D.U.P. NO. 2023-13

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

In the Matter of

SOUTH ORANGE-MAPLEWOOD
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2022-259

SOUTH ORANGE-MAPLEWOOD
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the South Orange-Maplewood Education Association ("Association") against the South Orange-Maplewood Board of Education ("Board"). The charge alleged that the Board violated N.J.S.A. 34:13A-5.4a(1), (3), and (7) when it issued layoff notices to 16 unit members (and subsequently announced its intent to subcontract transportation services) after the parties signed a March 25, 2022 memorandum of agreement ("MOA") for a successor CNA (retroactive to July 1, 2021) that was ratified in May, 2022, in violation of N.J.S.A. 34:13A-46. The Director determined that the Board procured transportation services through a shared services agreement, and that such agreements are precluded from the definition of a "subcontracting agreement" under N.J.S.A. 34:13A-44. The Director determined that the Association's charge was not precluded by the entire controversy doctrine or res judicata because a charge previously filed by the Association was based on a separate set of facts. The Director found that the charge failed to sufficiently allege that the Board's conduct could interfere with rights protected under the Act, or that the layoffs were motivated by anti-union animus. Finally, the Director determined that the charge failed to identify a regulation of the Commission that was allegedly violated.

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Appearances:

For the Respondent,
Lenox Law Firm, attorneys
(Patrick F. Carrigg, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys
(Colin M. Lynch)

REFUSAL TO ISSUE COMPLAINT

On June 21 and 27, 2022, South Orange-Maplewood Education Association (Association) filed an unfair practice charge and amended charge, together with an application for interim relief,[1] against South Orange-Maplewood Board of Education (Board). The amended charge alleges that on May 6, 2022, the

1/ On June 28, 2022, the Commission Designee sent correspondence to both parties specifying that he was declining to issue an Order to Show Cause pursuant to N.J.A.C. 19:14-9.2(c) and assigning the underlying unfair practice charge for regular case processing.

Board violated sections 5.4a(1), (3), and (7)[2/] of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it issued layoff notices to 16 unit members (and subsequently announced its imminent intent to subcontract transportation services) after the parties signed a March 25, 2022 memorandum of agreement (MOA) for a successor CNA (retroactive to July 1, 2021) that they subsequently ratified in May, 2022, violating N.J.S.A. 34:13A-46.[3/] As a remedy, the

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2/ 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"; "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act"; and "(7) Violating any of the rules and regulations established by the commission."

3/ N.J.S.A. 34:13A-46, entitled "Employer entering into subcontract agreement, terms, conditions," provides:

> No employer shall enter into a subcontracting agreement which affects the employment of any employees in a collective bargaining unit represented by a majority representative during the term that an existing collective bargaining agreement with the majority representative is in effect. No employer shall enter into a subcontracting agreement for a period following the term of the current collective bargaining agreement unless the employer:
>
> > a. Provides written notice to the majority representative of employees in each collective bargaining unit which may be affected by the subcontracting agreement and to the New Jersey Public Employment Relations

(continued...)

amended charge requests that the Board be enjoined from subcontracting transportation services.

On July 12, 2022, a staff agent conducted an exploratory conference with the parties.

On July 22, 2022, the Board filed and simultaneously served a position statement on the Association. The Board asserts that its " . . . decision to utilize Sussex County Regional Transportation Cooperative ("SCRTC") is not subcontracting under N.J.S.A. 34:13A-44[4/] et seq." but is in fact a shared services

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3/ (...continued)

Commission, not less than 90 days before the employer requests bids, or solicits contractual proposals for the subcontracting agreement; and

b. Has offered the majority representative of the employees in each collective bargaining unit which may be affected by the subcontracting agreement the opportunity to meet and consult with the employer to discuss the decision to subcontract, and the opportunity to engage in negotiations over the impact of the subcontracting. The employer's duty to negotiate with the majority representative of the employees in each collective bargaining unit shall not preclude the employer's right to subcontract should no successor agreement exist.

