

D.U.P. NO. 2024-2

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-2023-115

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 Association alleged the Board violated section 5.4a(5) of the New Jersey Employer-Employee Relations Act by refusing to negotiate the impact of the Board's decision to outsource bus drivers and bus aides. The Director found the Association waived the right to negotiate impact issues when the Association declined the Board's invitation to negotiate this issue during collective negotiations for a successor contract. The Director also found the Board did not have a mid-contract duty to negotiate the impact of the outsourcing decision during the term of the parties' current collective negotiations agreement.

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Appearances:

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

For the Charging Party,  
Zazzali, P.C., attorneys  
(Colin M. Lynch, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On January 13, 2023, the South Orange-Maplewood Education Association (Association) filed an unfair practice charge against the South Orange-Maplewood Board of Education (Board). The charge alleges the Board violated section 5.4a(5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1

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<sup>1/</sup> This provision prohibits public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

et seq., by refusing to negotiate the impact of the Board's decision to "outsource" bus drivers and transportation aides (hereinafter collectively referred to as "Transportation Employees") by entering into a shared services agreement with the Sussex County Regional Transportation Authority (Authority).

Specifically, the Association alleges:

1) During the course of collective negotiations for a successor agreement, the Board, on or about February 3, 2022, issued a "Notice of Intent to Subcontract" Transportation Employees;

(2) That "following execution of a memorandum of agreement and ratification of the same by" the Association and Board on May 4 and 25, 2022, the Association "sought information from the [Board]" about any agreement with a provider of transportation services and was advised "that no such agreement existed", but later learned that a shared services agreement between the Association and Authority was reached for the provision of transportation services;

(3) That on August 3, 2022, the Association submitted to the Board a "demand/proposal" for severance payments to the outsourced Transportation Employees, and that the Board "declined to provide or submit for consideration any counter proposal/offer to the [Association]"

On January 20, 2023, I sent a letter to the Association's counsel advising the charge was "defective" and that absent an amendment to the charge addressing the "deficiencies" outlined in my January 20 letter, I would dismiss the charge. Specifically, I noted in the letter that this charge ". . . relates to another

charge filed by the Association that was dismissed by the former Director of Unfair Practices." See South Orange-Maplewood Bd. of Ed., D.U.P. No. 2023-13, 49 NJPER 223 (¶50 2022) (hereinafter referred to as the "South Orange DUP").<sup>2/</sup> In the letter, I noted that in the South Orange DUP, the "Director noted that the Board offered to negotiate with the Association over the impact of the Board's decision to subcontract or outsource affected unit employees, but the Association declined to do so."

I also explained in the January 20 letter that "in general, when a public employer offers to negotiate a subject and the majority representative declines the offer, that conduct by the Association operates as a waiver of the right to negotiate." I further requested the Association explain, under the facts alleged in this charge, why the Association "did not waive the right to negotiate impact issues arising from the subcontracting/outsourcing decision by the Board." In the letter, I afforded the Association the opportunity to file an amendment to the charge by January 30, 2023. The Association requested and I granted an extension to file an amendment to its charge by February 6, 2023.

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<sup>2/</sup> The Association did **not** appeal this decision. I take administrative notice of the facts set forth in that decision. N.J.A.C. 19:14-6.6(a).

On February 6, 2023, the Association filed an amended charge.<sup>3/</sup> The Association acknowledges the Board "did offer to negotiate the impact of its subcontracting of Transportation Employees" at or around the time it provided notice of its intent to subcontract.<sup>4/</sup> However, the Association asserts it "did not reject or waive negotiations over impact, but rather elected at that time to continue and complete negotiations for a Successor Agreement" and "reserved the right to negotiate impact if and when the subcontracting was effectuated."<sup>5/</sup> In explaining why the Association adopted this negotiations position on severance payments for Transportation Employees, the Association writes:

The negotiation of the impact of subcontracting during negotiations for a larger agreement, necessarily pits unit members against each other wherein, for example, severance payments offered by the Board to Transportation Employees could affect wage rates negotiated in the agreement, and/or vice versa. Moreover, employees are not "subcontracted" until there is a subcontract. As such, SOMEA [Association] intended to respond to the Board's offer to negotiate severance upon conclusion of negotiations for a Successor Agreement. The MOA [Memorandum of Agreement] for a Successor Agreement was ultimately signed by the parties on or about March 25, 2022. The MOA was

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3/ Attached to the charge was a "Rider" written in the form of a position statement. The arguments set forth therein are summarized in this decision.

4/ Rider to Charge, p. 1.

