

H.E. NO. 2024-7

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

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-118

MIDDLESEX EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies Charging Party's motion for summary judgement and grants the Respondent's cross-motion. The Hearing Examiner finds that the Middlesex Board of Education (Borad) did not violated N.J.S.A. 34:13A-5.4a(1) and (5) when it refused to negotiate additional compensation for requiring Speech-Language Therapists (Speech Therapist) to prepare and submit billing for the Special Medicaid Initiative (S.E.M.I.) program. The Hearing Examiner found that the task of completing paperwork associated with S.E.M.I. billing is incidental or otherwise contemplated within the job description for Speech Therapists.

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.

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Appearances:

For the Respondent,
Bush Law Group LLC, attorneys
(Ari D. Schneider, of counsel)

For the Charging Party,
Detzky, Hunter & DeFillippo, attorneys
(David J. DeFillippo, of counsel)

HEARING EXAMINER'S DECISION ON
MOTION FOR SUMMARY JUDGMENT &
CROSS-MOTION FOR SUMMARY JUDGMENT

On January 18, 2023, Middlesex Education Association (Association) filed an unfair practice charge (UPC) against the Middlesex Board of Education (Board). The charge alleges that the Board refused to negotiate additional compensation for requiring Speech-Language Therapists (Speech Therapists) employed by the Board to prepare and submit billing for the Special Education Medicaid Initiative (S.E.M.I.) program. The Association asserts that the Board's actions constitute a

violation of 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

On or about May 16, 2023, the Deputy Director of Unfair Practices issued a Complaint on the Association's allegations and assigned the matter to me for a hearing. The Borough filed an Answer to the Complaint on December 7, 2022. In its Answer, the Borough denies violating the Act and asserts certain affirmative defenses.

On September 21, 2023, the Association filed a motion for summary judgement pursuant to N.J.S.A. 19:14-4.8, together with a brief, exhibits, and the certifications of Carolyn Muglia (Muglia), President of the Association and Rachel Singer (Singer), Speech Therapist employed by the Board.

On October 10, 2023, the Board filed a cross motion for summary judgment pursuant to N.J.S.A. 19:14-4.8, together with a brief.

On October 17, 2023, the Association filed a response to the Board's cross-motion for summary judgment.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;" and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On October 17, 2023, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8. I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter.

Based upon the record, I make the following:

FINDINGS OF FACT

1. The Board and the Association are, respectively, public employer and public employee representative within the meaning of the Act.

2. The Association is the exclusive representative of all regular full-time and part-time certified personnel and non-certified personnel (with some limited exceptions), employed by the Board.

3. The Board and the Association are parties to a Collective Negotiations Agreement (CNA) effective from July 1, 2021 through June 30, 2024.

4. The Board employs five Speech Therapists, all of whom are members of the Association.

5. The job description for Speech Therapist states that they are to keep "those records necessary for each child" and "complete all required local, state and federal reports." Some of these records include student evaluations, Individual Education Plans (IEPs), and other case management-type records. See Certification of Singer.

6. Speech Therapists are not required by the Board to hold private licences/certificates, specifically the American-Speech-Language-Hearing Association (ASHA) and/or the New Jersey Professional License. However, a number of members of the Association hold these licenses in order to perform private therapy sessions outside of their employment with the Board.

7. N.J.S.A. 18A:55-3(d) provides that "as a condition of receiving State aide, a school district shall . . . take appropriate steps to maximize the district's participation in the Special Education Medicaid Initiative (S.E.M.I.) Program, with maximum participation defined by the commissioner"

8. N.J.A.C. 6A:23A-5.3 provides that "[e]very school district . . . shall take appropriate steps to maximize its revenue from the Special Education Medicaid Initiative (S.E.M.I.) program"

9. Because Speech Therapists employed by the Board hold the aforementioned licences, the Board is able to bill Medicaid (S.E.M.I. billing) and recoup some costs associated with providing Medicaid-eligible students speech therapy services.

10. Prior to the Fall of 2021, Speech Therapists prepared and submitted S.E.M.I. billing. The S.E.M.I. billing requires Speech Therapists to record "how long sessions are, if same was an individual or group session, describe the type of session

conducted . . . and/or if the session was a specific type of meeting." See Certification of Singer.

11. In the Fall of 2021, the parties began contract negotiations. The Board was represented by then-Superintendent, Frank Williams (Superintendent Williams).

12. During negotiations, the Association proposed that Speech Therapists receive additional pay for performing the S.E.M.I. billing. In response, Superintendent Williams rescinded the duties of S.E.M.I. billing from Speech Therapists. Based on Superintendent Williams' response, the Association dropped its demand regarding additional compensation for holding the licenses. The parties concluded negotiations and executed a new agreement in December 2021/January 2022.

13. On or about June 22, 2022, TaNia Taylor (Taylor), Director of Special Education, informed the Speech Therapists via email that they would again be required to prepare and submit S.E.M.I. billing during the 2022-2023 school year.

14. On or about August 25, 2022, Union President Muglia responded to Ms. Taylor's email requesting that the Board "contribute to the cost" of the private licences/certificates.

15. Muglia also discussed the issue with Pio Pennisi, Interim Superintendent (Superintendent Pennisi), and prepared a Memorandum of Understanding (MOU) that indicated the Board would reimburse each Speech Therapist 50% of the cost of their private

licences/certificates. Superintendent Pennisi indicated he would present the draft MOU to the Board. See Certification of Muglia.