4/ N.J.S.A. 34:13A-44, entitled "Definitions relative to collective bargaining agreements and subcontracting," provides in pertinent part:

'Subcontracting agreement' means any

(continued...)

agreement as defined under N.J.S.A. 40A:65-3[5/], -4[6/]. The Board contends that, even if one assumes that its ". . . decision is not excluded from the requirements of N.J.S.A. 34:13A-45-49," it

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4/ (...continued)
agreement or arrangement entered into by an employer to implement subcontracting, but shall not include any contract entered into pursuant to the "Uniform Shared Services and Consolidation Act," P.L.2007, c.63 (C.40A:65-1 et al.), or any contract entered into to provide services to nonpublic schools through State or federal funds.

5/ N.J.S.A. 40A:65-3, entitled "Definitions relative to shared services and consolidation," provides in pertinent part:
'Service' means any of the powers, duties and functions exercised or performed by a local unit by or pursuant to law.
'Shared service' or 'shared' means any service provided on a regional, joint, interlocal, shared, or similar basis between local units, the provisions of which are memorialized by agreement between the participating local units, but, for the purposes of this act, does not include any specific service or activity regulated by some other law, rule or regulation.
'Shared service agreement' or 'agreement' means a contract authorized under section 4 of P.L.2007, c.63 (C.40A:65-4).

6/ N.J.S.A. 40A:65-4, entitled "Agreements for shared services," provides in pertinent part:
a.(1) Any local unit may enter into an agreement with any other local unit or units to provide or receive any service that each local unit participating in the agreement is empowered to provide or receive within its own jurisdiction, including services incidental to the primary purposes of any of the participating local units including services from licensed or certified professionals required by statute to be appointed.

has " . . . met its statutory obligation to offer to negotiat[e] and that [the Association's] failure to make any demands or [to] negotiate the impact of subcontracting leaves them with no further rights to assert." The Board avers that it has complied with its duty to provide timely notice of its intent to subcontract and has offered to negotiate the impact of subcontracting with the Association. It eschews the Association's contention that the (retroactive) effect of its ratifying the successor agreement renders unlawful its ability to subcontract for services. The Association's position is " . . . an illogical and erroneous reading of the relevant statutes."

The Board also maintains that this unfair practice charge (CO-2022-259) " . . . is barred by the entire controversy doctrine and res judicata" because the previous and withdrawn Association unfair practice charge (CO-2022-113) was based upon "the same core set of facts" and cannot be relitigated. The Board maintains that, even if those legal doctrines do not apply, "the Association's allegations . . . are facially deficient and the alleged conduct . . . does not constitute . . . [an] unfair practice[]."

On September 9, 2022, the Association filed and served a position statement on the Board. It initially asserts that "the Board's submission, at most, . . . demonstrates a dispute of fact warranting a hearing and not dismissal of the charge" and that

any asserted policy reasons for not issuing a complaint " . . . are at odds with the plain language of . . . N.J.S.A. 34:13A-46." The Association disputes the applicability of either collateral estoppel or res judicata and contends that neither applies to a claim "that did not exist" at the time of the previously withdrawn prior unfair practice charge. The Association argues the previous unfair practice charge was predicated on separate and distinct operative facts; could not have been litigated in the prior charge; and sought enforcement of a different section of the Act based upon separate and new facts and a distinct legal theory. The Association maintains that the Board's claim – i.e., "that its actions do not violate N.J.S.A. 34:13A-46 because any subcontracting . . . followed from [its] Notice of Intent to Subcontract" – is a concession that "it failed to effectuate the intent during the period following the expiration of [the parties'] prior [collective] agreement . . . or before the term of a new agreement which . . . was retroactive to the end of the prior one" and that is "[outside] the limits and constraints of the Act and N.J.S.A. 34:13A-46." The Association argues that after the parties reached a successor MOA on March 25, 2022, the Board " . . . simply elected to ratify that MOA [on May 16, 2022] and then engage in a back-channel process to effectuate some form of subcontracting that did not occur in the public domain subject to public challenge by the Association" and that "[t]he Board had

