

H.E. NO. 2010-12

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

In the Matter of

BUTLER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2010-006

BUTLER PARAPROFESSIONAL ASSN/NJEA,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Board violated 5.4a(5) and derivatively (1) of the Act when the Board changed the level of and eligibility for health benefits after certification of the Association as majority representative of aides. The Hearing Examiner rejected the Board's defense that the decision to change benefits had been discussed with aides and the public and included in the 2009-2010 budget before certification, thus, relieving the Board of any negotiations obligation. She determined that the changes were not a done deal and, in fact, were implemented months after the Association was certified.

The Hearing Examiner recommends that the remaining allegations regarding a unilateral change to procedures for applying for positions in the succeeding school year and direct dealing be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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

In the Matter of

BUTLER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2010-006

BUTLER PARAPROFESSIONAL ASSN/NJEA,

Charging Party.

Appearances:

For the Respondent,
Lindabury, McCormick, Estabrook and Cooper, attorneys
(Jeffrey R. Merlino, of counsel)

For the Charging Party,
Oxford Cohen, attorneys
(Sanford R. Oxford, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 2 and October 16, 2009, the Butler Paraprofessional Association (Charging Party or Association) filed a unfair practice charge and an amended charge against the Butler Board of Education (Respondent or Board) alleging that the Board violated 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} Charging Party

^{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; (3) Discriminating in regard to hire or tenure of employment or any term or
(continued...)

alleges that on or about March 31, 2009, the Association was recognized as the majority representative of all aides, assistants and paraprofessionals employed by the Board (J-1, J-2).^{2/} Thereafter, it is alleged, the Board changed terms and conditions of employment without negotiations, specifically, by reducing the aides' level of health benefits and by changing the procedure for aides to reapply for positions in the subsequent school year.

It is also alleged that the Board negotiated directly with individual employees about the changes to health care coverage. Finally, Charging Party alleges that as of October 6, 2009, the Board has refused to negotiate salaries for unit members. As a remedy, the Association seeks, among other things, an order to reinstate the status quo as of March 31, 2010 both as to the health care coverage and as to the procedures for re-employment.

During the hearing, Charging Party withdrew its 5.4a(3) allegations, namely that these actions were taken in retaliation for organizing the Association (T81-T82).

1/ (...continued)
condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ "J" refers to joint exhibits received into evidence at the hearing. "C", "CP" and "R" refer to Commission, Charging Party's, and Respondent's exhibits respectively.

On January 25, 2010, a Complaint and Notice of Hearing issued (C-1).

On February 1, 2010, Respondent filed its Answer (C-2). It generally denies that it violated the Act. Specifically, the Board rejects the contention that it unilaterally changed the level of health benefits arguing that the Association knew of its intention to make changes to the health benefits policy prior to filing its petition for certification by card check on March 9, 2009. Indeed, the Board included the changes to the health benefits in the 2009-2010 budget before the Association was recognized as the majority representative.

The Board next contends that there was no unilateral change in re-employment procedures because the procedures, including posting of positions and execution of one-year employment contracts, was the same as in previous years. It also asserts there was a legitimate business justification for its actions, namely that ordering paraprofessionals and aides to formally reapply for positions in the next school year was done as a result of its review of staffing needs in accordance with student IEPs. The Board additionally contends that the decision to fill or not to fill positions is a managerial prerogative.

Lastly, the Board refutes the allegation that it has refused to negotiate salary. The Board explains it already included an aggregate salary increase of 4.3% in its 2009-2010 budget before it received the Association's demand to negotiate the parties'

first collective negotiations agreement, and, in response to the Association's salary demands, the Board has proposed that salary adjustments be made prospectively only, not retroactively for 2009-2010. It contends, therefore, that it has negotiated the issue in good faith.

A hearing was conducted on April 7, 2010.^{3/} The parties examined witnesses and presented documentary evidence. After extension requests to file briefs were granted, briefs and replies were filed by June 25, 2010. Based on the record, I make the following:

FINDINGS OF FACT

1. The Butler Board of Education and the Butler Paraprofessional Association are respectively public employer and public employee representative within the meaning of the Act. The parties stipulate that, for purposes of this hearing, the term "aide" and "paraprofessional" are interchangeable (T8, T27).

2. Vickie Walsh is a Uniserv representative employed by the New Jersey Education Association (NJEA) and, among her assignments, she represents the teachers' unit and the custodial unit in the Butler school district as well as the aides represented by the Butler Paraprofessional Association who she organized in 2009 (T25-T26).

3. Superintendent Mario Cardinale has been employed by the Board since October 2008 (T84).

3/ Transcript references to the hearing are "T".

The Organizing Effort

4. In 2007, Walsh was contacted by the Butler aides regarding the potential for organizing. The aides had not previously been organized. This initial foray did not result in an organizing effort (T28).

5. The aides next contacted her office in 2008 to set up a meeting with Walsh to discuss their options and what would be available to them as members of the NJEA (T28). As a result of this request, Walsh met with a few organizers (T66).

6. Then, in January 2009, Walsh met with the potential general membership to explain the card check process - e.g. she specifically explained what authorization cards signified - and to promote the benefits of organizing (T66). There was discussion about rumors regarding changes to levels of health benefits. No action on health benefits had yet been taken by the Board, and Walsh was not given a copy of the Board's policy regarding health benefits (T65-T67). After the meeting, Walsh began collecting authorization cards (T28).