5/ Rider to Charge, p. 1.

ratified by SOMEA [Association] on May 4, 2022 and the Board on May 25, 2022.<sup>6/</sup>

After ratifying the parties' 2021-2024 collective negotiations agreement (Agreement), the Association requested a copy of any subcontracting agreement for transportation employees entered into by the Board.<sup>7/</sup> The Association did not learn from the Board until July 9, 2022, that the Transportation Employees were outsourced not by way of subcontracting, but by a shared services agreement<sup>8/</sup> entered into with the Authority.<sup>9/</sup> After learning this information, the Association, on August 3, 2022, submitted to the Board a proposal for severance compensation for outsourced Transportation Employees. The Board allegedly declined to respond to or otherwise present a counterproposal to the Association's August 3 proposal.<sup>10/</sup>

On February 7, 2023, I sent a letter to counsel for the Association and Board, affording the Board an opportunity to file

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<sup>6/</sup> Rider to Charge, pp. 1-2.

<sup>7/</sup> Rider to Charge, p. 2.

<sup>8/</sup> Rider to Charge, pp. 2-3.

<sup>9/</sup> While the Association characterizes the Board's notice of intent to subcontract Transportation Employees as "misleading" in its amended charge, the practical consequences for Transportation Employees under a "subcontracting" or "shared services agreement" are the same: they lost their jobs. And, as explained *infra*, the Association was put on notice of these consequences as early as January 26, 2022.

<sup>10/</sup> Rider to Charge, p. 3.

a response to the Association's Amended Charge and position statement by February 17, 2023. I also afforded the Association an opportunity to file a reply to the Board's response by February 22, 2023.

On February 17, 2023, the Board filed and served a position statement with exhibits on the Association.<sup>11/</sup> The Board contends that, under the doctrine of *res judicata*, the Association is barred from pursuing this unfair practice charge concerning impact negotiations. Specifically, the Board maintains that the issue of whether the Board has an obligation to negotiate the impact of its outsourcing decision on Transportation Employees was already decided by the former Director in the South Orange DUP.<sup>12/</sup> The Board further argues the Association waived the right to negotiate impact issues such as severance payments by declining the Board's invitation to meet and negotiate impact issues and ratifying the 2021-2024 Agreement without addressing

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<sup>11/</sup> The exhibits included: (1) a copy of the Director of Unfair Practices's decision in South Orange-Maplewood Bd. of Ed., D.U.P. No. 2023-13, 49 NJPER 223 (¶50 2022); (2) a copy of the Association's September 9, 2022 position statement filed in opposition to the Board's position statement in charge CO-2022-259; and (3) postings on the Association's website dated February 22, March 6 and March 10, 2022 expressing the Association's opposition to the Board's outsourcing of transportation employees.

<sup>12/</sup> 2/17/23 Position Statement, pp. 2-3.

severance payments for Transportation Employees.<sup>13/</sup> Finally, the Board argues that under the doctrine of "judicial estoppel", the Association is precluded from litigating this impact issue since it's position on this issue is inconsistent with the position it took on the charge that was dismissed in the South Orange DUP.<sup>14/</sup>

After granting an extension of time to file a response to the Board's February 17 position statement, the Association filed a position statement with exhibits on February 27, 2023.<sup>15/</sup> The Association reiterates that the Board has an obligation to negotiate the impact of its decision to outsource Transportation Employees and that the Association ". . . is not required to negotiate the impact of outsourcing/subcontracting at the time of the Board's choosing."<sup>16/</sup> The Association also asserts that its obligation to negotiate the impact of outsourcing ". . . does not ripen until such time as there is actual outsourcing" and explains:

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<sup>13/</sup> 2/17/23 Position Statement, p. 4.

<sup>14/</sup> 2/17/23 Position Statement, p.4.

<sup>15/</sup> The exhibits included: (1) an email exchange between Board counsel Patrick Carrigg and the Association's NJEA Uniserv Representative Luis Delgado on May 25, 2022; (2) an email from Association counsel Colin Lynch to Mr. Carrigg dated August 3, 2022 proposing a severance payment of \$550,000 to be allocated among 11 bus drivers and 11 transportation aides who were outsourced.

<sup>16/</sup> 2/27/23 Position Statement, p. 2.



