

H.E. NO. 2022-4

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

In the Matter of

BUENA REGIONAL BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-2019-232

BUENA REGIONAL SUPPORTIVE  
STAFF ASSOCIATION,

Charging Party.

**SYNOPSIS**

A hearing examiner grants the Buena Regional Supportive Staff Association's (Association) motion to compel in part and denies it in part. The hearing examiner grants the Association's motion with respect to its discovery requests regarding the identity of potential contractors for the classroom assistant position for the 2018-2019 school year only. The hearing examiner concluded that the remainder of the outstanding discovery requests were not reasonably calculated to lead to the discovery of admissible evidence.

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,  
Parker McCay, attorneys  
(Frank Cavallo and Jeffrey P. Catalano, of counsel)

For the Charging Party,  
Selikoff and Cohen, attorneys  
(Keith Waldman and Hop Wechsler, of counsel)

**HEARING EXAMINER'S DECISION**  
**ON MOTION TO COMPEL DISCOVERY**

On March 13, 2019, the Buena Regional Supportive Staff Association (BRSSA or the Association) filed an unfair practice charge against the City of Buena Regional Board of Education(Board). The charge alleges that on or about September 15, 2018, the Board abrogated an April 19, 2018, sidebar agreement (Sidebar) that the parties reached to avoid the subcontracting of classroom assistants for the 2018-2019 school year, that the Board made an arbitrary and/or capricious substitution of private workers for public employees, and that an

unnamed supervisor on February 15, 2019, attempted to persuade unit employees that part-time assistants should work for Insight, a third-party contractor. The Association alleges that such conduct violated subsections 5.4a(1) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

On January 11, 2021, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing. On January 21, 2021, the City filed an Answer asserting various affirmative defenses and denying that it violated the Act. In its Answer, it represented that the personnel from Insight are substitutes and not employees.

The parties subsequently served their discovery requests on March 30 and April 30, 2021. On or around June 1, 2021, the Board responded to the Association's discovery request, except for essentially two categories of information addressed in Interrogatories 1, 2, 3, 4, 5, 6 and Request for Production of Documents 13. On June 4, 2021, the Association sent a deficiency letter to the Board asking to provide the outstanding information. (Assoc. Mot. Ex. C) On June 11, the Board

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<sup>1/</sup> 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...."

responded by denying that its responses were deficient and refusing to provide any additional information. (Assoc. Mot. Ex. D) The Association replied again on June 14, 2021. (Assoc. Mot. Ex. E)

Counsel for the Board subsequently changed. During a September 30, 2021 pre-hearing conference call, the parties were granted additional time to resolve the discovery dispute as the new Board representative onboarded. However, the parties were unable to reach a resolution. In an October 21, 2021, pre-hearing conference call, the parties set forth a mutually agreed-upon briefing schedule. Pursuant to those deadlines, on November 19, 2021, the Association filed the instant motion to compel. On December 1, 2021, the Board filed its opposition. On December 7, 2021, the Association filed its reply.

### ***The Disputed Discovery***

By way of background, the Association is the exclusive majority representative of a negotiations unit consisting of, *inter alia*, secretaries and assistants (paraprofessionals) employed by the Board. At the time of the alleged unfair practices, the collective negotiations agreement covered the period from July 1, 2017, through June 30, 2020.

The first category of discovery in dispute pertains to the following information for the period covering the 2019-2020 school year to the present:

- Interrogatory 1: information concerning the terms and conditions of employment of "every paraprofessional [i.e. Classroom Assistant], if any, whose employment the Board has non-renewed or terminated from the end of the 2017-2018 school year to the present."
- Interrogatory 2: information concerning whether "the Board [has] hired any [Classroom Assistants] since the beginning of the 2018-2019 school year" and their terms and conditions of employment.
- Interrogatory 3: information concerning the terms and conditions of employment of "every [Classroom Assistant] whom the Board has hired as a contractor from the beginning of the 2018-2019 school year to the present."
- Interrogatory 6: information concerning "the process by which the Board advertised, recruited, evaluated and interviewed candidates for all in-house [Classroom Assistant] positions, if any, for the 2018-2019, 2019-2020, and 2020-2021 school years."
- Document Request 13: "copies of all job postings for all in-house [Classroom Assistant] positions for the 2018-2019, 2019-2020 and 2020-2021 school years identified in Interrogatory 6."

In sum, the information sought in these requests all pertain to the hiring, discharge and recruitment process of employees and contractors employed in the classroom assistant positions during the 2018-2019 school years to the present. While the Board provided the above information as it pertains to the 2018-2019 school year, it refused to provide the same information for the remaining school years to the present.