7. At the Board's February 2009 meeting, a power point presentation was given during the tentative budget adoption hearing. Among several recommendations was a recommendation to eliminate all health benefit coverage for instructional aides, but there was resistance to this suggestion. There was then discussion among the Board members about recommending a reduction

in the level of health benefits for full-time aides to single coverage only (T72, T85, T93).

The aides told Walsh about this meeting, but she considered the presentation to be only a suggestion for a potential for reduction, not a done deal (T76).

8. Subsequently, in late February or early March, as a result of the rumors regarding health benefits changes, two aides, Debra Morgese and Mary Harbinsky, requested a meeting with Superintendent Cardinale. He advised them that the budget was going to include a change in their level of health benefits (T69, T90, T92-T93). Cardinale also told Morgese and Harbinsky that student IEPs were being carefully reviewed to determine staffing needs for the 2009-2010 school year (T90, T94).

9. Walsh did not attend the meeting with Harbinsky and Morgese, but she met with Cardinale on March 9, 2009^{4/} to discuss the rumors about the changes to the level of health benefits for the aides and, in particular, about the effect of the changes in regard to several aides - Morgese, Harbinsky and Geraldine Scheeler - who had many years in the pension system and stood to lose their health benefits in retirement if the changes went into effect (T62-T63, T69). To address this issue, Cardinale indicated to Walsh that the Board was prepared to offer single

^{4/} It is unclear from the record whether the two met in person or spoke by telephone on that date. This fact is immaterial since both Walsh and Cardinale agree that they spoke and the content of their conversation.

benefit coverage to the two aides since they were so close to retirement (T93). It is not clear whether an agreement was reached as to the individual aides at this meeting, but Walsh told Cardinale that before any changes to the level of health benefits were made, she wanted an opportunity to meet with the membership and discuss what was best for them, namely the changes to health benefits or layoffs (T63). She also told Cardinale that she was organizing the aides (T92).

10. Also, on March 9, 2009, Cardinale met with the aides at 3:00 p.m. at the Aaron Decker School (R-2; T91). The aides had been informed of the voluntary meeting by memo dated March 4, 2009 (R-2; T91). Walsh did not attend because she only heard about this meeting after the fact (T63-T64). Approximately 25 aides, however, attended. Cardinale considered this to be a good turnout (T91). The difficult financial situation was discussed as well as the likely reduction in health benefits (T91).

Cardinale told them he was concerned about the final budget getting voter approval, in particular because the previous year's budget had been defeated (T92). Cardinale explained to the aides that if the 2009-2010 budget was defeated "all bets were off" and the Board might not even be able to provide a reduced level of benefits. Cardinale also mentioned the student IEP review that was being conducted to determine staffing needs for 2009-2010 (T94).

11. On March 9, 2009, either before or after Walsh spoke with Cardinale, a Petition for Certification by Card Check was filed with the Commission by the Butler Paraprofessional Association, seeking to represent all full-time and part-time aides, assistants and paraprofessionals employed by the Butler Board of Education. The size of the unit was estimated as 37 employees. Although filed on March 9, the petition was signed by Walsh^{5/} and dated March 5, 2009 (J-1).

12. On March 31, 2009, the Director of Representation approved a Stipulation of Appropriate Unit describing the petitioned-for unit as "all regularly employed full and part-time aides, assistants and paraprofessionals". I take administrative notice that a certification was issued and sent to the parties on April 8, 2009 certifying the Association as the majority representative for the aides. On April 13, 2009, Walsh received notification of the Director's approval (J-2; T30). Presumably, the Board also received notification on or about April 13, 2009.

13. As soon as Walsh received J-2, she met with the unit members to discuss what was best for them, namely layoffs or health care coverage and contacted the Board to begin negotiations for a collective agreement and to address the issue of potential changes to the health benefits coverage (T30, T33, T62-T63). Walsh spoke with both the Board attorney and with

^{5/} Walsh signed the petition as Vicki Hendrickson, her maiden name. She was married thereafter and now uses her married name (T9).

Superintendent Cardinale to alert them that before any changes could be made there would have to be negotiations with the Association (T30-T31, T63).

Level of Health Care Coverage and Eligibility for Health Care

14. As of April 8, 2009 when the Association was certified as the majority representative, Board Policy No. 4420 controlled health care benefits available to the aides (CP-1; T114-T115). Policy had been in place since 2004 (CP-1). The policy set out a two-tiered system of coverage for those hired before or after July 2005.

Specifically, full-time employees, defined as those working 25 hours or more, hired before 2005 were eligible for family coverage including medical, dental and prescription. There was a \$2,000, \$600 and \$180 opt-out provision for medical, prescription and dental coverage, respectively.

If hired after 2005, full-time employees, defined as those working 30 hours or more per week, were also entitled to family coverage with the same opt-out provision. Part-time employees, defined as those working less than full-time employees - e.g. less than 30 hours but more than 25 hours per week, who were "increased to 30 hours as of July 1, 2005", were eligible for single-only coverage with the same opt out payment provision (CP-1).