SOMEA [Association] is under no obligation to negotiate prior to that point [of actual outsourcing] and [be] forced by the Board to negotiate impact during larger contract negotiations by potentially robbing "Peter" to pay the proverbial "Paul"—that is being forced to sacrifice potential wage increases from part of the unit to pay severance to another. Thus, SOMEA [Association], as per its right, opted to first attempt to prevent the outsourcing altogether through wholly proper means. That is not a waiver of the right to negotiate impact, but rather a deferral of such negotiations until such time as there will be a known impact.<sup>17/</sup>

The Association further maintains that the Board's "Notice of Intent to Subcontract" Transportation Employees was "misleading" because the Board ultimately decided to outsource those employees through a shared services agreement with the Authority. The Association also contends it did not learn of the shared services agreement until after it filed a related charge (docket CO-2022-259) and that "no such waiver [of the right to negotiate impact] can occur when the Board has failed to disclose to SOMEA [Association] its intentions and actions."<sup>18/</sup>

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

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<sup>17/</sup> 2/27/23 Position Statement, p. 2.

<sup>18/</sup> 2/27/23 Position Statement, p.4

standard has not been met, I will 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 Association is the exclusive majority representative of a collective negotiations unit of certificated and non-certificated Board employees. The Association's unit includes, but is not limited to, Transportation Employees. The Board and Association were parties to a collective negotiations agreement that expired on June 30, 2021 (2021 Agreement).<sup>19/</sup>

After the 2021 Agreement expired, the Association and Board engaged in collective negotiations for a successor agreement. During the course of those negotiations, on January 26, 2022, the Board filed a petition with the New Jersey Public Employment Relations Commission (Commission) and served on the Association a "Notice of Intent to Subcontract" (Notice) Transportation Employees.<sup>20/</sup> The Notice provided, in pertinent part, the following information to the Association:

(1) The total approximate number of employees in the Association's unit (730);

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<sup>19/</sup> 49 NJPER at 224

<sup>20/</sup> The Notice was served on the Association's New Jersey Education Association (NJEA) Uniserv Representative, Luis Delgado. The Notice bears Commission docket number NSC-2022-001.

(2) The total approximate number of employees impacted by the Board's outsourcing decision (26);

(3) The job titles impacted by the outsourcing decision (bus drivers and bus aides); and

(4) The "date the employer intends to request bids or solicit contracts" for transportation services (specifically, May 1, 2022).

Under Commission regulations governing Notice filings, an employer seeking to subcontract employees governed by an expired collective negotiations agreement must comply with certain regulatory procedures.<sup>21/</sup> First, the employer seeking to subcontract must provide written notice to the Commission and majority representative of the employees potentially impacted by a subcontracting decision "not less than 90 days before the employer requests bids, or solicits proposals for a subcontracting agreement."<sup>22/</sup> Second, the employer must provide the majority representative whose unit employee(s) are impacted by a subcontracting proposal ". . . 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." Third, the Notice must be filed with the Commission's Director of Conciliation and include, in pertinent part, information about the dates "the employer has met or will

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<sup>21/</sup> N.J.A.C. 19:12-8.1; N.J.A.C. 19:12-8.2.

<sup>22/</sup> N.J.A.C. 19:12-8.1(b) (1).

meet with the affected majority representative to discuss the planned subcontracting”, “dates the employer has negotiated or will negotiate with the affected majority representative over the impact of the planned subcontracting”; and “dates the employer will request bids or solicit contracts for subcontracting.”<sup>23/</sup>

Consistent with these procedures, the Board’s counsel notified the Association in writing of its intent to outsource Transportation Employees.<sup>24/</sup> Specifically, on January 26, 2022, Board counsel wrote to the Association:

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.<sup>25/</sup>

On January 31, 2022, the Association emailed the Board a request for information seeking a “list of potentially impacted positions and evidence of anticipated cost savings regarding the intent in order to appropriately prepare to negotiate the impact

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<sup>23/</sup> N.J.A.C. 19:12-8.2(a). As explained, *infra*, the Board did not provide meeting or negotiations dates on its notice because the Association declined the Board’s invitation to meet and negotiate over the impact of its outsourcing of Transportation Employees.

<sup>24/</sup> 49 NJPER at 224

<sup>25/</sup> Id. (emphasis added)

of this decision" to outsource Transportation Employees.<sup>26/</sup> The Board replied to the information request on February 8, 2022.<sup>27/</sup> No meeting or negotiations session was requested by the Association prior to entering into a Memorandum of Agreement (MOA) with the Board for a successor agreement.<sup>28/</sup>

On or about March 25, 2022, Board and Association representatives signed a MOA subject to ratification by the Association membership and Board.<sup>29/</sup> The MOA, by its terms, was to be applied "retroactively to June 1, 2021", or around the time the 2021 CNA expired.<sup>30/</sup> The MOA's terms provided, in pertinent part, the following provisions:

(1)Salaries shall be retroactive. Per diem, stipends, and hourly rates shall be prospective only. **Members that have left the District for any reason except to retire prior to ratification shall not be entitled to retroactive pay.** [emphasis added];

(2)All issues "not memorialized in writing in a tentative agreement or not set forth herein are withdrawn" and "all other language in the expired" 2021 Agreement "shall remain unchanged.";

(3)The MOA memorialized the following salary increases to existing salary guides

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<sup>26/</sup> Board Position Statement, p. 2. , 49 NJPER at 224

<sup>27/</sup> Id.

