

D.U.P. No. 2020-6

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

In the Matter of

BERNARDS TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2017-160

BERNARDS TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Bernards Township Education Association (Charging Party) against the Bernards Township Board of Education (Respondent). The charge alleges that the Respondent violation section 5.4a(5) and, derivatively, a(1) of the New Jersey Employer-Employee Relations Act (Act) when it amended a policy to prohibit guidance counselors from providing counseling services on a fee basis to both district and non-district students without negotiating with the Charging Party prior to implementation. After the filing of this charge, the policy was subsequently amended again to prohibit fee-based counseling services to district students only. Both amendments expressly applied to all certificated staff, including guidance counselors. Since substantive determinations made by public employers regarding what types of outside employment may constitute a conflict of interest are not mandatorily negotiable, the Director concluded that the Respondent was not obligated to negotiate either the general prohibition against fee-based counseling services or the more limited version.

D.U.P. No. 2020-6

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

In the Matter of

BERNARDS TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2017-160

BERNARDS TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Adams, Gutierrez & Lattiboudere, LLC, attorneys
(John E. Croot, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Sanford Oxfeld, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 24, 2017, the Bernards Township Education Association (the Charging Party or Association) filed an unfair practice charge against the Bernards Township Board of Education (the Respondent or Board). The charge alleges that on or around September 26, 2016, the Board violated section 5.4a(5) and, derivatively, a(1)^{1/} of the New Jersey Employer-Employee

^{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
(continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by amending Board Policy 3232, entitled "Private/Tutoring/Personal Services" to prohibit guidance counselors from providing counseling services on a fee basis. The Charging Party alleges that the amended policy restricting counselors' outside employment constitutes a unilateral change to a term and condition of employment, and that the Board failed to negotiate prior to implementation.

By letter dated September 17, 2019, I advised the parties of my tentative findings and conclusions. I explained that I was not inclined to issue a complaint on the allegations of this charge, and invited the Charging Party to respond by the close of business on September 24, 2019. The Charging Party submitted its response on September 25, 2019. The Board also requested to respond, and submitted its response seven days later on October 4, 2019.

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

1/ (...continued)
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."

standard has not been met, I may decline to issue a complaint.

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).

I find the following facts.

The Charging Party is the exclusive majority representative of the Board's employees, including guidance counselors. The Board and the Association are parties to a series of collective negotiations agreements.

Since 2013, the Board has maintained regulations and policies regarding conflict of interests and ethics. "District Regulation 3230-Outside Activities" provides in a pertinent part:

A. Outside Employment

1. A full-time employee may engage in outside employment when such employment does not:
 - a. Constitute a conflict of interest;
 - b. Violate the provisions of the New Jersey School Ethics Act; or
 - c. Occur at a time when the employee has assigned district duties and responsibilities.
2. A full-time employee who engages in employment outside the school district shall report that employment to the Superintendent only if the outside employment may require any type of accommodation by the school district or if the outside employment would require the staff member to not perform or limit the staff member's

ability to perform all the responsibilities of their school district employment.

Similarly, "District Policy 3214-Conflict of Interest" prohibits, among other conduct, teaching staff members from "engag[ing] in any business or transaction or professional activity which is in conflict with the proper discharge of the teaching staff member's duties." This policy also restricts teaching staff members from improperly using their official positions and limits the circumstances under which they can accept gifts.

At issue in this case is "District Policy 3232-Private Tutoring/Personal Services," (Tutoring and Personal Services Policy) that the Board initially created in 2013. The policy generally permits teachers to provide tutorial instruction and personal services to students. However, it expressly prohibits teachers from providing such services to students they teach or evaluate "[t]o avoid placing a teacher in a position where he/she may have a conflict of interest . . ." It bans all employees from providing services if they were "instrumental in recommending the need for those services."

In the fall of 2016, the Board amended its Tutoring and Personal Services Policy to ban certificated staff members from providing counseling services for a fee to students. This revision did not distinguish between in-district and out-of-district students. After the Association filed this charge, the

Board claims it decided to revise the policy again in the spring of 2017 as follows:

To avoid placing staff members into possible professional conflicts, as well as possible conflicts of interest, certificated staff members may not provide fee based counseling services to district pupils including but not limited to: college and career planning, individual or family therapy and medical or drug/alcohol counseling (emphasis added).

This version of the Tutoring and Personal Services Policy ultimately became effective on July 1, 2017. While the charge in this case alleges that the policy prohibits guidance counselors from providing outside counseling services for a fee, its plain language includes all "certificated staff members" within its scope. The Board, in its October 4 response, confirmed that the policy applies to all certificated staff members.

ANALYSIS

The Charging Party contends that guidance counselors' outside employment is a term and condition of employment, and that the Board was required to negotiate in good faith with it before changing the policy. It asserts that restrictions on outside employment curtail employees' earning capacity, and therefore are subject to negotiations, unless such restrictions are related to the core mission of the public employer. The Charging Party in its September 25 response, maintains that the Board cannot plausibly claim that its prohibition on outside employment is related to its core mission because the Board's

policy only applies to guidance counselors and not to teachers in the district providing the same type of fee-based counseling services.