Policy 4420 was revised in May 2008 to add the following language:

This policy will be re-evaluated annually by January 31 to determine the level of health benefits to be provided to aides in the following school year. [CP-1]

Under Board Policy 4420 (CP-1), during the 2008-2009 school year, 13 aides received health care benefits. Of the 13, 9 aides were full-time hired before 2005 and received family coverage. Four aides hired after 2005 received single-only coverage (T34-T35).

15. Sometime at the end of March 2009, there was a second power point presentation at the Board's public meeting to approve the final 2009-2010 budget for submission to the County Superintendent (R-1; T87, T94). The presentation noted the elimination of all non-instructional aides - e.g. loss of 4 part-time positions. These were not positions covered by the Association's unit (R-1; T108). This final budget presentation also included a reduction in the level of benefits for non-unit staff. Cardinale explained in the power point that the Board was reducing, not eliminating, health benefits for instructional aides (T86). It is unclear from R-1 which simply has a heading "Reduction in level of benefits to non-unit staff" and Cardinale's testimony as to the details of what was explained to the Board and public about the reduction in health benefits. Nevertheless, I find that there was public discussion at the March Board meeting about changes in health benefits for instructional aides, changes that were eventually approved to take effect July 1 for the 2009-2010 school year.

16. The 2009-2010 budget, including the reduction in health benefits for aides - e.g. the elimination of the two-tiered system and providing single-level health benefits coverage for full-time aides with no coverage for part-time aides as well as changes to the opt-out provision - was presented to the voters in April 2009 (the exact date is not in the record) and was defeated by 14 votes (T95-T96).

The budget was then submitted to the Borough Council for review. The Council reduced administrative costs in the budget by \$50,000, but left the reduced level of health coverage for aides in the budget. These changes were reflected by revisions to Board Policy 4420 proposed in May 2009 (CP-7, CP-8; T87). The change in health benefits took effect July 1, 2009 (CP-3a,b,c).

Application for 2009-2010 Posted Positions Issue

17. On April 29, 2009, Cardinale sent a memo to the aides outlining the process for posting positions and making appointments for the 2009-2010 school year (R-3; T97). He explained that an administrative review of all aide positions was necessary to meet student needs in 2009-2010 and that recommendations would be made to the Board at its June 1, 2009 meeting for both full-time and part-time aide positions (R-3).

18. On June 4, 2009, Cardinale posted vacant full-time and part-time support staff positions for the 2009-2010 school year at Butler High School and Aaron Decker School (CP-2). He invited

any qualified staff who were interested to apply in writing for the positions no later than June 12, 2009 (CP-2).

The posting listed four full-time aide positions, namely two 30-hour aide positions at Butler High School and two 30-hour aide positions at Aaron Decker School. All four full-time positions had "single level employee only benefit coverage" for the 2009-2010 school year (CP-2).

There were 20 part-time aide positions listed: 5 aide positions at Butler High School and 15 aide positions at Aaron Decker. The part-time positions had no health benefits for the 2009-2010 school year (CP-2).

19. Following the posting, Cardinale received applications for the posted positions (T98). Aides signed individual acceptances of their positions for the succeeding school year just as they had done in previous years (R-4). For example, the acceptance signed by Susan Capo stated:

I hereby accept appointment for the 2009-2010 school year at the salary stated herein.

POSITION: District Aide 5.50 hrs./day 5 days per week (Aaron Decker School)

Salary: \$11.50 per hour

To be paid in 20 equal installments based on 174 days + 1 adjustment payment for time worked over 174 days.

Per Board Policy, termination of contract requires 30 days notice. [R-4]

Capo's form was identical to the forms signed by the other aides in 2009 (R-4). The forms were all executed between mid-July and end of August 2009. Unlike the June 4 posting for the positions which contained the new level of health benefits, none of these individual forms set out the changed level of health benefits (R-4; T107).

Eventually, the appointments were approved by the Board (T98-T99).

20. To Cardinale's knowledge the appointment process was the same as in previous years, namely positions were posted depending on the IEP needs of individual students which change from year to year. The posted positions were then accepted, or not, by the aides who signed individual employment contracts setting out the position, the hours per day and hourly rate together with Step placement^{6/} as well as any degree or certification requirements (R-4; T99). There was no automatic renewal of positions.

The employment contract or acceptance forms for the 2008-2009 and 2009-2010 school years were provided by the Board during the hearing (R-4). The forms for the two school years are identical.

21. According to Walsh, when she questioned the aides about the June 4 posting, they told her that this was the first time

^{6/} Even before the aides were organized, there was a salary guide used to place the aides on appropriate steps (T104).

they had to apply for a position after their initial hire, because they were automatically renewed. None of the aides testified. This testimony is hearsay. Walsh has no personal knowledge to support that the aides were automatically renewed from year to year. Therefore, based on the forms (R-4) and Cardinale's testimony, I find that there was no automatic renewal and that the procedure for filling posted positions was the same in 2009-2010 as in 2008-2009.

22. Nevertheless, when Walsh saw Cardinale's June 4 posting of positions for the 2009-2010 school year, she realized for the first time that full-time employees regardless of when they were hired - e.g. before or after 2005 - were entitled to single-only health care coverage (no family coverage) and part-time employees working less than 30 hours but more than 25 hours were entitled to no benefits (CP-2; T37-T38). The Association had not agreed to these changes in health coverage nor had the changes announced in the June 4 posting been negotiated (T39).