<sup>28/</sup> Id.

<sup>29/</sup> Id.

<sup>30/</sup> Id.

(inclusive of cost of increments, but exclusive of longevity and training level/degree salary differentials):

(a) 2021-22 salary guide enhancement of \$579,720 to the 2020-21 salary guide;

(b) \$579,720 applied to the 2021-22 base salary for the 2022-23 contract year;

The MOA did not address severance pay, recall rights or any other impact-related issues affecting outsourced Transportation Employees. A critical factor informing the Board's decision to enter into the MOA was the Association's agreement to withdraw its unfair practice charge (docket no. CO-2022-113) challenging and seeking to enjoin the outsourcing of Transportation Employees.<sup>31/</sup>

On May 4 and 16, 2022, the Association and Board ratified the MOA. The MOA was subsequently reduced to a collective negotiations agreement extending from July 1, 2021 through June 30, 2024 (2024 Agreement).<sup>32/</sup> Consistent with the MOA, the 2024 Agreement provided that its provisions "shall become effective on July 1, 2021 and continue in force until June 30, 2024."

On the subject of salaries, the 2024 Agreement provides under Article XXXIII (C):

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<sup>31/</sup> Id.

<sup>32/</sup> Id. On March 14 and 31, 2023, the Association's Negotiation Chairperson, the Board's President, and the Board's Business Administrator signed the 2024 Agreement.

Salaries shall be retroactive. Per diem, stipends, and hourly rates shall be prospective only. Members that have left the District for any reason except to retire prior to ratification shall not be entitled to retroactive pay.

Under Article III(A) and (C) of the 2024 Agreement, entitled "Negotiation Procedure", the Board and Association agreed to the following, pertinent provisions:

A. The parties agree to enter into collective negotiations for a successor agreement **on or before February 1** [2024] of the year in which the contract expires. [emphasis added].

C. This Agreement shall not be modified in whole or in part by the parties **except by an instrument in writing duly executed by both parties**. [emphasis added].

During the period the Board and Association collectively negotiated and ratified the MOA and 2024 Agreement (February 2022 to May 2022), the Association chose to challenge in the public sphere the Board's outsourcing of Transportation Employees in lieu of negotiating severance pay and/or related impact issues with the Board.<sup>33/</sup> On or about March 10, 2022, the Association

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<sup>33/</sup> Exhibits B and C to Board's Position Statement. The Association acknowledges this on pages 4 and 11 of its September 9, 2022 Position Statement on charge CO-2022-259. See Exhibit B to Board's Position Statement ("It was the intent of the Association to challenge outsourcing publicly when bids were made and offered for approval at a public Board Meeting"; and "it was and remained the Association's position to challenge subcontracting . . ." of Transportation Employees.).

published on its website "Action Dates" concerning the terms and conditions of its unit employees.<sup>34/</sup> Specifically the notice provided the following position and information on outsourcing Transportation Employees:

ACTION DATES:

WEDNESDAY, MARCH 16

**-WE SAY "NO"! TO OUTSOURCING OUR BUS DRIVERS AND OTHER TRANSPORTATION WORKERS.**

- COME TO SUPPORT OUR MEMBERS AND SPEAK OUT AGAINST THE BOARD'S PLAN TO OUTSOURCE OUR TRANSPORTATION PERSONNEL THIS COULD MEAN THE LOSS OF JOBS FOR THOSE 26 SOMEA [ASSOCIATION] MEMBERS. ITS AN ATTEMPT BY THE BOARD TO WEAKEN OUR UNION, WHICH THE BOARD KNOWS IS STRONG!

MONDAY, MARCH 21

**-SETTLE WITH US NOW! WE WANT A FAIR AND EQUITABLE CONTRACT!**

-COME TO MAKE SOME NOISE AT THE BOARD MEETING! SPEAK OUT ABOUT OUR INADEQUATE SALARIES AND WORKING CONDITIONS! CALL OUT THE VARIOUS WAYS WE ARE DISRESPECTED ON THE JOB, INCLUDING THE POOR PROFESSIONAL DEVELOPMENT OFFERED TO US! SETTLE NOW!<sup>35/</sup>

Similar public action notices were posted on the Association's website challenging the Board's outsourcing decision on February 22 and March 6, 2022.<sup>36/</sup>

Following the Board and Association's ratification of the 2024 MOA in May 2022, the Association filed another unfair practice charge against the Board on June 21, 2022 (bearing

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<sup>34/</sup> Exhibit C to Board's Position Statement.

