

D.U.P. No. 2019-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

DEERFIELD TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2019-106

DEERFIELD TOWNSHIP TEACHERS' ASSOCIATION,

Charging Party,

-and-

DEERFIELD TOWNSHIP SUPPORTIVE STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses, in part, an unfair practice charge filed by the Deerfield Township Teachers' Association (DTTA) and the Deerfield Township Supportive Staff Association (DTSSA) (collectively, Associations) against the Deerfield Township Board of Education (Board). The charge alleges that the Board violated section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally revised its policy regarding unit employee use of sick leave, pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., from consecutive to concurrent exhaustion of available sick leave with the use of FMLA leave; unilaterally revised its sick leave verification policy, without negotiating the impact on costs to employees, from requiring a doctor's certificate if a unit member is absent more than three days to requiring a doctor's certificate if a unit member is absent three or more days or is absent on certain other dates; and unilaterally increased the contractual work year for certificated employees from 185 to 186 days. The Director finds that the complaint issuance standard has not been met with respect to the work year issue given that both parties rely upon contractual provisions to support their respective positions and DTTA has not alleged that the Board repudiated a clear contractual provision or asserted that the work year is controlled by past practice. N.J.S.A. 34:13A-5.3 requires any dispute covered by the terms of a collective negotiations agreement to be resolved in accordance with the parties' negotiated grievance procedure. However, the Director issued a complaint with respect to the 5.4a(1) and (5) allegations concerning unilateral changes to the Board's policies regarding employee use of sick leave and sick leave verification.

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Appearances:

For the Respondent, Comegno Law Group, P.C., attorneys
(Mark G. Toscano, of counsel; Jeffrey R. Caccese, of
counsel; Daniel F. Thornton, of counsel)

For the Charging Parties, Selikoff & Cohen, P.A.,
attorneys (Keith Waldman, of counsel)

DECISION

On October 22, 2018, Deerfield Township Teachers' Association (DTTA) and Deerfield Township Supportive Staff Association (DTSSA) (collectively, the Associations) filed an unfair practice charge against Deerfield Township Board of Education (Board). The charge alleges that on or about April 24, 2018, the Board unilaterally revised its policy regarding unit employee use of sick leave, pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. §2601 et seq., from consecutive to

concurrent exhaustion of available sick leave with the use of FMLA leave. On the same date, the Board allegedly and unilaterally revised its sick leave verification policy without negotiating the impact on costs to employees. Specifically, the charge alleges that the Board had required a doctor's certificate if a unit member is absent more than three days and now requires a certificate if a unit member is absent three or more days or is absent on in-service days, dates of school meetings, before or after holidays, and around the NJEA convention. Finally, the charge alleges that on October 4, 2018, the Board unilaterally increased the contractual work year for certificated employees from 185 to 186 days. The Board's conduct allegedly violates section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

On February 26, 2019, a staff agent conducted an exploratory conference with the parties.

On March 29, 2019, the Board served a position statement on the Associations.^{2/} With respect to the teachers' work year, the

^{1/} These provisions 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 employees in that unit, or refusing to process grievances presented by the majority representative."

^{2/} On May 3, 2019, the Board submitted a supplemental position
(continued...)

Board asserts that “. . . [t]he parties’ 2013-2017 [collective negotiations] agreement provides in Article X that the teacher work year shall be 186 days, consisting of 180 instructional days, one employee-orientation days, and five in-service days . . . [and] the parties’ subsequent [m]emorandum of [a]greement makes no changes to these provisions, which remain the same in the current 2017-2020 [collective negotiations] agreement.”

On April 25, 2019, the Associations served a position statement on the Board.^{3/} With respect to the teachers’ work year, DTTA alleges that “[o]n or about October 4, 2018, the Board . . . unilaterally increase[d] the contractual work year for certificated staff to 186 days” and argues that “. . . [c]hanges in the contractual work year are negotiable and, as to its impact, raise severable, negotiable compensation issues.”

