H.E. NO. 88-30

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

In the Matter of

RUTHERFORD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-181-4

RUTHERFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that Respondent violated §§5.4(a)(5) and (1) of the New Jersey Employer-Employee Relations Act when it unilaterally prorated teacher sick leave beginning in 1982. The Hearing Examiner dismissed the Board's arguments that the Association waived its right to object to proration and that the parties have a past practice of prorating sick leave.

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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RUTHERFORD BOARD OF EDUCATION,

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RUTHERFORD EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Fogarty & Hara, Esqs.
(Rodney T. Hara, of counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Louis P. Bucceri, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 14, 1986, the Rutherford Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Rutherford Board of Education ("Board") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(5) and (1),[1/] when it prorated

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

sick leave of teachers without negotiations.

On July 10, 1986, a Complaint and Notice of Hearing issued. On July 17, 1986, the Board filed an answer stating that it has a past practice of prorating sick leave for those employees "becoming employed after the start of the school year." It also asserted that sick leave is governed by statute as interpreted in Schwartz v. Dover Public Schools, 180 N.J. Super 222 (App. Div. 1981).

On November 19, 1986, I conducted a hearing at which the parties examined witnesses, introduced exhibits and argued orally. The parties filed post-hearing briefs by September 8, 1987.[2/]

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Rutherford Board of Education is a public employer within the meaning of the Act.

2. The Rutherford Education Association is a public employee representative within the meaning of the Act.

2/ I received the transcript of this case on March 21, 1987. The Association filed its brief on June 18, 1987. H. Ronald Levine was Board Counsel through the hearing of this matter. On July 3, 1987, a substitution of counsel was made in which the firm of Fogarty and Hara became counsel for the Board. Following renewed and ultimately unsuccessful attempts at resolving the matter, the Board Counsel, with agreement of Charging Party, filed his post-hearing brief on September 8, 1987.

3. The Association represents a broad-based unit of teachers, nurses, librarians, secretaries, maintenance personnel, bus drivers, aides and others. The last expired collective negotiations agreement executed by the Board and Association ran from July 1, 1983 to June 30, 1985 and the current agreement extends from July 1, 1985 to June 30, 1988 (Exhibits J-1 and J-2). J-1 and J-2 contain clauses concerning extended sick leave and payment for unused sick days.3/

3/ J-1 and J-2 contain identical clauses concerning extended sick leave. Each clause states:

> In the event an employee has used up his/her sick leave and has been out ill for more than 5 days, the Superintendent of Schools shall bring such cases to the Board of Education for a decision on whether the Board shall grant extended sick leave. Each case shall be based on the past record of the individual and each case shall be reviewed on its own merits.
>
> In the case of an employee who is out ill for an extended period and is rapidly approaching depletion of his/her accumulated sick days, the Superintendent can bring this to the attention of the Board for possible immediate extension of time for said illness.

The 1985-88 collective negotiations agreement (J-2) contains an unused sick days clause reciting a payment schedule to a maximum of $7,500. The final sentence of the clause states:

> Whenever the Board of Education shall grant additional sick leave to any employee above and beyond that mandated by statute (18A:30-2), said days granted shall be deducted from the total payment due for unused sick leave prior to payment (J-2).

4. Linda Dahse has been employed by the Board as a ten-month teacher since 1979. On July 10, 1985, Dahse applied in writing to Luke A. Sarsfield, Superintendent of Rutherford Schools, for disability leave because of pregnancy. The leave was to commence October 14, 1985. Dahse noted that she had accumulated 33 sick days and requested that child rearing leave begin at the termination of disability leave (CP-1).[4/] On August 13, 1985, Dahse received a letter from the secretary to the Superintendent stating that at a regular meeting of the Board, she was "granted a disability leave commencing October 14, 1985 until the completion of sick days, to be followed by child rearing leave, without pay, through June 30, 1986" (CP-2). At the start of the school year in September, Dahse, like all other district teachers, received a card from the administration reciting accumulated sick days (T17, T18). Dahse's card stated that she had accumulated 23 days plus a "new credit" of 10 days equaling 33 "total available" days (CP-3).

5. The parties stipulated: On or about September 26, 1985, the Superintendent verbally advised a staff member, Mary Rose Schmid, that both she and Dahse would not (my emphasis) receive ten sick leave days for the 1985-86 school year. The Superintendent advised that their 1985-86 sick leave days would be prorated because of their "anticipated absences during part of the school year due to maternity leaves" (C-1, T-7). Accordingly, Dahse received 25 sick leave days because her leave commenced October 14, 1985 (T21).

4/ "CP" refers to Charging Party exhibit.