The second category of discovery in dispute pertains to the following information for the period covering the 2018-2019 school year to the present:

- Interrogatory 4: information concerning the identity of "every corporation, partnership, proprietorship, business entity of any kind and individual who asked for or received requests for proposals and/or bid specifications for the contracting or subcontracting of the Board's paraprofessional services for the 2018-2019, 2019-2020, and 2020-2021 school years."
- Interrogatory 5: information concerning the identity of "every interested vendor who submitted a proposal and/or bid specifications for the contracting or subcontracting of the Board's paraprofessional services for the 2018-2019, 2019-2020, and 2020-2021 school years pursuant to N.J.S.A. 18A:18A-4.5(b) .

In sum, the Association seeks information regarding the solicitation of and responses to proposals for contracting paraprofessional services. The Board did not provide any of the requested information for any of the identified years, including the 2018-2019 school year.

***The Parties' Arguments Regarding Discovery Pertaining to the Employment of Classroom Assistant Employees and Contractors After the Expiration of the Sidebar***

The Association contends that it is entitled to all of the requested information because the information is directly relevant to the Board's continuing violation of certain notice requirements contained in the state's education administrative regulations, specifically N.J.S.A. 18A:18A-4.5(c). The Association claims that under this education statute, when a board of education considers subcontracting services currently performed by employees, the board must notify affected employees of its intent to solicit proposals so that there is an opportunity for the employees or their majority representative to

propose changes the existing contract to reduce costs. Specifically, the education statute relied upon by the Association outlines the following process:

If the board of education, at the time of solicitation, utilizes its own employees to provide the goods or perform the services, or both considered for competitive contracting, the board of education shall, at any time prior to but no later than the time of solicitation for competitive contracting proposals, notify affected employees of the board of education's intention to solicit competitive contracting proposals. Employees or their representatives shall be permitted to submit recommendations and proposals affecting wages, hours, and terms and conditions of employment in such a manner as to meet the goals of the competitive contract. If employees are represented by an organization that has negotiated a contract with the board of education, only the bargaining [negotiations] unit shall be authorized to submit such recommendations or proposals. When requested by such employees, the board of education shall provide such information regarding budgets and the costs of performing the services by such employees as may be available. Nothing shall prevent such employees from making recommendations that may include modifications to existing labor agreements in order to reduce such costs in lieu of award of a competitive contract, and agreements implementing such recommendations may be considered as cause for rejecting all other proposals.

In support of its motion, the Association claims that the Board has engaged in subcontracting of the Classroom Assistant position by replacing classroom assistant employees with "'long-term substitute' classroom assistant contractors through a

process of attrition" and that this conduct violates both the parties' sidebar agreement for the 2018-2019 school year and "violate[s] the notice requirements of N.J.S.A. 18A:18A-4.5(c) for every subsequent year in which such subcontracting occurs and the Association is denied notice that would trigger the opportunity to negotiate a more competitive contract." It asserts that the Board is "conflat[ing] the allegation that [the Board] violated the sidebar agreement . . . with the allegation that [the Board] violated the notice provision of N.J.S.A. 18A:18A-4.5(c) by continuing to subcontract the positions without notifying the Association once it violated the sidebar agreement." Therefore, the discovery it sought would give it access to facts that are potentially relevant to its position that "the Board continued to replace in-house Classroom Assistants with subcontractors after it repudiated the sidebar agreement by conduct without giving the Association either notice or the opportunity to make recommendations and whether the Board engaged in good-faith efforts to fill the positions in-house prior to subcontracting the positions."

The Board contends that discovery is complete because it provided all documents reasonably calculated to lead to the discovery of a material fact. The Board submits that the issue before the Commission is whether its contract with Insight violates the Sidebar it entered into with the Association. It



explains that it objected to producing information for years after the 2018-2019 school year because the Sidebar, which is attached to the charge, only applied to the 2018-2019 school year by its express and clear terms. The Board notes that there is no language in the Sidebar that extends the obligation past that particular school year, and that there is no legal support for the proposition that there can be a continuing violation of an expired and finite legal obligation.

The Board also contends that there is no continuing violation of the N.J.S.A. 18A:18A-4.5(c) notice requirements because there is no dispute between the parties that the Board provided notice as required when it contemplated the subcontracting of classroom assistants during the 2018-2019 school year and the parties engaged in negotiations that resulted in the Sidebar. The Board maintains that there cannot be a continuing notice violation when there is no dispute that it satisfied the notice requirements initially. Moreover, the Board asserts that its obligation to notify only extends to "affected employees." Thus, when the Board decided to solicit competitive contracting proposals for substitute classrooms assistants, it did not need to notify full-time classroom assistants because those substitutes were not performing the work of the full-time assistants and the terms and conditions of employment of the full-time assistants were not impacted since none of the

currently employed, full-time classroom assistants were discharged or had employment benefits reduced. For these reasons, the Board concludes that any information after the 2018-2019 school year has no bearing upon the issue of whether the Board violated an agreement that applied only to the 2018-2019 school year. Therefore, Interrogatories 1, 2, 3 and 6 and Document Request 13 are clearly irrelevant to the instant dispute.