The Commission has authority to issue a complaint where it appears that a charging party’s allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint.

2/ (...continued)
statement enclosing U.S. Department of Labor (DOL) Opinion Letter FMLA 2019-1-A (FMLA 2019-1-A).

3/ On May 3, 2019, the Associations submitted a response to the Board’s supplemental position statement.

N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012). Based upon the following, I find that the complaint issuance standard has not been met with respect to the teachers' work year issue raised in Count III of the charge.

DTTA represents all non-administrative and non-supervisory certificated personnel, full or part-time, employed by the Board. The Board and DTTA are parties to a collective negotiations agreement (CNA) in effect from July 1, 2017 through June 30, 2020.

Article V of DTTA's 2017-2020 CNA, entitled "Salaries," provides in a pertinent part:

G. CALCULATION OF PAY AT SEVERANCE OR
TERMINATION (MID-YEAR) FOR CERTIFICATED STAFF

The contractual work year for certificated staff is one hundred eighty-five (185) days. Should an employee end employment at any time other than the last regular workday, the following formula shall be used to determine the appropriate amount of his/her last paycheck.

*The annual salary shall be divided by 200 days to calculate the per diem rate. (N.J.S.A. 18A:30-6).

*The actual number of days worked or to be worked during the employee's final pay period shall be multiplied by the per diem rate.^{4/}

^{4/} Article V, Section G of the parties' 2013-2017 CNA is
(continued...)

Article X of DTTA's 2017-2020 CNA, entitled "Teacher Work Year," provides in a pertinent part:

A. The work year for all employees covered by this agreement shall consist of no more than one hundred eighty (180) days of pupil instruction, unless mandated to do so by the State of New Jersey.

B. In addition to Article XA, employees covered by this agreement shall be required to work the following additional days:

1. All current employees shall be required to attend one (1) day for employee orientation prior to the opening of school for pupils.

2. All employees newly employed in the Deerfield Township School District shall be required to attend one (1) day for new teacher orientation in addition to Article XB1 prior to the opening of school for pupils.

3. All employees shall be required to attend five (5) days of in-service training.^{5/}

Article XV of DTTA's 2017-2020 CNA, entitled "Grievance Procedure," provides in a pertinent part:

A. Definitions

1. A grievance is an allegation by an employee or the Association that a provision(s) of this contract has been violated or that there has been a decision of the Superintendent that has adversely

4/ (...continued)
identical to the parties' 2017-2020 CNA.

5/ Article X, Sections A-B of the parties' 2013-2017 CNA is identical to the parties' 2017-2020 CNA.

affected an employee or the Association or that there has been a violation of an existing Board policy. However, grievances on Board policy violations may only be appealed to the Board level, and the decision of the Board of Education, in such matters, is final and binding.

2. An aggrieved person is the person making the allegations or the Association.

* * *

C. Procedure

1. Level One - An employee with a grievance shall first discuss it informally with his/her immediate supervisor within thirty (30) school days of the occurrence of the grievance. The immediate supervisor shall review any facts presented by the grievant and shall render a decision to the grievance within seven (7) school days of the actual receipt of the grievance.

2. Level Two - If the aggrieved person is not satisfied with the disposition of his/her grievance at Level One, he/she may submit the grievance to the Superintendent or his/her designee, in writing, on the form provided by the Board of Education, within five (5) school days after receiving the decision of the immediate supervisor. The Superintendent will investigate the information presented in the written grievance and will prepare a written decision within five (5) school days after receipt.

3. Level Three - If the aggrieved person is not satisfied with the disposition of his/her grievance at Level Two, he/she may then submit his/her grievance to the Board of Education, in writing, on the form provided by the Board of Education, within twenty (20) school days after receiving the written decision of the Superintendent in Level Two above. The Board of Education shall review the information provided on the appeal form and shall render a decision, in writing, within thirty-one (31) school days from the date of the receipt of the grievance.