6. The parties also stipulated: By letter of November 13, 1985, the Charging Party through its president demanded recision of any attempt to prorate sick leave absent a negotiated agreement, as well as compensation for its constituents, Schmid and Dahse, and anyone else adversely affected (C-1; T-7).

7. By letter of December 2, 1985, the Superintendent rejected the Charging Party's demand (C-1, T-7). Sarsfield stated in his December 2 letter that the Board had prorated sick leave for several years and "it is a past practice." Sarsfield was concerned that while Dahse and Schmid were on leave, "their replacements would also receive ten sick days each. Thus, we would have two positions within which 20 sick days were sick awarded" (CP-6).

8. Thomas Slezak has been employed by the Board as a teacher for thirteen years and has been president of the Association from 1979 through 1986. Slezak has participated in collective negotiations since 1979 and chaired the Association's negotiations team for the most recent agreement (T35, T36). Slezak was informed of the Dahse leave problem in September 1985. He was unaware of any Board policy requiring prorated sick leave (T37).

9. Sarsfield and Slezak testified that the subject of proration of sick leave never arose during collective negotiations (T43, T92). The Board never advised the Association of any policy or practice in which teachers who began their employ on the first day of school and who went on leave later in the school year were awarded a prorated number of sick days (T43, T118). A Board policy

entitled "Anticipated Disability Leaves" (CP-7), adopted June 28, 1976, includes a section on child rearing leave. The Board adopted a sick leave policy in May 1962. It provides:

> All persons holding any office, position or employment in this school district who are steadily employed by the Board of Education or who are protected in their office, position or employment under the provision of state statute 18A:28-4 to 18A:28-7 inclusive, shall be allowed sick leave with pay for a minimum of 10 school days in any school year for ten-month employees; 11 school days for eleven-month employees; and 12 school days for twelve-month employees. All unused sick leave days are cumulative for future use.
>
> Whenever the Board of Education shall grant additional sick leave to any employee above and beyond that mandated by statute (18A:30-2),5/ said days granted shall be deducted from the total payment due for unused sick leave prior to payment. (CP-8).

10. Joan Lord and Lynda Meredith are teachers employed by the Board (T73, T78). Lord has been a physical education teacher since 1978. She started work in the 1982-83 school year in September and took disability leave with pay and sick days beginning November 2, 1982. She received ten sick days commencing September

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5/ N.J.S.A. 18A:30-2 provides:

> All persons holding any office, position or employment in local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

1982 (T74). The disability leave ran from November 2 to December 3, 1982 and the maternity/child rearing leave ran from December 4, 1982 through June 30, 1983. Lord returned to work in September 1983 (CP-9).

11. Lynda Meredith began her maternity leaves in March 1977 and February 1982 (T78). Meredith took a disability and child rearing leave from March 15, 1977 through June 30, 1978. She specifically recalled receiving ten sick days at the time she commenced that leave (CP-9; T81). At the start of the 1981-82 school year, Meredith had accumulated 22 sick days and was awarded 10 more. She took her second disability and child rearing leave from February 2, 1982 through June 30, 1982. When she requested the leaves, the Board did not challenge the ten days she was allotted at the start of the respective school terms.

12. Sarsfield began prorating sick leave in the 1982-83 academic year after he was informed of Schwartz v. Dover Public Schools (T118).[6/] Sarsfield concluded from the decision that

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6/ In Schwartz, the Dover Education Association appealed a decision of the New Jersey State Board of Education concerning paid sick leave. The collective negotiations agreement executed by the Association and the Dover Board of Education provided that employees were entitled to ten days sick leave a year without loss of pay, but any employee "whose contract is effective after the beginning of the school year, shall be allowed one day of sick leave for each remaining month of the contract period." The State Board of Education upheld the contract provision against a Dover Education Association claim that N.J.S.A. 18A:30-2 requires every board to provide ten

Footnote Continued on Next Page

proration was not an appropriate subject for collective negotiations (T108). In the 1982-83 school year, if a teacher notified the Board

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6/ Footnote Continued From Previous Page