every opportunity to enter into a subcontracting agreement prior to ratifying the MOA and putting in place an existing collective negotiations agreement (CNA)." The Association contends that it and " . . . was prepared to challenging outsourcing of transportation publicly . . . but . . . never got the chance . . . because rather than engage in a transparent bidding and approval process subject to public scrutiny, the Board instead ratified the CNA . . . and attempted to subcontract the transportation employees under the proverbial radar." The Association also argues that although "the prior charge and the instant charge relate generally and superficially to subcontracting . . .", they are "predicated on separate and distinct operative and core facts . . . as well as legal theories" such that "preclusion cannot and does not apply"; that the prior charge alleged "that the subcontracting of the transportation employees was in retaliation for the filing of [that] charge in violation of Section 5.4a(1) and (3) of the Act" whereas the instant charge alleges that the Board subcontracted after the MOA was ratified on May 16, 2022 ". . . [in] violation of Section 5.4a(7) [of the Act] . . . [specifically] N.J.S.A. 34:13A-46 and PERC regulations promulgated pursuant thereto." Although the Association "acknowledges that N.J.S.A. 34:13A-44 . . . provide[s] that a 'subcontracting agreement' for purposes of N.J.S.A. 34:13A-46 'shall not include any contract entered into

pursuant to the Uniform Shared Services and Consolidation Act", it contends that the Board has "fail[ed] to evidence the actual existence of a qualifying 'Shared-Services Agreement' which would remove the Board's subcontracting of transportation employees from the ambit of the prohibition from subcontracting during the terms of a CNA."

On September 23, 2022, the Board produced a document purporting to be a shared services agreement executed by the Board and SCRTC for the provision of student transportation coordination for the 2022-23 school year. The Board also provided similar agreements with SCRTC (covering a subset of its transportation services) for the 2021-22 school year. On September 29, 2022, the Board filed a supplemental position statement explaining the documents and restating its position.

I find the following facts:

The Board and the Association were parties to a CNA that expired on June 30, 2021.

On November 15, 2021, the Association filed an unfair practice charge (CO-2022-113) alleging that the Board violated the Act by unilaterally implementing a referral bonus program impacting Association members without first consulting and/or negotiating with the Association.

Before the current dispute arose, the Board had procured certain student transportation services through a joint

transportation agreement with the Sussex County Regional Transportation Cooperative ("SCRTC"). During the 2021-22 school year, for example, SCRTC was responsible for providing transportation of students to and from special education schools, athletic events, and field trips. The Board estimates that about 80% of transportation services were outsourced before the 2022-2023 school year.

On January 26, 2022, the Board gave written notice to the Association that it intended to subcontract transportation services. Specifically, the Board's Counsel wrote that the Board:

> ". . . intends to seek bids on or about May 1, 2022 to subcontract transportation services for the school year beginning July 1, 2022. The Board offers the opportunity to meet and consult to discuss the decision to subcontract and to negotiate the impact of the subcontracting. If the Association is desirous of meeting regarding the above, please contact me to schedule a meeting."

Also on January 26, 2022, the Board filed with the Commission a "Notice of Intent to Subcontract" (NSC-2022-001). The notice provided, in part, that "[t]he Board is exploring the outsourcing of its remaining transportation routes based upon financial constraints and anticipated costs savings."

On January 31, 2022, the Association sent an email to the Board seeking a list of potentially impacted positions and evidence of anticipated cost savings regarding the intent to subcontract "[i]n order to appropriately prepare to negotiate the

impact of this decision . . . ." The Board replied to the Association's request on February 8, 2022.

On February 10, 2022, the Association amended its unfair practice charge (CO-2022-113) alleging that the Board engaged in bad faith bargaining by failing to raise its intent to subcontract additional transportation services while the parties were engaged in negotiations. The amended charge also alleges that the Board acted in retaliation for the Association's filing of its November 15, 2021 unfair practice charge.

On March 25, 2022, the Board and the Association negotiated a memorandum of agreement ("MOA") regarding a successor CNA. Provisions of the MOA were to apply retroactively to June 1, 2021.

The Association does not dispute the Board's representation that the withdrawal of the then-pending unfair practice charge (CO-2022-113) was a critical factor in the Board's agreement to sign the MOA. On or about June 2, 2022, the Commission granted the Association's request to withdraw its prior unfair practice charge (CO-2022-113).