23. By letter dated July 1, 2009, Board Business Administrator Debra Naley-Minenna notified three aides - Association Officers Geraldine Scheeler and Debra Morgese as well as Association member Catherine Cummings - of changes to their health care coverage (CP-3a, CP-3b, CP-3c). Scheeler and Morgese were notified that coverage for their spouses ended as of June 30, 2009 (CP-3a and CP-3b). Cummings was notified that her single-only coverage was terminated as of June 30, 2009 and that

the Board would no longer pay for her health coverage as of July 1, 2009 (CP-3c).

The Association had agreed to none of these changes to health benefits announced by the July 1 letters and to be effective as of that date (T43, T116). In fact, there had been no negotiations sessions scheduled before July 1, 2009, the effective date of the changes (T44). On July 2, 2009, the Association filed the unfair practice charge which is the subject of this hearing (C-1).

24. After the initial charge was filed, the parties attempted to meet to resolve the charge, but, according to Walsh, the Board informed her that the changes to the health benefits would remain (T44). Also, the aides received a salary increase as of July 1, 2009 that had not been negotiated with the Association (T44). The Association has not alleged that this unilateral change in the aides' salaries for the 2009-2010 school year violated the Act.

The Negotiations

25. The parties met formally for the first negotiation session on October 6, 2009 (CP-4; T45). Walsh prepared CP-4 titled "Butler Paraprofessionals Association - Negotiations Proposal" in anticipation of the meeting. The document states:

It is the understanding of the parties that this meeting is in response to the Unfair Labor Practice charge filed on behalf of the members of the Butler Paraprofessionals Association regarding the discontinuance of health benefits without written notification.

It is further understood that this meeting will not be considered a "formal" negotiations for the purposes of establishing a first collective bargaining agreement.

The parties agree to meet at a future date to begin the process of establishing the terms and conditions of employment for the newly established Association.

Health benefits

- 1) All full-time paraprofessionals are returned to full family coverage for health, dental and prescription.
- 2) All part-time paraprofessionals are returned to single coverage for health, dental and prescription.
- 3) Reimbursement is made for any out of pocket expenses incurred during the months of July, August, September and October 2009 for impacted individuals who lost their health care. Including out of pocket expenses for health, dental and prescription.
- 4) Board obtains legal opinion from the IRS regarding COBRA stimulus coverage. Requested on September 3, 2009. [CP-4]

According to Walsh, the Board responded to CP-4 that they were going to maintain the status quo represented by the changes it had already made to health care effective July 1, 2009. Cardinale denies refusing to negotiate over the change to health care coverage. I do not know whether the Board refused to negotiate health benefits prospectively, but I find that the Board's first negotiations proposal contained the changes it had already made to the aides' health care coverage in the 2009-2010 budget, changes that were not negotiated with nor agreed to by

the Association. That was the starting point for the Board's negotiations on this issue (CP-6). [See discussion below]

26. A negotiations session was held on October 20, 2009 at which the parties exchanged their first proposals (CP-5, CP-6; T47, T51). As to health insurance coverage, the Association proposed family coverage for all employees with the Board paying the cost of all premiums (CP-5 at Article XIV).

The Board, however, proposed single-only coverage for medical, dental and prescription for full-time aides defined as those working 30 hours or more per week. An opt-out provision equal to 25% of the single premium cost was available to the first 10% of the employees who elected the option. Employees who were eligible for the single-only benefits as outlined in the Board's proposal would be allowed to purchase coverage for eligible family members who were enrolled in and covered under the Board's benefit programs as of June 1, 2009 (CP-6 at "Insurance", paragraph B and C).

Basically, the language of the Board's proposal^{7/} regarding health insurance coverage mirrored Board Policy 4420 revised May 2009 that Walsh saw for the first time at the October 20 meeting (CP-7; T54, T59).^{8/} Family coverage was no longer offered for

7/ There were a number of Board policies attached to the Board's Proposal including, among others, revised Board Policy 4420 entitled "Benefits" (CP-6, CP-8)

8/ Policy 4420 codified changes to health care coverage that were also reflected in the Superintendent's June 4, 2009
(continued...)

full-time employees regardless of hire date; no health benefit was offered to part-time employees, defined for the first time as employees working less than full-time hours (30 hours), and the opt-out option was changed (CP-2, CP-7). The Association had not previously negotiated nor agreed to the changes implemented by Board Policy 4420 as revised May 2009 (T58).

27. At the October 20 session, there was discussion of both the Association's (CP-5) and the Board's (CP-6) proposals but no agreement was reached (T48).^{2/} The Association specifically did not agree to the Board's proposal regarding health insurance coverage (T51-T52).

28. Also, at either the October 6 or 20, 2009 negotiations session, the Board provided the Association with a scattergram placing the aides on a salary guide and listing their hourly rates of pay (T73). In the 2009-2010 budget, the Board had included an average salary increase for aides of 4.307% that was paid as of July 1, 2009 the beginning of the fiscal year (T73-T74).^{10/} The Board, therefore, proposed that for the first

8/ (...continued)
memorandum posting positions for the 2009-2010 school year together with the health benefits for each position (CP-2; T54-T55).

9/ CP-4, the document presented at the October 6 meeting, was also discussed again but not resolved at the October 20 meeting (T47-T50).