<sup>35/</sup> Exhibit C to Board's Position Statement.

<sup>36/</sup> Exhibit C to Board's Position Statement.



docket number CO-2022-259).<sup>37/</sup> The June 2022 charge alleged the Board violated the Act “when it issued layoff notices to 16 unit members (and subsequently announced its imminent intent to subcontract transportation services)” after the parties signed and ratified the 2024 MOA.<sup>38/</sup> The then Director of Unfair Practices dismissed the charge. South Orange-Maplewood Bd. of Ed., D.U.P. No. 2023-13, 49 NJPER 223 (¶50 2022). In dismissing the charge, the Director noted, in pertinent part:

In this case...it is undisputed that before signing the MOA on May 16, 2022, the Board provided the Union [Association] with notice of its intent to subcontract transportation services for the 2022-23 school year; offered to meet and consult regarding the impact of the subcontracting; filed an official notice of intent to subcontract with the Commission, and issued layoff notices to affected employees.” [49 NJPER at 225-226]

On August 3, 2022, Association counsel emailed Board counsel a “severance settlement proposal” for the outsourced Transportation Employees.<sup>39/</sup> The proposal requested payment totaling \$550,000 in severance payments to be allocated among 11 bus drivers and 11 bus aides. The Board did not respond to the proposal, and this charge ensued.

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<sup>37/</sup> 49 NJPER 224

<sup>38/</sup> Id. The charge alleged this action by the Board violated sections 5.4a(1), (3) and (7) of the Act. The charge does **not** allege a section 5.4a(5) violation.

<sup>39/</sup> Exhibit to Association’s February 27 Position Statement.

**ANALYSIS**

I dismiss the Association's charge for three principal reasons:

(1) The Board did not have a mid-contract duty to negotiate severance pay or other impact-related issues affecting Transportation Employees during the term of the 2024 Agreement;

(2) The Association, by declining the Board's invitation to negotiate severance pay and other impact issues affecting outsourced Transportation Employees as part of collective negotiations for the 2024 Agreement, waived the right to negotiate that subject during the term of the 2024 Agreement, and

(3) Even if the Board had a duty to negotiate these impact issues, continued litigation over whether the Board should have negotiated this subject during the term of the 2024 Agreement does not effectuate the policies of our Act.<sup>40/</sup>

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<sup>40/</sup> The Board also argues the Association is barred from pursuing the instant charge under the doctrine of *res judicata* because the issue of whether the Board had an obligation to negotiate impact issues was decided in the South Orange DUP. I disagree. The instant charge presents a section 5.4a(5) claim which was not alleged in the South Orange DUP. The Director in the South Orange DUP interpreted the shared services statutes to determine whether those statutes imposed an obligation to meet and negotiate with a majority representative over the impact of a shared services agreement. However, the Director in the South Orange DUP did not have occasion to consider whether, under section 5.4a(5), the Board had an obligation to negotiate impact-related issues. That is the central issue in this case. For similar reasons, I also reject the Board's "judicial estoppel" argument.

For these principal reasons, the unfair practice charge is dismissed.

**Waiver and The Duty to Negotiate Mid-Contract**

In New Jersey Turnpike Authority, P.E.R.C. No. 99-49, 25 NJPER 29 (¶30011 1998), the Commission delineated the standards for determining whether an employer has a duty to negotiate, mid-contract, a mandatorily negotiable term and condition of employment. In doing so, the Commission also outlined the principles governing when a majority representative has *waived* the right to negotiate a term and condition of employment during the term of a collective negotiations agreement. New Jersey Turnpike Authority, 25 NJPER at 31; see also Rahway Valley Sewerage Authority, P.E.R.C. No. 99-79, 25 NJPER 134 (¶30060 1999); Livingston Tp.., D.U.P. No. 2015-9, 41 NJPER 289 (¶96 2014). As the Commission explained in New Jersey Turnpike Authority:

When collective negotiations agreements are reached, they must be reduced to writing. N.J.S.A. 34:13A-5.3. These written agreements set terms and conditions of employment for the life of the contract, unless the parties agree to change them. However, there is a duty to negotiate mid-contract as to subjects which were neither discussed in successor contract negotiations nor embodied in contract terms. Under federal law, a party may waive its right to negotiate mid-contract about a subject where, among other circumstances, it was fully discussed and consciously explored in contract negotiations but was not addressed in the resulting contract. A party may also waive its statutory right to negotiate over a subject through contract language; where such a waiver is claimed, the

test applied has been whether the waiver is in "clear and unmistakable language."

