the Commission find that the Board violated §5.4(a)(5) and derivatively a(1) of the Act, by implementing the evening work hours prior to negotiating with the Association.

Remedy

In its Charge the Association requested a return to the status quo prior to any negotiations over an evening program, and an order providing back pay and interest. Since the evening program only lasted until May 1987 and has not, to my knowledge, been implemented this academic year, the Board has already returned to the status quo. I recommend, however, that the Board be ordered to cease and desist from changing the hours of unit members prior to engaging in negotiations with the Association.

I further recommend that the Board be required to pay the affected employees at the rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest. That hourly rate was negotiated by the parties in J-1 for

evening meetings (§B.7); for extra pay and/or release time (§B.8); and with regard to the teacher work cycle (§B.9(b)) which requires the Board to pay the employees per hour for working more than seven hours in one day.

Pursuant to R.4:42-11(a)(ii), the interest should be calculated at a rate of 7.5% per year.

Based upon the above analysis I make the following:

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, particularly by refusing to negotiate with the Association over work hours and compensation for the evening program prior to the program's implementation.

2. Changing the work hours of unit members prior to engaging in negotiations with the Association.

B. That the Board take the following affirmative action:

1. Pay the affected employees for working the evening program at a rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest.

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: December 17, 1987
Trenton, New Jersey

Appendix "A"

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 Act, particularly by refusing to negotiate with the Association over the work hours and compensation for the evening program.

WE WILL cease and desist from changing the work hours of unit members prior to engaging in negotiations with the Association.

WE WILL pay the affected employees at the rate of 1/140 of their monthly salary per hour for each hour the employees worked in the evening program, plus interest at the rate of 7.5% per year.

Docket No. CO-87-244-134 MORRIS SCHOOL DISTRICT BOARD OF EDUCATION
(Public Employer)

Dated_____ By_____
(Title)

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

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