The Board counters that it wasn't obligated to negotiate because both versions of its policies reflect educational policy determinations that are within its managerial prerogative. The Board asserts that academic tutoring services are fundamentally different than counseling services, like college admissions. In its view, under the former scenario every student has the potential to obtain a perfect score on a test or in a class, whereas under the latter scenario students are competing for a limited number of admission spaces. Therefore, particularly in the area of college admissions, the Board was concerned that there had been and would continue to be conflicts of interest if guidance counselors and all other certificated staff offered counseling services for pay. According to the Board, counseling on a fee basis also could lead to conflicting advice between counselors acting in their official capacity for the Board and those acting in their private capacity, which would be especially problematic for students receiving therapy or drug counseling. Without offering specifics, the Board claims that there had been incidents where a paid counselor gave advice to clients that conflicted with advice a school counselor gave. It further notes that the ethical standards published by the American School

Counselor Association also recognize the potential for conflicts of interest, and restrict the ability of school counselors to engage in outside employment.^{2/} Therefore, to avoid such conflicts and the appearance of conflicts, the Board concluded that it needed to limit fee-based counseling services provided by certificated staff members.

The Commission applies the following three-part test in 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 a 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.

[IFPTE Local 195 v. State, 88 N.J. 393, 404-05 (1982)]

In State of N.J. (OER) and CWA, P.E.R.C. No. 93-55, 19 NJPER 60 (¶24028 1992), aff'd in pt. rev'd in pt. 267 N.J. Super. 582

^{2/} Under Section A.6, of the Association's published standards, entitled "Appropriate Referrals and Advocacy" subsection h provides that school counselors "[e]nsure there is not a conflict of interest in providing referral resources. School counselors do not refer or accept a referral to counsel a student from their school if they also work in a private counseling practice."

(App. Div. 1994), certif. den. 135 N.J. 468 (1994), the court applied the above test to evaluate whether the State was required to negotiate before revising its code of ethics to prohibit Treasury Department employees from engaging in certain types of outside employment. For nearly two decades, Treasury's original code of ethics had generally permitted outside employment so long as such activity did not impair objectivity or otherwise create an impression of impropriety. Id., 267 N.J. Super. at 584. However, the Treasury Department's Division of Taxation became concerned about the ethics of its employees, particularly auditors, engaging in tax preparation, accounting or bookkeeping for compensation on behalf of private taxpayers. Id. at 585. Around forty percent of its auditors were engaged in such outside employment. Id. Consequently, it revised its code of ethics to ban Division of Taxation employees from engaging in outside employment involving tax return preparation because it constituted a conflict of interest or an appearance of one. Id. The union representing the employees filed an unfair practice charge alleging that the State refused to negotiate the changes. Id. at 585-86. The Commission determined that the prohibition was negotiable as it applied to non-New Jersey tax returns, but was not negotiable as it pertained to New Jersey tax returns. Id. The court reversed the Commission's determination as it pertained to non-New Jersey tax returns, concluding that

negotiations over the revisions would substantially interfere with the State's managerial prerogatives. Id. at 591.

In reaching its conclusion, the court announced that the "adoption of the code of ethics is a fundamental governmental policy decision" that was not suitable for negotiations since it would privilege employees' financial interests over the public interest in ethical governance. Id. The court noted that the New Jersey Conflict of Interest Law, N.J.S.A. 52:13D-12 et seq. prohibited actual misconduct and the appearance of impropriety, and required each agency to adopt ethics codes that were generally consistent with its guidelines. Id. at 588. However, it did not rely on the statute in determining the ban was not negotiable. The court explained:

[b]eyond this statutorily-imposed responsibility, however is the more basic responsibility of any government to ensure ethical conduct in government. What is more fundamental to good government operations than a code of ethics? *What is ethical or a conflict of interest cannot be determined at the bargaining table.* An act either is or is not unethical or a conflict of interest. [Id. at 589 (emphasis added)]

The court also refused to evaluate the merits of the code of ethics in the case in reaching its decision. Id. at 590.

Instead, it recognized that case law distinguished between substantive and procedural aspects of a policy. Citing Bethlehem Tp. of Ed., v. Bethlehem Tp. Educ. Ass'n., 91 N.J. 38, 46-47 (1982), it explained that the former are non-negotiable, while

the latter are negotiable. Id. Since the changes to the code of ethics in this case involved substantive policy determinations related to its managerial prerogative, the State was under no obligation to negotiate. Id. at 591.

State of N.J. (OER) and CWA appears to be dispositive of the issues raised in this charge. Like the Treasury Department, the Board reconsidered the appropriateness of employees performing certain types of outside employment because in its view such activity posed a conflict of interest or an appearance of a conflict.^{3/} Both employers amended their policies without prior negotiations with the affected employees' majority representative. Because the court recognized in State of N.J. (OER) and CWA that ethical and conflict of interest determinations are fundamental substantive government policy decisions, any negotiations would significantly interfere with the Board's exercise of its inherent managerial prerogative. Therefore, the Board was under no obligation to negotiate with

^{3/} The Tutoring and Personal Services Policy clarifies that in addition to avoiding conflicts of interest, the other purpose of restricting guidance counselors' outside employment is avoiding "possible professional conflicts." In disposing of this charge, I am relying solely on the Board's conflict of interest justification, based on the analysis set forth in State, Office of Employee Relations. Therefore, I am not determining whether a revision to conflicts of interest rules based only on a public employer's concern of "possible professional conflicts" would be within the managerial prerogative of a public employer.

the Association regarding either the original ban on outside employment or the more limited version of the policy that ultimately went into effect.