[25 NJPER at 31; internal case citations omitted]

The Commission has also recognized a majority representative's waiver of the right to negotiate when that representative declines an opportunity to negotiate after being apprised that the employer intends to change existing, or implement new, terms and conditions of employment. Rahway Valley, 25 NJPER at 137; State of New Jersey, P.E.R.C. No. 89-129, 15 NJPER 343 (¶20152 1989); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987).<sup>41/</sup> "When an employer notifies

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<sup>41/</sup> We have consistently dismissed refusal to negotiate mid-contract claims where a majority representative was aware of a change and/or establishment of a new term and condition of employment and decided not to negotiate that term/condition of employment as part of collective negotiations (and did not preserve the right to negotiate the issue mid-term after ratification of a collective negotiations agreement). Mercer Cty. Bd. of Social Services, P.E.R.C. No. 92-122, 18 NJPER 356 (¶23153 1992) (Commission dismisses charge alleging refusal to negotiate mid-contract compensation for increased workload during term of a collective agreement, noting that any such claim "...must be raised during successor contract negotiations"); Borough of Upper Saddle River, D.U.P. No. 99-9, 25 NJPER 80 (¶30032 1999) (Director dismisses a refusal to negotiate mid-contract claim over an alternative work schedule); Monmouth Cty., D.U.P. No. 2000-18, 26 NJPER 328 (¶31132 2000) (Director dismisses refusal to negotiate mid-contract claim over drug testing procedures); Middletown Tp. Bd. of Ed., H.E. No. 2003-17, 29 NJPER 202 (¶60 2003) (final agency decision) (Dismissal of refusal to negotiate mid-contract claim over peer mediation stipend); Upper Saddle River Bd. of Ed., D.U.P. No. 2004-7, 30 NJPER 263 (¶91 2004) (Director dismissed refusal to negotiate mid-contract claim

(continued...)

a majority representative of a proposed change in working conditions, the majority representative has an obligation to request negotiations with the employer over the proposed change.” Livingston Tp., 41 NJPER at 290-91; Monroe Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). That principle applies with equal force to demands to negotiate severance pay or other impact-related issues arising from a subcontracting or outsourcing decision. Monroe Bd. of Ed., 10 NJPER at 570.

Here, the Board fulfilled its duty to negotiate in good faith over severance payments and/or other impact issues arising from the Board’s outsourcing of Transportation Employees when it offered to negotiate the same with the Association as early as January 26, 2022 (approximately five months before the parties ratified their 2024 Agreement). The Association acknowledges it declined the offer to negotiate this subject as part of collective negotiations for the 2024 Agreement. In doing so, the Association waived the right to negotiate this subject during the term of the 2024 Agreement. New Jersey Turnpike Authority; Livingston Tp., Rahway Sewerage Authority.

In its approach to collective negotiations and related unfair practice charges, the Association also waived the right to negotiate impact issues during the term of the 2024 Agreement.

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41/ (...continued)  
over change in sick/FMLA leave).

In lieu of engaging in collective negotiations over severance payments, recall rights, and other negotiable impact issues arising from the outsourcing of Transportation Employees, the Association elected instead to challenge and enjoin the Board from outsourcing Transportation Employee both at PERC and in a public forum (i.e., at a Board meeting open to the general public) by actively campaigning against the outsourcing decision in March of 2022.

It is also undisputed the Association withdrew multiple unfair practice charges concerning the outsourcing of Transportation Employees and that these withdrawals were a critical factor in the Board's decision to ratify the 2024 MOA. Moreover, the Association ratified a 2024 MOA and Agreement with provisions that support a finding of waiver here, including but not limited to:

(1) Article III of the 2024 Agreement, which provides that the 2024 Agreement cannot be modified in whole or in part absent "an instrument in writing duly executed by both parties";

(2) Acknowledgment in the 2024 MOA that "all issues not memorialized in writing in a tentative agreement or not set forth herein are withdrawn"<sup>42/</sup>

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<sup>42/</sup> Contrary to the Association's assertion that it "preserved" the right to negotiate severance payments during the term of the 2024 Agreement, there is no contract language in the 2024 Agreement or MOA referencing severance payments and their negotiation during the term of the Agreement.