16. Although the draft MOU was initially to be discussed at the Board's September 19, 2022 meeting, no vote took place and no explanation was provided. To date, the draft MOU has not been presented to the Board. Id.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

N.J.A.C. 19:14-4.8(d) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill; Judson. The summary judgment motion is not to be used as a substitute for a plenary trial.

Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

As a general rule, the assignment of duties unrelated to an employee's job classification is mandatorily negotiable. See, e.g., Township of West Orange, H.E. No. 2008-008, 34 NJPER 167 (¶70 2008); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Somerset Raritan Valley Sewage Auth., P.E.R.C. No. 97-49, 22 NJPER 403 (¶ 27220 1996); Long Branch Bd. of Ed., P.E.R.C. No. 93-8, 18 NJPER 403 (& 23182 1992); Borough of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (& 18123 1987); Kearny Tp., P.E.R.C. No. 82-12, 7 NJPER 456 (& 12202 1981). However, employers may unilaterally assign duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., Tp. of West Orange, P.E.R.C. No. 2007-21, 32 NJ PERC 331 (¶138 2006) (police officers required to fuel their patrol cars); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) (fire officers required to perform crossing guard or patrol duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (bus drivers required to pump gas); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982) (firefighters required to go on fire patrols).

Here, I find that no genuine issue of material fact exists that would require a plenary hearing. The parties agree that

Speech Therapists are not required to hold private licences/certifications. However, prior to the Fall of 2021, Speech Therapist who held such licenses prepared and submitted S.E.M.I. billing. During contract negotiations in the Fall of 2021, the Association raised the issue of providing Speech Therapists with additional compensation for S.E.M.I. billing. In response, the Board rescinded the duty of S.E.M.I. billing from Speech Therapists and the Association withdrew its request for additional compensation. In June of 2022, Speech Therapists were advised that starting in school year 2022-2023 they would again be responsible for preparing and submitting S.E.M.I. billing.

The Association, relying on In re Bryram Tp. Bd. of Ed., supra, argues that the tasks in preparing and submitting S.E.M.I. billing by Speech Therapists are not incidental or otherwise contemplated within their Job Description. In In re Bryram Tp. Bd. of Ed., teachers were required to perform certain non-teaching duties, including custodial duties of moving classroom equipment, furniture or supplies. The Court found that requiring the teachers to perform said duties was mandatorily negotiable as many of the duties would normally be assigned to maintenance personnel. In further support of their argument, the Association indicates that former Superintendent Williams recognized this fact when he rescinded S.E.M.I. billing as one of the Speech Therapists job duties. Additionally, the Union argues that

S.E.M.I. billing is not required by any local, state or federal mandate.

The Board argues that completing S.E.M.I. billing is a task that has historically been part of Speech Therapists' responsibilities. Further, the Board asserts that Speech Therapists are required by their job description to complete "S.E.M.I. billing as it is legislatively required paperwork"

In re Bryam Tp. Bd. of Ed. is distinguishable from the facts in this matter. Here, Speech Therapists are required to complete S.E.M.I. billing, which includes recording "how long sessions are, if same was an individual or group session, describ[ing] the type of session conducted . . . and/or if the session was a specific type of meeting." See finding no. 10. The information required by the S.E.M.I. billing is based on the Speech Therapy sessions conducted by Speech Therapists. There is no allegation by the Association that the S.E.M.I. billing is a job duty of other personnel employed by the Board. Contrast In re Bryam Tp. Bd. of Ed. (where the duties being performed by the teachers were normally those assigned to maintenance personnel). Additionally, as admitted by the Association, Speech Therapists are responsible for completing various paperwork including, student evaluations, IEPs and other case management-type records. Therefore, I find that the task of completing paperwork associated with S.E.M.I.

billing is incidental or otherwise contemplated within the job description for Speech Therapists.

I disagree with the Association that former Superintendent Williams previously recognized that S.E.M.I. billing was not incidental or otherwise contemplated within the Speech Therapist job description. Exhibit E to the Associations' Motion, an email from former Superintendent Williams, indicates, "[h]owever, part of our discussions were the billing occurred because it was part of their roles as Speech Therapist and had occurred for years" The email further indicates that if the Speech Therapists chose not to "do it" the billing could still occur as others are capable of completing the task. Nothing in the email from Superintendent Williams indicates that he recognized that S.E.M.I. billing was not incidental or otherwise contemplated within Speech Therapists' job duties.

The Board argues that "S.E.M.I. paperwork is legislatively required paperwork, and its completion thus clearly falls within the ambit of the existing job description" of Speech Therapists. The Association argues that participation in the S.E.M.I. program is not required by the statute.^{2/} Even if I agree with the Association, once the Board made the decision to participate in

^{2/} N.J.S.A. 18A:55-3(d) indicates that "as condition of receiving State aid, a school district shall . . . take appropriate steps to maximize the district's participation in" the S.E.M.I. Program.

the S.E.M.I. Program,^{3/} the billing is statutorily required so that Medicaid reimbursement can take place. As discussed above, part of the Speech Therapists' job duties is completing various paperwork. Therefore, the task of completing paperwork associated with S.E.M.I. billing is incidental or otherwise contemplated within the job description for Speech Therapists.

CONCLUSIONS OF LAW

For the forgoing reasons, the Association's motion for summary judgment is denied. The Board's cross-motion for summary judgment is granted.

RECOMMENDATION

I recommend that the complaint be dismissed.

/s/ Stephanie D'Amico
Stephanie D'Amico
Hearing Examiner

DATED: March 1, 2024
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 March 11, 2024.

^{3/} The Association does not argue that the Board's decision to participate in the S.E.M.I. Program violated any provision of the Act.