

D.U.P. NO. 2021-1

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

In the Matter of

PATTERSON STATE OPERATED
SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2020-105

PATERSON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging violations of section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act). The Paterson Education Association (Association) alleged the employer violated the Act by refusing to bargain the impacts of its decision to require employees to diaper and/or toilet students.

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Appearances:

For the Respondent,
(Law Offices of Robert E. Murray, attorneys)
(Robert E. Murray, of counsel)

For the Charging Party,
(Sasha Wolf, NJEA Field Representative)

REFUSAL TO ISSUE COMPLAINT

On October 17, 2019, the Paterson Education Association (Association) filed an unfair practice charge against the Paterson State Operated School District (District). The charge alleges that on September 16, 2019, the Association demanded to negotiate the impacts of the District's decision to require certain employees to diaper and/or toilet students. The charge alleges that the District violated section 5.4a(1) and (5)^{1/} of

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act, and (5) Refusing to (continued...)"

the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by ignoring the Association's demand.

On January 6, 2020, the District served a position statement on the Association. The District denies violating the Act and contends that it did not change anyone's assigned duties. Alternatively, the District argues that the charge is untimely, and that the substantive allegations should be deferred to the parties' negotiated grievance procedure.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The Association and the District are parties to a collective negotiations agreement extending from July 1, 2017 through June

1/ (...continued)
negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

30, 2022 (Agreement). The Association represents all non-supervisory staff employed by the District, including, but not limited to all certificated staff, instructional assistants, secretaries, security officers and other non-certificated staff. The following titles in the Association's unit perform, or could be asked to perform diaper/toileting duties: Master Teacher-Early Childhood Education, Teacher Special Education/Behavior Resource, Personal Aide, Kindergarten Instructional Assistance, Classroom Instructional Assistant, Preschool Instructional Assistant, and Special Education Teacher.^{2/}

Diapering and/or toileting students is contemplated within several of these titles' job descriptions. For example, the Preschool Instructional Assistant-14 job description states, "[h]elp students with clothing, grooming, health habits, and bathroom activities;" the Personal Aid-2 job description states, "[a]ssist the student(s) with self-help, daily living, academic, and/or behavioral needs;" and the Special Education Teacher (Self-Contained)-7 job description states, "[a]ssist the

^{2/} Multiple attempts were made to ascertain which of these titles regularly perform the duties of diapering/toileting students, and which titles have never performed the duties but could be asked to do so given the nature of the job description. Neither party provided the requested information.

student who is physically challenged with movement to participate in activities or with other physical needs, when necessary.”^{3/}

By the Association’s admission, the District has required certain employees to perform diaper/toileting duties for years, and has not made any changes related to those duties whatsoever. Notwithstanding the apparent practice, on or about September 16, 2019, the Association demanded to bargain the impacts of the District’s decision to require employees to perform these duties, which the District ignored.

ANALYSIS

N.J.S.A. 34:13A-5.3 defines when a public employer has a duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established . . .

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process.

See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 52 (1978). A public employer

^{3/} We can only speculate if these are the titles that perform diaper/toilet duties since neither party confirmed who actually performs the work.

may violate section 5.4a(5) of the Act if it modifies terms and conditions of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State Coll.) And Count. Of N.J. State Coll. Locals, NJSFT-AFT, P.E.R.C. No. 86-28, 11 NJPER 580 (¶ 16202 1985). For the Commission to find such a violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

In this matter, the Association cannot show a change in a term or condition of employment. It admits that the District has not changed the duties of those employees whose job titles are referenced above. As such, the Association cannot prove the first element necessary to show a violation of section 5.4a(5) of the Act. Since there has been no change in employees' duties, the District is not obligated to negotiate with the Association. Therefore, the charge filed by the Association must be dismissed.

Even if I assume that the District changed these employees' job duties by requiring them to diaper/toilet students for the first time, the Association's charge would be dismissed because requiring employees to diaper and/or toilet students is not only contemplated within most of the job descriptions, but they are incidental to the employees' normal duties. A majority

representative may negotiate on behalf of unit employees for contractual protections against being required to assume duties outside their job title and beyond their normal duties. New Jersey Highway Authority, P.E.R.C. No. 2002-76, 28 NJPER 261, 263 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div.2003). Such provisions “. . . protect the integrity of the equation between negotiated salaries and the required work.” 28 NJPER at 263. Employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. Id.; State of New Jersey (Dep't of Human Services), D.U.P. No. 2018-8, 44 NJPER 366 (¶103 2018), adopted P.E.R.C. No. 2018-55, 45 NJPER 24 (¶6 2018), (new duties were incidental or comprehended within the job description even though the duties were also performed by a different bargaining unit); 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).

Here, the duties of being required to diaper and/or toilet students are contemplated within the employees' job descriptions and are also incidental to the employees' normal job duties. If the District did assign Association employees those new duties, it had a managerial prerogative to do so.

Based on the foregoing, I conclude the Association's unfair practice charge does not satisfy the complaint issuance standard.

N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: July 7, 2020
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by July 21, 2020.