(3) Express agreement in the MOA and 2024 agreement as to retroactive salary and prospective forms of compensation (such as per diems, stipends, and hourly rates of pay) on the condition that "members that have left the district for any reason except to retire prior to ratification shall not be entitled to retroactive pay."

This last provision is particularly pertinent, since it would address whether employees who left due to outsourcing were entitled to retroactive or severance pay. In other words, the parties could have agreed to address that issue, but chose not to in the 2024 Agreement. That is a waiver for the term of the 2024 Agreement.

The Association nonetheless maintains it has the right to request negotiations whenever it chooses and cannot be compelled by the Board to negotiate the subject as part of collective negotiations. True enough. But the same is true of the Board. The Board cannot be compelled to negotiate a subject during the term of the 2024 Agreement, and may take the position that the issue of severance payments should be considered as part of a global contract settlement for all Association unit employees. And collective negotiations for the Association's unit must be conducted within a legal framework governing the Board's budgetary limitations and in recognition of the practical limitation all budgets present: i.e., a finite amount of funds available to the Board for appropriation of salaries and other contract benefits to unit employees.

Under New Jersey education laws<sup>43/</sup> and Commission regulations, school boards are obligated to negotiate salary and other benefits within the context of strict budgetary deadlines and limitations. Boards of Education (along with other public employers) must commence collective negotiations with a majority representative "no later than 120 days prior to the public employer's required budget submission date." N.J.A.C. 19:12-2.1(a). Boards of Education are also required to provide a wide range of budgetary information within strict time frames concerning their employees' terms and conditions of employment. N.J.S.A. 18A:7F-5; N.J.A.C. 6A:23A-8.1. This information must be provided to a Board of Education's Executive County Superintendent, the New Jersey Commissioner of Education, and the general public. Id. The budgetary information includes, but is not limited to, data on appropriations, salaries and benefits of active and retired employees, and information about shared services agreements. Id. Within this budgetary framework, the Board may, consistent with the Act, negotiate severance payments as part of collective negotiations for salaries and benefits of other unit employees.

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<sup>43/</sup> Specifically, title 6A, Chapter 23 of the New Jersey Administrative Code, entitled "Fiscal Accountability, Efficiency and Budgeting Procedures", lays out in detail the budgetary procedures, deadlines and requirements all school boards must comply with.



The Association, however, objects to having to negotiate severance payments for Transportation Employees within the broader framework of collective negotiations of salaries and benefits for all other unit employees. It contends that negotiations of severance payments and other impact issues for Transportation Employees during collective negotiations "necessarily pits unit members against each other" since "severance payments offered by the Board to Transportation Employees could affect wage rates negotiated in the agreement."<sup>44/</sup> Moreover, according to the Association, negotiating impact issues "during larger contract negotiations" can potentially lead to "robbing Peter to pay the proverbial 'Paul'"—that is being forced to sacrifice potential wage increases from a part of the unit to pay severance to another."<sup>45/</sup>

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<sup>44/</sup> Rider to Charge, pp. 1-2. The Association also argues that negotiations over severance payments and other impact issues affecting outsourced or subcontracted unit employees should commence *after* those employees are actually subcontracted and not a moment sooner. But this position conflicts with the legislatively expressed policy and Commission regulations on subcontracting and outsourcing, which plainly directs an employer to meet and negotiate impact issues with a majority representative *prior to* and *in anticipation of* the implementation of an outsourcing and/or subcontracting decision. N.J.S.A. 34:13A-46(a) (An employer must commence negotiations and/or discussion of subcontracting and/or impact issues "**not less than 90 days before the employer** requests bids, or solicits contractual proposals for the subcontracting agreement") (emphasis added); see also N.J.A.C. 19:12-8.1; N.J.A.C. 19:12-8.2.

<sup>45/</sup> 2/27/23 Position Statement, p. 2.

However, the Association's objection is no objection at all, but is instead part and parcel of every collective negotiations process. It is an essential attribute to any collective negotiations process involving a unit of employees holding different job titles. As the Commission describes collective negotiations (albeit in the context of a duty of fair representation claim):

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. [Belen, 142 N.J. Super. at 491, citing Ford Motor Company, 345 U.S. at 337-38 (1953)]

Hopatcong Education Association, D.U.P. No. 2018-11, 44 NJPER 471, 473 (¶131 2018); see also Springfield Tp., D.U.P. No. 79-13, 5 NJPER 15, 16-17 (¶10008 1978); Middlesex Cty., P.E.R.C. No. 81-62, 6 NJPER 555,557 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. denied 91 N.J. 242 (1982) (Citing the Springfield Tp. decision with approval).