On April 18, 2022, the Board passed Resolution 4285R. The Resolution:

> Approves an agreement with Sussex County Regional Cooperative to provide transportation coordination services for transporting special education, public/private school, sports and field trip and other school students during the period of July 1, 2022 through June 30, 2023 for an

administrative fee of 3% of the actual cost paid for transportation.

On May 4, 2022, the Association ratified the MOA.

On May 8, 2022, SCRTC issued bid no. 2022-23-01, which included all District bus routes. Bids were due to be received by the Hopatcong Board of Education[7/] by May 18, 2022.

On May 16, 2022, the Board ratified the MOA.

On May 24, 2022, SCRTC advised the Board that Bel Air Transportation had won the bid for the District's routes.

On June 27, 2022, during a Hopatcong Board of Education meeting, the SCRTC approved Bel Air Transportation's bid for the Board's bus routes.

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. 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

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7/ Per the agreement with SCRTC, ". . . the Hopatcong Board of Education shall provide services under the name of Sussex County Regional Transportation Cooperative." The agreement provides that the Hopatcong Board of Education and SCRTC are "the same legal entity."

issuance standard has not been met and decline to issue a complaint.

ANALYSIS

Under N.J.S.A. 34:13A-46, an employer is prohibited from entering into a "subcontracting agreement" that will affect the employment of represented employees during the term of an existing CNA. When a CNA expires, an employer may only enter into a subcontracting agreement if it provides written notice of at least ninety (90) days to the affected employees and the Commission, and offers to meet and consult with the majority representative and negotiate over the impacts of subcontracting. N.J.S.A. 34:13A-46(a)-(b). Under the statute, ". . . any contract entered into pursuant to the 'Uniform Shared Services and Consolidation Act[8/]'" is not considered a "subcontracting agreement." N.J.S.A. 34:13A-44.

N.J.S.A. 40A:65-4(1) provides, in part, "[a]ny local unit may enter into an agreement with any other local unit or units to provide or receive any service that each local unit participating in the agreement is empowered to provide or receive within its own jurisdiction . . . ." Any such "shared services" agreement must specify the services to be provided, standards for the level, quality, and scope of performance, estimated costs, duration, and procedures for payment. N.J.S.A. 40A:65-7. A local

8/ Codified at N.J.S.A. 40A:65-1 to 65-35.

unit entering into a shared services agreement may do so by passing a resolution. N.J.S.A. 40A:65-5. In crafting the shared services statute, the legislature wrote of its intent ". . . to facilitate and promote shared service agreements, and therefore the grant of power . . . is intended to be as broad as is consistent with the general law." N.J.S.A. 40A:65-13.

The Board's agreement for transportation services is a shared services agreement, and therefore, it is excluded from the definition of a "subcontracting agreement" under N.J.S.A. 34:13A-44. The Board entered into an agreement with the SCRTC, a group of local units sharing student transportation coordination services. The Board passed a resolution on April 18, 2022 approving the agreement with SCRTC for " . . . transporting special education, public/private school, sports and field trip and other school students during the period of July 1, 2022 through June 30, 2023 for an administrative fee of 3% of the actual cost paid for transportation."

Since the agreement with SCRTC is not considered a "subcontracting agreement," the Board is not restrained by N.J.S.A. 34:13A-46, which prohibits subcontracting of certain work during the term of a CNA, and provides the terms under which an employer may subcontract after the expiration of a CNA. Therefore, in this case, it is immaterial whether the Board provided written notice to the affected employees at least ninety

days in advance of the solicitation of bids, or offered the majority representative the chance to meet and discuss and negotiate over impacts.