10/ On cross examination, Cardinale was asked to review R-4 and, in particular, the 2008-2009 and 2009-2010 employment contracts for Aide Donna Burke. R-4 reflects that Burke's hours per week were reduced from 30 hours in 2008 to less

(continued...)

year of the parties' collective negotiations agreement there would be no further increase for 2009-2010 over the 4.307% already allocated and paid to the aides (T74, T101).

Walsh considered the Board's salary proposal for 2009-2010 - e.g. no increase - to be a refusal to negotiate (T44). The Association, therefore, amended its charge to include an allegation of refusal to negotiate the salary issue (C-1; T44-T45).

29. There were two more negotiations sessions in November 2009 but no agreement was reached between the parties who agreed not to meet pending the outcome of the hearing on the unfair practice charge (C-1; T60-T61).

ANALYSIS

The Association alleges that the Board violated 5.4a(1) and (5) of the Act by (1) unilaterally changing terms and conditions of employment without negotiations, namely by reducing the level of health benefits and requiring aides to reapply for positions in the 2009-2010 school year; (2) dealing directly with aides as to health benefits; and (3) refusing to negotiate over salary for the 2009-2010 school year. The evidence supports that the Board violated 5.4a(5) and, derivatively, a(1) of the Act when it

10/ (...continued)
than 30 hours in 2009. Also, her salary increase for 2009 was 2% not 4.3%, but Cardinale did not know whether the increase projected by the Board was inclusive or exclusive of increments (T104). Burke apparently received less than the 4.307% average increase projected in the Board's 2009-2010 budget.

reduced the level of health benefits for aides without negotiations. However, I recommend that the Complaint be dismissed as to the remaining allegations.

Unilateral Changes to Employment Terms and Conditions

The Association asserts that on or about March 31, 2009 when the Director approved the parties' Stipulation of Appropriate Unit and certainly by the time it was certified as the majority representative on April 8, 2009, aides were entitled to the level of health benefits under a two-tiered system set out in Board Policy 4420 (CP-1). The Association asserts that the Board unilaterally changed the level of and eligibility for health benefits for Association members effective July 1, 2009 and included those changes in the 2009-2010 budget. Specifically, family coverage was eliminated for full-time employees regardless of hire date and replaced with single-only coverage. No health benefits were offered to part-time employees. The opt-out provision was also altered. The parties do not dispute that these changes were made unilaterally by the Board.

The Board contends, however, that it had no negotiations obligation because at the time the Association was certified as the majority representative of the aides, the status quo as to their reduced level of health benefits was already in place and included in the 2009-2010 proposed school budget. In any event, it argues, Board Policy 4420 which was subject to re-evaluation annually by January 31 to determine the level of health benefits

to be provided to aides in the following year, permitted the Board to make changes to health benefits for 2009-2010 as long as it was made by January 31, 2009. The Board also contends that the Association knew when it was certified what changes were proposed to the level of health benefits and, nevertheless, allowed aides to accept positions for the 2009-2010 school year and sign individual employment agreements reflecting the change in the level of benefits, but never demanded negotiations and waited until the effective date of the changes (July 1, 2009) to file this charge. For the following reasons, I reject these arguments.

N.J.S.A. 34:13A-5.3 gives public employees, among other rights, the right to chose (or refuse to choose) an employee representative to represent them exclusively for purposes of collective negotiations concerning their terms and conditions of employment. This fundamental right lies at the heart of the Act. When this right is exercised and employees select a majority representative, the certification of that representative prevents unilateral action in the creation of and/or changes to terms and conditions of employment. Camden Housing Authority, P.E.R.C. 88-5, 13 NJPER 639 (¶18239 1987); Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 115 LRRM 2571 (1984).^{11/}

^{11/} In interpreting the Act, the New Jersey Supreme Court has suggested that experience and adjudications under the National Labor Relations Act, 29 USCA 151 et seq., should serve as a guide. Lullo v. Int'l Assn. of Firefighters, 55 (continued...)

In Galloway Tp. Bd. of Ed. v. Galloway Tp. Educ. Ass'n, 78 N.J. 25, 48-49 (1978), the New Jersey Supreme Court rejected unilateral imposition of working conditions as the antitheses of the Legislature's desire that terms and conditions of employment be negotiated bilaterally. Although Galloway contemplated the alteration of a term and condition established by statute, not present in this instance, the labor principals enunciated therein have been cited extensively and followed in Commission decisions. See generally, Hudson Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp. 2d 62 (¶44 App. Div. 1979) (alteration of status quo prohibited whether term and condition established by collective agreement or some other source).

Once employees have chosen to be represented another principle comes into play. 5.3 also 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, collective negotiations must be conducted with the majority representative before the establishment of new or different employment terms and conditions.

Where a newly organized unit is certified, the starting point for negotiations is the status quo in existence at the time

11/ (...continued)
N.J. 409, 424 (1970).

of certification as majority representative. County of Essex, H.E. No. 88-35, 14 NJPER 113, 115-116 (¶19043 1988) aff'd P.E.R.C. 88-5, 14 NJPER 403 (¶119159 1988). See also, Camden Housing Auth., supra. The Association was certified on April 8, 2009. Thus, after April 8, 2009 certainly, if not before - e.g. at the time the card check petition was filed, the Board was obligated to maintain the status quo as to terms and conditions of employment in existence at that time until the parties negotiated any alteration to the status quo.