And in describing the obligation to negotiate as to *all* unit employees during collective negotiations of terms and conditions employment, we have explained (albeit in the context of a unit clarification petition) the inherent "unfairness" of imposing an obligation to negotiate terms and conditions for a limited group of employees *after* a collective negotiations agreement is signed by an employer when the subject *could* have been raised prior to entering into such an agreement:

In the undersigned's opinion the contractual relationship and the negotiations relationship are inextricably intertwined. Therefore, the Commission's clarification of unit procedure should not be utilized in a manner disruptive of either contractual or negotiations responsibilities. Thus, a change in unit composition mandated by a clarification of unit determination should not be permitted to alter the parties' contractual commitments. If the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. This agreement to include or to exclude certain persons or titles in a contract may have involved concessions by both parties in the negotiation of the final terms and conditions of employment. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed.

Thus, the clarification of unit procedure should be designed so as not to encourage avoidance of contractual responsibilities, or to change the benefits and burdens of the bargain. **Equally objectionable to the avoidance of contractual responsibilities is an attempt to impose additional negotiations responsibilities upon one party subsequent to the signing of a contract by seeking to include in the unit an additional title whose terms and conditions were not previously negotiated. It would be patently unfair to require negotiations in a vacuum on behalf of a limited group of employees when one of the parties had not been made aware of the existence of the dispute with regard to the title in the earlier negotiations.**

Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 252 (1977) (emphasis added); see also Middletown Tp. Bd. of Ed., 29 NJPER at 207 (final agency decision) (Hearing Examiner finds that imposing obligation on employer to negotiate a "peer mediation" stipend mid-contract was inappropriate since the majority representative declined to address the subject during collective negotiations).

Here, three months after the Association and Board ratified the 2024 Agreement and eight months after the Board offered to negotiate over the impact of outsourcing Transportation Employees, the Association proposed the Board pay severance totaling \$550,000 to twenty-two outsourced Transportation Employees. That amount of severance is equal to 94.8% of the total 2021-2022 salary guide enhancement agreed to by the Board and Association for the 2024 Agreement (which was \$579,720). Undoubtedly, as acknowledged by the Association, had this

severance proposal been made during collective negotiations for the 2024 Agreement, the Board would have had to reassess how much it could afford to appropriate for salaries and benefits of other unit employees. But by presenting the issue of severance *after* the 2024 Agreement was ratified, the Board was deprived of the opportunity to reasonably deliberate, within concrete budgetary constraints, about what it can agree to pay Association unit employees.

The Board did not have a mid-contract duty to negotiate severance payments for Transportation Employees during the 2024 Agreement.

### **Mootness**

While I find the Association waived the right to negotiate severance payments and other impact issues during the term of the 2024 Agreement, that waiver is not permanent. The Board does not contend that severance payments and impact issues are non-negotiable, and it is clear, as negotiable subjects, the Board *would* have an obligation to negotiate them (upon demand by the Association) as part of successor contract negotiations to the 2024 Agreement. Rahway Valley, 25 NJPER 135; Middletown Bd. of Ed., 29 NJPER at 206-207.

By its terms, the Association and Board *must* commence collective negotiations for a successor agreement to the 2024 Agreement on or before February 1, 2024. (Article III(A) of 2024

Agreement). Under Commission regulations, the Board must commence collective negotiations for a successor agreement at least 120 days before the Board's budget submission date, which would mean negotiations should commence sometime in the Fall/Winter of 2023. N.J.A.C. 19:12-2.1(a); see also Middletown Bd. of Ed., 29 NJPER at 207 (Noting "successor contract negotiations in education often begin in the fall and certainly by the spring of the final contract year").

Given the imminent opportunity for both parties to collectively negotiate the issue of severance payments and other impact issues as part of successor contract negotiations, I find continued litigation over past allegations against the Board for not negotiating impact issues during the term of the 2024 Agreement would ". . . unwisely focus the parties' attention on a divisive past rather than a cooperative future." Ramapo-Indian Hills Regional H.S. Dist., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990); Middletown Bd. of Ed., 29 NJPER at 206-207; Rahway, 25 NJPER at 137. Therefore, even if the Board had a mid-contract duty to negotiate impact issues during the term of the 2024 Agreement, I find the charge is moot.

**ORDER**

The Association's unfair practice charge is dismissed.

/s/ Ryan M. Ottavio  
Ryan M. Ottavio  
Director of Unfair Practices

DATED: August 14, 2023  
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to  
N.J.A.C. 19:14-2.3. See N.J.A.C. 19:14-2.3(b).**

**Any appeal is due by August 24, 2023.**