It is also unnecessary to determine whether an employer's decision to subcontract certain services (outside the term of a CNA) violates N.J.S.A. 34:13A-46 where, after providing initial notice of its intent to subcontract and soliciting bids, but prior to the bids being received, it ratifies a CNA retroactive to the expiration date of the prior agreement. In this case, however, it is undisputed that before signing the MOA on May 16, 2022, the Board provided the Union with notice of its intent to subcontract transportation services for the 2022-23 school year; offered to meet and consult regarding the impact of subcontracting; filed an official notice of intent to subcontract with the Commission; and issued layoff notices to affected employees. Though it was not required to for a shared services agreement, I infer that the Board's conduct reveals an effort to comply with the procedures set forth in N.J.S.A. 34:13A-46.

The Board asserts that the Union's charge is barred based on the entire controversy doctrine and res judicata because the prior unfair practice charge (CO-2022-113) "and claims asserted . . . [therein] arise based upon the same core set of facts" and "was already determined . . . and not cannot be relitigated." I disagree. The current charge alleges that the Board unlawfully

subcontracted work during the term of a CNA in violation of N.J.S.A. 34:13A-52. The earlier charge and amendment (CO-2022-113), filed February 10, 2022, alleged that the Board unlawfully provided bus drivers with referral bonuses, and retaliated against the Union for protected activity by stating that it would subcontract its transportation services. The earlier charge does not (and cannot) allege illegal subcontracting during the term of the CNA, because it is undisputed that, at the time that charge was filed, the parties did not have a current CNA. The two charges, therefore, are not based on the same core set of facts, and the Association's prior charge (CO-2022-113) and subsequent resolution does not bar the current charge.

The charge alleges that the Board's conduct violates Section 5.4a(1) of the Act. In New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978), the Commission articulated the standard for finding a violation of section 5.4a(1) of the Act:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

In Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983), the

Commission explained that the tendency of an employer's conduct to interfere with employee rights is the critical element of a 5.4a(1) charge, holding that "proof of actual interference, restraint, or coercion is not necessary." 8 NJPER at 552.

The charge does not allege how the Employer's conduct interfered with rights protected under the Act. As noted above, the Board procured transportation coordination services through a shared services agreement. Although it is true that a number of unit members ultimately received layoff notices, the legislature provided the Board the right to enter into the shared services agreement under N.J.S.A. 40A:65-4(1), without requiring it to follow the procedures set forth in N.J.S.A. 34:13A-46 (relating to notice and an offer to negotiate impacts of subcontracting). The Board contends that the agreement results in cost savings, which is an explicit intention of the legislature in encouraging the use of shared service agreements. See, N.J.S.A. 40A:65-2 (c) (declaring "[i]t is appropriate for the Legislature to enact a new shared services statute that can be used to effectuate agreements between local units for any service or circumstance intended to reduce property taxes through the reduction of local expenses"); N.J.S.A. 40A:65-13 (stating "[i]t is the intent of the Legislature to facilitate and promote shared service agreements . . . ."). Under these circumstances, I cannot conclude that the Board's conduct violated section

5.4a(1).

The charge also alleges a violation of section 5.4a(3). Public employees have a right to engage in "protected" conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in Bridgewater Tp. V. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. At 246.

The charge alleges that the Board unlawfully subcontracted in violation of state law, but it does not allege that the layoffs were in retaliation for protected conduct under the Act.[9/] No allegation contends that the Board was motivated to enter the shared services agreement based on anti-union animus. In fact, the Board had been utilizing the SCRTC to provide a

9/ The Association's prior unfair practice charge (CO-2022-113), by contrast, alleged that the Board's decision to subcontract transportation services "constitutes retaliation" in violation of the Act. No such allegation appears in the instant charge.

majority of its transportation services prior to the 2022-23 school year. The charge fails to satisfy the complaint issuance standard set forth in Bridgewater to establish a violation of section 5.4a(3). Accordingly, I dismiss that allegation.

The charge further alleges a violation of section 5.4a (7), based on the Association's contention that the Board violated "N.J.S.A. 34:13A-46 and PERC regulations promulgated pursuant thereto." As noted above, I have determined that the Board did not violate section 34:13A-46 because a shared services agreement is not a subcontracting agreement under state law. Although the charge cites to "PERC regulations," it does not identify a specific regulation of the Commission that was allegedly violated. As such, I dismiss the 5.4a(7) violation.

I find that the complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: October 18, 2022
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 October 28, 2022.