> sick leave days in any school year for each employee regardless of when employment began. Louise Moore was a full-time compensatory education teacher who had worked from March 1, 1978 through June 30, 1978, during which time she had used one sick day. In September 1978, Moore was informed that her sick leave accumulation was three days.
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> An Administrative Law Judge ruled that the collective negotiations agreement provision on sick leave conflicted with the statute because the statute required a minimum of ten paid days and "shall" was used in a mandatory rather than permissive sense. This decision was adopted by the Commissioner of Education by inaction and passage of time. See N.J.S.A. 52:14B-10(c).
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> The State Board of Education reversed the Commissioner's decision, framing the issue as whether a local board could validly agree in a collective bargaining agreement that an employee whose contract becomes effective after the beginning of the school year would be allowed one day of sick leave for each remaining month of the contract. The State Board held that "such a provision did not conflict with N.J.S.A. 18A:30-2 and was therefore a validly negotiated term or condition of employment."
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> The Appellate Division held:
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> We affirm essentially for the reasons given by the State Board of Education. Reason is said to be the "soul of law," and the sense of a statute should control over its literal terms. State v. Carter, 64 N.J. 382, 290-291 (1974). Interpretations which lead to absurd or unreasonable results should be avoided. State v. Gill, 47 N.J. 441, 444 (1966); Marranca v. Harbo, 41 N.J. 569, 574 (1964). In the latter case the court, considering an interpretation of a statute urged by a party, observed, "[n]o one can think of a reason why the Legislature would want that extraordinary result...." We take the same view of the statute before us.

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that he or she was resigning during the year or taking a leave of absence for part of the year (and the employee had not used his or her annual allotment of sick days), then the teacher would be credited with one sick day for each month of employment (T102-T108, T112, T113). Sarsfield added:

> "If they are employed legitimately by a board of education and they either do not report to work that first day and are legitimately ill or they do report to work and subsequently become ill, I think one would allow them those ten days. If, on the other hand, somebody says I am going to retire as of December 31, you certainly do not grant them ten days" (T112).

Sarsfield believed that the Association was not entitled to notice about proration of sick leave (T108).

13. Sarsfield prepared R-1, a list of all teachers (in an unspecified number of schools) who had sick days prorated from the

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> There is no reason why the Legislature would want to grant the same number of sick leave days to an employee who has only worked one or two months of the school year as are guaranteed to employees who worked the full year. Appellants contend that the failure of the legislature to provide a method of allocation where an employee works less than a full year precludes such an interpretation. We disagree. N.J.S.A. 18A:30-2 is directed toward employees who are "steadily employed" or who are protected by tenure. It is more likely that the Legislature was contemplating regular, full time employees and did not contemplate employees who were hired for less than a full school year. Employees who work a full school year are guaranteed ten days of paid sick leave. A reasonable interpretation is to allow a proportionate amount of sick leave for those employed less than a full school year. Id. at 226-227.

1982-83 school term through the 1985-86 term (T94; R-1). R-1 lists fourteen employees who have received prorated sick leave compensation accompanied by maternity or adoption leave or retirement. For example, in the 1983-84 school year, nine teachers received prorated sick leave for four to seven days (R-1). R-1 also shows that Linda Dahse received three paid sick leave days in the 1984-85 school year and another teacher received nine days when she commenced maternity leave in May, one month from the completion of an entire term (R-1). No teacher informed the Association about proration of sick leave before 1985 (T55).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." In other words, employers may not unilaterally alter prevailing terms and conditions of employment because such changes circumvent the statutory duty to bargain Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). The duty to bargain is not limited to the period of negotiations for a new agreement; "...it applies at all times..." (Galloway at 49), including "prior to implementing a proposed change in an established practice governing working conditions which is explicitly or impliedly included under the terms of the parties." New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den., P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt.

No. A-2450-77 (4/2/79). In 1973, the New Jersey Supreme Court determined that sick leave is a negotiable term and condition of employment. Burlington Cty. Coll. Fac. Assn. v. Bd. of Trustees, Burlington Cty. Coll., 64 N.J. 10, 14 (1973).

In or around September 1982, the Board unilaterally began prorating the compensated sick leave of the vast majority of teachers who took disability, maternity and child-rearing leave during the term. The Board does not contest that before September 1982, teachers received the ten days of compensated sick leave in September, as established by statute (N.J.S.A. 18A:30-2) and by its own policy (CP-8). The Superintendent testified that the subject was not appropriate for collective negotiations.

In NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), the Supreme Court of the United States defined the duty to bargain collectively:

> [It is] the duty to meet and confer in good faith with respect to wages, hours and other terms and conditions of employment. Clearly, the duty thus defined may be violated without a general failure of subjective good faith: for there is no occasion to consider the issue of good faith if the party has refused even to negotiate in fact - to meet or confer about any of the mandatory subjects (my emphasis) Id. at 742.

In September 1982, the Board failed to negotiate in fact - to discuss with the Association any changes in the allocation of compensable sick leave before establishing a new rule. The imposition of proration of sick leave without notice and negotiations violates subsection 5.4(a)(5) and derivatively (a)(1)

unless the Board proves that the Association waived its right to negotiate. See NLRB v. Katz and South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986).