On April 8, the level of health benefits that the aides were entitled to receive, and were receiving, was defined by Board Policy 4420 (CP-1). That policy provided that full-time aides hired before 2005, defined as those working 25 hours or more, were eligible for family health care coverage including medical, dental and prescription with a paid opt-out provision. Full-time employees hired after 2005, defined as those working 30 hours or more per week, were also entitled to family coverage with the same opt-out provision. Part-time employees, defined as those working less than full-time employees - e.g. less than 30 hours but more than 25 hours per week, who were "increased to 30 hours as of July 1, 2005", were eligible for single-only coverage with the same opt-out payment provision as full-time employees. This was the status quo.

The Board disagrees and contends that its decision to change health care benefits for aides was made and included in the

proposed 2009-2010 budget well before the Association was certified. It argues that Superintendent Cardinale and the Board discussed this possibility in the fall of 2008 when formulating the 2009-2010 budget, and the changes were included in the proposed final budget presentation at the March Board meeting. In other words, its decision to reduce the level of health benefits for aides, it contends, was final and set the status quo that was binding on the parties at the time the Association was certified. This argument is without merit.

Although the Board's proposed budget as well as the final budget telegraphed the Board's intent to reduce the level of health benefits for the aides, as of April 8, the Board's decision to change health benefits for aides was a proposal, not a done deal, and was subject to approval by the voters and possibly review by the Borough Council. Indeed, the voters defeated the proposed budget in April 2009. The budget was then sent to the Borough Council for review and revision. The Board then revised Policy 4420 in May 2009 to reflect the changes it wanted to make to the aides' health benefits effective July 1, 2009. The timing of these events, weeks after the filing of the card check petition on March 9 and the April 8 certification of the Association as majority representative, does not support the Board's argument that its proposed changes to health benefits was the status quo. See generally, Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998) (Library not merely

carrying out a decision already made when it eliminated holiday pay during pendency of representation proceeding; decision was subject to approval of trustees).

County of Essex, supra, cited by the Board, is inapposite. There, the Commission found no violation attached to the County's unilateral action in changing its payroll hold-back system shortly before certification of a majority representative. Unlike here, the County's decision to change the payroll system to conform to law was made well before the representation petition was filed, there had been good faith negotiations with the County's established unions, and the new system was implemented two weeks before the election certifying the Charging Party as majority representative.

Here, Superintendent Cardinale knew the aides were organizing after his March 9 meeting with the Association's representative, Vickie Walsh. Walsh met with him, specifically, to discuss the rumored changes in health benefits and told Cardinale she wanted notice before any changes were implemented so that she could speak to the aides about the ramifications relative to changes to their health care versus possible layoffs. Walsh filed authorization cards seeking to represent the aides that same day with the Director of Representation. Although the Board had effective notice as of March 9 that the aides were seeking to organize and that collective negotiations might be required before any changes to their health care coverage were

unilaterally implemented, Walsh was never contacted to negotiate the issue.

In Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981), the Commission considered what is appropriate behavior once an employer has knowledge of a pending question concerning representation of its employees. It determined that an employer violates the act if it negotiates with an incumbent union during this period before the Commission resolves the representation issue. The employer must remain neutral. This holding was reaffirmed in Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 458 (¶14196 1983) wherein the Commission held that an employer may not seek to influence the election process through a negotiations strategy that includes negotiations with an incumbent during representation proceedings. The tenets of Middlesex and Bergen Cty. have been extended to other types of unilateral actions taken by employers during the pendency of the representational process. See also, Camden Housing Auth., supra, (adoption of resolution delaying payment of employees' annual salary increments one day prior to certification changed status quo pending initial negotiations and violated the Act). Thus, once the card check petition was filed on March 9 and the question concerning representation of the aides' was raised, the Board acted at its peril in making unilateral changes to health care thereafter.

Next, the Board argues that Policy 4420, in existence when the Association was certified, states that the level of health benefits would be re-evaluated annually by January 31.

Basically, the Board asserts that the status quo was the right of the Board to change benefits at any time. This argument must also be rejected. While the Board was under no negotiations obligation when the aides were unorganized, the March 31, 2009 certification of the Association as majority representative created a negotiations relationship that prevented the Board from unilaterally changing mandatorily negotiable terms and conditions of employment, such as the level of health benefits and eligibility for those benefits.^{12/} The policy permitting re-evaluation annually did not give the Board license to ignore the certification. County of Essex.

The Board also contends that since the Association and/or the individual aides knew well before July 1, 2009 of the Board's intent to reduce the level of health benefits, the Association had a duty to demand negotiations. The Board couches this argument under the equitable doctrine of laches, suggesting that failing to demand negotiations and remaining silent while the aides signed acceptances of positions for the 2009-2010 school

^{12/} Both the level of health benefits and who is eligible to receive health benefits are mandatorily negotiable subjects under the Act absent a preemptive statute or regulation. Rockaway Boro. Bd. of Ed., P.E.R.C. No. 2010-9, 35 NJPER 293 (¶102 2009); Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005).

year that contained the new level of benefits somehow bars the Association's claim. I disagree.