4. Level Four - If the Association is not satisfied with the disposition of the grievance at Level Three, it may then request

arbitration of the grievance by filing notice with the Public Employment Relations Commission. The rules of the Commission shall be followed with regard to the selection of an arbitrator. The arbitrator shall establish rules for the hearing, except as provided herein. The arbitrator shall first rule on the arbitrability of the grievance if so requested by either party. The arbitrator shall not have the power to add to, subtract from, or otherwise modify the collective bargaining agreement. The arbitrator's decision shall be final and binding on all parties. The costs of the services of the arbitrator shall be shared equally by the parties in interest.

(a) No grievance based on the non-renewal of a non-tenured employee's contract shall be submitted to binding arbitration provided no other portion of this agreement has been violated.

(b) No grievance based on an alleged violation of school district policy shall be submitted to arbitration since the decision of the Board of Education on such matters shall be final and binding.

On October 22, 2018, the Associations filed the instant unfair practice charge.

ANALYSIS

Teachers' Work Year

DTTA alleges that the parties' CNA expressly provides that the contractual work year for certificated staff is 185 days. The Board argues that this issue requires an interpretation of the parties' CNA and should therefore be deferred to

arbitration.^{6/} I agree with the Board and dismiss this aspect of the Associations' charge.

N.J.S.A. 34:13A-5.3 requires any dispute covered by the terms of a collective negotiations agreement to be resolved in accordance with the parties' negotiated grievance procedure. State of New Jersey (Dep't of Human Services), D.U.P. No. 2018-8, 44 NJPER 366 (¶103 2018), adopted P.E.R.C. No. 2018-55, 45 NJPER 24 (¶6 2018); see also State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 422 (¶15191 1984). "Absent allegations that predominately relate to an employer's duty to negotiate in good faith (such as the claim an employer repudiated a clear contractual provision, among other examples), we will not exercise unfair practice jurisdiction over disputes that are governed by a collectively negotiated procedure." State of New Jersey, 44 NJPER at 368.

Both DTTA and the Board rely upon contractual provisions to support their respective positions. Compare 2017-2020 DTTA CNA, Art. V, Section G ("[t]he contractual work year for certificated staff is 185 days") with 2017-2020 DTTA CNA, Art. X, Sections A-B ("180 days of pupil instruction" + "1 day for employee orientation" + "5 days of in-service training" = 186 days). The parties' CNA specifies that "allegation[s] by an employee or the

^{6/} The Board refused to waive procedural defenses; had it agreed to do so, deferral to the parties' negotiated grievance procedure would have been appropriate.

Association that provision(s) of this contract ha[ve] been violated" are subject to the parties' negotiated grievance procedure which ends in binding arbitration. See 2017-2020 DTTA CNA Art. XV(A) (1), - (C) (4).

DTTA has not alleged that the Board repudiated a clear contractual provision, nor has it asserted that the teachers' work year is controlled by past practice. Contrast Passaic Cty. Reg. Bd. of Ed., D.U.P. No. 89-5, 15 NJPER 54 (¶20019) 1988), rev'd P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106 1989) (the Director dismissed an unfair practice charge alleging that the Board unilaterally increased the work year based upon his finding that "the parties [had] a good faith difference concerning the interpretation" of "contractual workyear provisions" and that "[t]he appropriate forum for resolution of contractual disputes [was] in the contractual grievance procedure"; the Commission reversed and ordered that a complaint be issued, finding that "the union [did] not claim a contractual right or seek enforcement of any contractual provision . . . [but] instead . . . claim[ed] that the employer ha[d] unilaterally changed a past practice without . . . prior negotiations").

Accordingly, I find that the complaint issuance standard has not been met with respect to the teachers' work year issue and dismiss that portion of the charge. N.J.A.C. 19:14-2.1.

ORDER

Count III of the Deerfield Township Teachers' Association and Deerfield Township Supportive Staff Association's unfair practice charge is dismissed. I will issue a complaint on Counts I and II.

/s/ Jonathan Roth
Director of Unfair Practices

DATED: June 6, 2019
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by June 17, 2019.