In its September 25 response, the Charging Party first objects to my reliance on a case that did not arise in a school district or other educational context. Although State of N.J. (OER) and CWA is not a school district case, the Charging Party does not explain why the distinction means that the Appellate Division's holding is not dispositive of the issue in this matter. Nothing in the court's reasoning in State of N.J. (OER) and (CWA) suggests that its holding should not apply to boards of education.

The Charging Party cites in support of its position Somerset County, P.E.R.C. 84-92, 10 NJPER 130 (¶15066 1984), where the Commission ruled that the County violated the Act by failing to negotiate with the union representing social workers, psychologists and psychiatrists before adopting a regulation prohibiting only social workers and psychologists but not psychiatrists from conducting private practice within the County. Contrary to the Charging Party's assertion, Somerset County is not directly on point. In that decision, the Commission overturned the hearing examiner's conclusion that a statute adopted more than two months after the regulation in question preempted negotiations regarding outside employment. The

Commission noted that there was nothing in the record indicating why the County issued the resolution or why it exempted psychiatrists. Id. at 132 n.2. The County relied solely on its preemption argument and disclaimed any reliance on conflict of interest laws for its preemption claim. Id. n.3. Therefore, the Commission was not presented squarely with the question of whether a ban on outside employment activities that constitute potential conflicts of interest is within a public employer's managerial prerogative. To the extent that Somerset County could be read as requiring negotiations over conflict of interest-based restrictions on outside employment, the Charging Party does not explain why a decision from the Commission issued in 1984 should have more precedential value than a decision from the Appellate Division in 1993 involving the same legal issue.

The Charging Party also relies on Association of State Col. Fac. v. New Jersey Bd. of Educ., 66 N.J. 72 (1947). The union in State of N.J. (OER) and (CWA) cited that decision, and the court explained why it was distinguishable:

Contrary to the CWA's argument, the Court did not rule that negotiations were required for the adoption of modifications to a code of ethics when the modifications involve policy issues pertaining to managerial prerogatives. While the Supreme Court found that the changes to the code of ethics should have been negotiated, the decision was based upon the fact that the modifications to the code of ethics in question did not involve any policy

issues. The modifications in question involved procedural matters largely concerning what type of notice and approval was necessary prior to engaging in outside employment.

State of N.J. (OER) and (CWA), 267 N.J. Super. at 590 (internal citation omitted). Since the changes to the Board's policy in this case, like the changes at issue in State of N.J. (OER) and (CWA), do not involve procedural matters, Association of State Col. Fac. is inapposite.

Lastly, the Charging Party cites City of Clifton, P.E.R.C. No. 91-106, 17 NJPER 307 (¶22135 1991) and Rutgers, the State University, P.E.R.C. No. 2004-64, 30 NJPER 109 (¶44 2004). Contrary to the Charging Party's assertion, City of Clifton, did recognize off duty private employment as mandatorily negotiable. Instead, it held that a dispute over the negotiability of a local ethics code ordinance was rendered moot by a state statute known as "The Local Government Ethics Law," N.J.S.A. 40A:9-22.1 et seq. since the statute preempted negotiations over ethics codes for employees of municipalities without municipal ethics boards. It is also unclear how Rutgers, the State University can be read to support the Charging Party's position. That case involved a scope of negotiations dispute regarding the negotiability of the school's revised patent policy. Rutgers, the State University, 30 NJPER at 109. The particular portion quoted by the Charging Party arose in the Commission's analysis of the revised patent

policy's requirement that employees submit their outside consulting agreements to the university for review. Id. at 116. The Commission specifically noted that the union was not seeking to negotiate the conflict of interest rules. Id. The Commission recognized employees' interest in maintaining their earning capacities and yet, after weighing that interest against the employer's interest in ensuring rights are not assigned to other parities, it nonetheless concluded that the university had a non-negotiable right to require review of outside consulting agreements. Id. at 117.

Like the Treasury Department in State of N.J. (OER) and CWA, the Board made a substantive determination that a certain type of outside employment could create conflict of interests. Under State of N.J. (OER) and CWA, substantive determinations about what types of outside employment constitute conflict of interest are not mandatorily negotiable since negotiations would significantly interfere with the making of government policy. Therefore, the Board was under no obligation to negotiate the revisions it made to its Tutoring and Personal Services Policy. Accordingly, the Commission's complaint issuance standard has not been met with respect to the Association's 5.4a(5) and derivative a(1) claims, and I decline to issue a complaint on the

allegations of this charge.^{4/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: October 23, 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 November 7, 2019.

^{4/} N.J.A.C. 19:14-2.3