5.3 requires negotiations **before** establishment of new rules or modifications of existing rules. To accept the Board's argument in this regard would turn the Act on its head. The Association accurately cites County of Essex, supra, in support of this proposition. There, the Hearing Examiner found, and the Commission affirmed, that the County violated the Act when it discontinued an established practice of paying supplemental compensation and compensatory time. The County's defense that the practice was established unilaterally before the employees were organized was rejected, since this fact did not diminish the County's obligation to negotiate before changing the practice after the employees were represented by a union.

Here, therefore, the burden was not on the Association to demand negotiations before changes were made to the aides' health benefits, although Walsh did alert both Superintendent Cardinale and the Board's attorney in March of the Board's duty to negotiate. The Board cannot shift the burden to the Association to demand negotiations after the Board acted unilaterally in violation of the Act.

Similarly, the Board's argument that the Association's knowledge of its intention to reduce the aides' health benefits somehow bars this claim must be rejected, because our cases hold that both the announcement as well as the implementation of a

unilateral change can constitute an unfair practice under the Act. Liberty Tp. Bd. of Ed., P.E.R.C. No. 85-37, 10 NJPER 572 (¶15267 1984). See also, Riverside Tp., P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994) (even though Township announced intent to eliminate supplemental payments for injury on duty, union could wait until implementation to file charge.); Palisades Park, I.R. No. 98-24, 24 NJPER 239 (¶29113 1998) (Borough's introduction of ordinance during pendency of interest arbitration telegraphing intent to transfer unit work can constitute violation as well actual implementation of unilateral change.)

Finally, the fact that individual aides signed acceptances of positions for the 2009-2010 school year does not absolve the Board of its duty to collectively negotiate with the Association before changing working conditions. Even if the forms signed by the aides contained the changes to the level of health benefits unilaterally implemented by the Board on July 1, which they did not, their individual acceptances do not bind the Association or diminish the Board's duty to negotiate before acting unilaterally.

In Troy v. Rutgers, 168 N.J. 354, 372 (2001), the New Jersey Supreme Court determined that the Act obligates majority representatives to protect and advance the interests of employees it represents in collective negotiations, while individual employees retain no separate negotiating rights. See also, Mt. Holly Tp. Bd. of Ed. v. Mt. Holly Tp. Education Ass'n, 199 N.J.

319 (2009) (Court reaffirmed rights set out in Troy determining collective agreement controlled where custodian's individual employment contract conflicted with and diminished terms of collective agreement.) These cases support that any agreement signed by the individual aides do not bind the Association or supercede its right to have any changes to the aides' level of health benefits negotiated before being made.

Based on the above, I recommend that the Board violated 5.4a(5) and, derivatively, (1), when, effective July 1, 2009, it unilaterally changed the level of health benefits set out in Board Policy 4420 (CP-1) by, among other things, eliminating the two-tiered system for those hired before and after 2005 that provided family care health coverage for certain full-time aides and single health care coverage for part-time aides represented by the Association.

As to the Association's claim that the Board unilaterally changed the procedures for applying for positions in the 2009-2010 school year, I disagree. Although such procedures are negotiable,^{13/} the evidence does not support that the Board changed procedures for aides when applying for positions in the succeeding school year. The status quo was maintained. I

^{13/} The Board asserts that it has a managerial prerogative to fill positions. I agree, but that is not the issue raised in this charge. The issue before me is whether the procedures to fill positions were changed. Those procedures are negotiable, but I did not find any change to the status quo in this regard.

recommend, therefore, that the Commission dismiss the allegation that the Board unilaterally changed procedures regarding application for re-employment.

Direct Dealing Issue

N.J.S.A. 34:13A-5.3 provides that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. In Lullo v. IAFF, 55 N.J. 409 (1970), the New Jersey Supreme Court upheld exclusive representation as the cornerstone of the Act. The Association asserts that the Board violated 5.4a(1) when Superintendent Cardinale met individually with two aides (Morgese and Harbinsky) to discuss the issue of their health benefits and with the aides generally to announce changes in the level of their health care coverage. This, it contends, was direct dealing in violation of the Act. I disagree.

First, the evidence supports that Cardinale did not seek to negotiate changes in health benefits with either Harbinsky or Morgese at their meeting in late February/early March or with the aides at the March 9 meeting. In the first instance, Harbinsky and Morgese requested the meeting with Cardinale to discuss rumors as to health benefits changes and the impact on them individually. At this point in time, the aides were not represented, and no representation petition had been filed. The

meeting with Harbinsky and Morgese was not prohibited by principals of exclusivity.

As to the voluntary March 9 meeting with the aides called by Cardinale to announce the changes to their health benefits in the 2009-2010 budget, the Association had not yet filed its representation petition. Although the petition was filed that same day, the evidence does not support that Cardinale sought to negotiate with the aides, only that he was announcing decisions that the Board had made relative to health benefits changes and that were included in the 2009-2010 budget presented to the Board for consideration. Since the meeting was advisory only with no exchange of proposals, there was no prohibition attached to this informational exchange. Contrast Upper Pittsgrove Tp. Bd. of Ed., P.E.R.C. No. 90-34, 15 NJPER 621 (¶20259 1989) (Board unlawfully by-passed union dealing directly with individual teachers over choice between coaching intramurals during regular school day without stipend or coaching after school with stipend.)

Based on the foregoing, I recommend that the allegations as to direct dealing be dismissed.