The Board argues that since 1982, the parties have a past practice of prorating sick leave amounting to a term and condition of employment and that the Association's failure to object to the proration constitutes a waiver of the right to negotiate. The Board also argues that proration is consistent with the Appellate Division interpretation of N.J.S.A. 18A:30-2 in Schwartz v. Dover Public Schools.

Generally, a past practice which defines a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. County of Sussex, P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). If the agreement is silent or ambiguous on the particular issue in dispute, past practice controls. Sussex, Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982; Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Docket No. A-4991-80 (1982). A past practice should demonstrate "not only a pattern of conduct but also some kind of mutual understanding, either expressed or implied." United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970).

> Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably

> consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute (Id. at 2597).

The parties agree and the record shows that no provisions of the current and expired collective negotiations agreements refer to any number of compensated sick leave days or any method of distributing them.7/ Past practice therefore controls. See Sussex and Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976), where the Commission determined that it will not defer to arbitration when the contract is silent on the issue in dispute.

No evidence remotely suggests that the Association had notice of the Superintendent's September 1982 decision to prorate sick leave. Although R-1 lists fourteen teachers whose compensated sick leaves were prorated in the 1982 through 1985 school years, neither the Board nor the affected employees notified the Association about the change before 1985. Furthermore, the change to proration could have been apparent to only a limited number of employees in perhaps several schools. (In fact, the Board never changed the annual notice to teachers reciting their respective accumulated and allotted sick leaves). Finally, two teachers, Lord

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7/ The agreements contain clauses concerning extended sick leave and payment for unused sick days. The agreements do not include any "fully bargained" provisions which could suggest that the Association contractually waived its right to object to proration. See Montville Tp. Bd. of Ed., P.E.R.C. No. 86-51, 11 NJPER 702 (¶16241 1985).

and Meredith, received the full ten days sick leave during the period that proration was in effect. Even if the Board consistently prorated sick leave, the facts simply do not show that the parties had any "mutual understanding" about proration. Similarly, I disagree with the Board that the Association's failure to challenge Sarsfield's interpretation and application of Schwartz constitutes "acquiescence." A party cannot expressly or tacitly comply with a change of which it has no notice.8/ I conclude that the Board failed to prove that it has a past practice of prorating teacher sick leave.

I also dismiss the Board's argument that Schwartz prohibits negotiations about proration. In affirming the validity of the contract provision prorating sick leave, the court necessarily recognized that proration is a term and condition of employment within the meaning of N.J.S.A. 34:13A-5.3. The judges essentially found that N.J.S.A. 18A:30-2 "allows" parties to negotiate sick leave for those teachers specifically "hired for less than a full school year." Their holding does not require proration for all

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8/ The Board asserts that knowledge may be imputed to a majority representative when a term and condition of employment existed for four years. Ridgefield Bd. of Ed., P.E.R.C. No. 80-143, 6 NJPER 297 (¶11140 1980). Although I agree that knowledge may be imputed to either party, the particular term and condition must be open and notorious, as was the case in Ridgefield. There, the school principal announced in faculty bulletins that teaching staff attendance at PTA meetings was expected, the meetings were related to curriculum, most teachers consistently attended the meetings and those unable to attend gave notice to the principal.

teachers who take sick leave with other types of leave. Accordingly, I find that the Board violated § 5.4(a)(5) and derivatively (a)(1) of the Act when it unilaterally prorated teacher sick leave. The Association requested a remedy for "all those [teachers] adversely affected" by [proration]. Considering the timeliness of the Association's charge about proration in the 1985-86 term, its ignorance of proration (nor could it have known about the change) beginning in 1982 and the litigation of evidence of proration beginning in 1982, I find that the appropriate remedy must extend back to the 1982-83 term. See N.J.S.A. 34:13A-5.4(c).

RECOMMENDED ORDER

I recommend that the Commission ORDER that

A. Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by unilaterally prorating sick leave of unit employees.

2. Refusing to negotiate in good faith with the Rutherford Education Association concerning proration of sick leave.

B. The Respondent take the following affirmative action:

1. Forthwith restore to unit employees the number of compensated sick leave days to which they were entitled prior to proration in the 1982-83 term.

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.

Jonathon Roth
Hearing Examiner

DATED: December 29, 1987
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the Act, particularly by unilaterally prorating sick leave of unit employees.

WE WILL NOT refuse to negotiate in good faith with the Rutherford Education Association concerning proration of sick leave.

WE WILL forthwith restore to unit employees the number of compensated sick leave days to which they were entitled prior to proration in the 1982-83 term.

Docket No. CO-86-181-4 Rutherford 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.