Refusal to Negotiate Salary for 2009-2010

The parties do not dispute that salary is a negotiable term and condition of employment. The Association contends, however, that the Board has refused to negotiate over salary for the 2009-2010 school year. The Board disagrees and argues that it

proposed no additional increase for 2009-2010 and is willing to negotiate increases for subsequent years. Under the totality of the circumstances, I do not find that the Board violated 5.4a(5) of the Act by proposing no salary increase for 2009-2010.

Section 5.3 of the Act requires negotiations over terms and conditions of employment before they are established. The Act, however, requires negotiations, but not agreement. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 338 (1989). In State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976), the Commission created the standard for determining whether a party has refused to negotiate in good faith:

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement . . . [and] . . . is not necessarily a failure to negotiate in good faith. Id. at 40.

In determining whether good faith negotiations have occurred, the standard for review is the totality of the parties' conduct. The object is to determine the intent of the respondent - e.g. whether the respondent had an open mind at the negotiations table and a sincere desire to reach an agreement or whether the respondent was just going through the motions. State, supra.

Here, the first negotiations session took place in October 2009. There is no allegation that the Board stalled the negotiations process. The Board proposed that for the first year

of the parties collective agreement (2009-2010), there would be no salary increase. The Board's position was premised on the fact that, effective July 1, 2009, the aides were given, albeit unilaterally, an average salary increase for 2009-2010 of 4.307%. The Board's position as to succeeding years, however, was presumably open for negotiation. While the parties have a negotiations obligation running from the April 8 certification that includes the 2009-2010 school year, notwithstanding the fact that the Board already granted a unilateral increase for that year, the Board has not refused to negotiate a salary for 2009-2010. Rather the Board offered a zero percent additional increase.

The evidence does not support nor does the Association allege that the Board refused to negotiate salary increases in succeeding years of the agreement. Within the context of the increase that the Board had already budgeted and paid to the aides, its proposal of what amounted to a zero percent increase for 2009-2010 is no more than hard bargaining and does not under the totality of the circumstances constitute bad faith negotiations.

Based on the foregoing, I recommend that 5.4a(5) violation regarding the allegation of refusal to negotiate salary in 2009-2010 be dismissed.

CONCLUSIONS OF LAW

The Butler Board of Education did not violate 5.4a(1) and (5) by changing procedures for aides to re-apply for positions in 2009-2010, by meeting with Aides Harbinsky or Morgese at a meeting in late February/early March 2009 to discuss rumors of changes to health coverage or by meeting with aides on March 9, 2009 to announce changes to health care coverage and eligibility for health benefits, and by refusing to offer additional salary increases for aides in the 2009-2010 school year.

The Board violated 5.4a(5) and derivatively (1) of the Act when it unilaterally changed health care coverage and eligibility for aides effective July 1, 2009 without negotiations with the Butler Paraprofessional Association/NJEA.

RECOMMENDED ORDER

I recommend that the Commission dismiss the 5.4a(1) and (5) allegations regarding changes to procedures for aides to re-apply for positions in 2009-2010, meeting with aides over changes to health care coverage and eligibility for health benefits, and refusal to offer additional salary increases for aides in the 2009-2010 school year.

I recommend the Commission ORDER:

A. That the Butler Board of Education cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the

Act, particularly by unilaterally changing aides' health care coverage and eligibility for health benefits effective July 1, 2009 without negotiations with the Butler Paraprofessional Association/NJEA.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally changing aides' health care coverage and eligibility for health benefits effective July 1, 2009 without negotiations with the Butler Paraprofessional Association/NJEA.

B. That the Board take the following action:

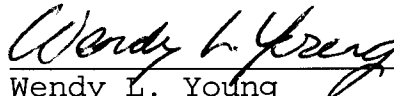
1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive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

2. Restore the aides to the level of health benefits and eligibility for health care coverage set out in Board Policy 4420 (CP-1) and to which they were entitled prior to the changes effective July 1, 2009, except to the extent that recent statutory changes may preempt the issue of contributions to health care coverage.

3. Make whole any aide for any monetary loss attributed to the changes in health care coverage and eligibility for benefits effective July 1, 2009, except to the extent that recent statutory changes may preempt the issue of contributions to health care coverage.

4. Immediately negotiate any proposed changes to the aides' level of health care coverage and eligibility for health benefits.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.


Wendy L. Young
Hearing Examiner

DATED: June 28, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by July 12, 2010.



NOTICE TO 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 employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally changing aides' health care coverage and eligibility for health benefits effective July 1, 2009 without negotiations with the Butler Paraprofessional Association/NJEA.

WE WILL NOT refuse to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by unilaterally changing aides' health care coverage and eligibility for health benefits effective July 1, 2009 without negotiations with the Butler Paraprofessional Association/NJEA.

WE WILL restore the aides to the level of health benefits and eligibility for health care coverage set out in Board Policy 4420 (CP-1) and to which they were entitled prior to the changes effective July 1, 2009, except to the extent that recent statutory changes may preempt the issue of contributions to health care coverage.

WE WILL make whole any aide for any monetary loss attributed to the changes in health care coverage and eligibility for benefits effective July 1, 2009, except to the extent that recent statutory changes may preempt the issue of contributions to health care coverage.

WE WILL immediately negotiate any proposed changes to the aides' level of health care coverage and eligibility for health benefits.

Docket No. CO-2010-006

Butler Board of Education
(Public Employer)

Date: _____

By: _____

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 Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372