***The Parties' Arguments Regarding Discovery Pertaining to Potential Contractors for Classroom Assistant Positions***

The Association contends that it is entitled to all of the requested information because such information is "directly relevant to the central issue of whether the Board intended to comply and did comply with the sidebar agreement and notice provision of N.J.S.A. 18A:18A-4.5(c) or whether it did not." It asserts that whether the Board solicited or responded to contracting proposals for the Classroom Assistant position as well as the substance and timing of the Board's responses to any such proposals are directly relevant to the allegation that the Board engaged in bad faith bargaining.

The Board counters that since it admitted that it subcontracted with insight to provide substitute classroom assistants, information pertaining to the request for proposals ("RFP") or bid process has no material impact on the question of whether it violated the Sidebar agreement. The Board again

argues that discovery requests pertaining to information for future years is irrelevant to the question of whether it violated an agreement that only applied to the 2018-2019 school year.

**STANDARD OF REVIEW**

N.J.A.C. 1:1-10.1, entitled "Purpose and function; policy considerations; public documents not discoverable," provides:

(a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.

(b) It is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) In considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

(d) Discovery shall generally not be available against a State agency that is neither a party to the proceeding nor asserting a position in respect of the outcome but is solely providing the forum for the dispute's resolution.

"Our system of discovery is designed to make available

information that is reasonably calculated to lead to relevant evidence concerning the respective positions of the parties," and "[a] litigation strategy that features surprise to the adversary is no longer tolerated." Young v. Latta, 123 N.J. 584, 597-59 (1991). See also New Jersey Court Rule 4:10-2.<sup>2/</sup>

### **ANALYSIS**

#### ***Discovery Dispute Pertaining to the Employment of Classroom Assistant Employees and Contractors After the Expiration of the Sidebar***

I find that Interrogatories 1, 2, 3 and 6 and Document Request 13 are not reasonably calculated to lead to the discovery

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<sup>2/</sup> R. 4:10-2 provides in pertinent part:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

of admissible evidence. Therefore, the Association's motion to compel with respect to those discovery requests is denied.

According to the allegations in the charge, the Association was aware that Insight contractors were "reporting to work on a daily basis, doing the work of full-time assistants" since September 15, 2018, and it notified the Board on or around November 19, 2018, that such use was an abrogation of the Sidebar. Whether there was compliance with the notice requirements of N.J.S.A. 18A:18A-4.5(c) has no bearing upon whether the Board's particular use of Insight contractors constituted a repudiation of the Sidebar that applied only to the 2018-2019 school year.

Regarding the Association's claim that the requested discovery is directly relevant to the allegation of a continuing violation of the notice provisions of N.J.S.A. 18A:18A-4.5(c), such a claim is not within the Commission's unfair practice jurisdiction. The charge recognizes that the Board acted pursuant to the notice provision of N.J.S.A. 18A:18A-4.5(c) in giving notice of its contemplated contracting for the 2018-2019 school year, and it does not specifically plead a continuing violation of that provision. Even if the charge were amended to include such a claim, nothing in the quoted regulation relied upon by the Association indicates that a violation of the statute constitutes an unfair practice. Moreover, ascertaining the

merits of an alleged violation of the notice requirements of N.J.S.A. 18A:18A-4.5(c) would necessarily involve resolving an interpretation dispute over the meaning of "affected employees," which is a dispute reserved for the Commissioner of Education. N.J.S.A. 18A:6-9 (Commissioner of Education "shall have jurisdiction to hear and determine . . . all controversies and disputes arising under school laws . . . .").

For these reasons, the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence.

***The Parties' Arguments Regarding Discovery Pertaining to Potential Contractors for Classroom Assistant Positions***

I find that the information sought in Interrogatories 4 and 5 is not reasonably calculated to lead to the discovery of admissible evidence to the extent the such information applies any year after the 2018-2019 school year. The Board's conduct after the 2018-2019 school year has no bearing on the central issue of whether the Board complied with the Sidebar that applied only for the 2018-2019 school year. Discovery regarding the Board's compliance with the notice provisions of N.J.S.A. 18A:18A-4.5(c) is also not reasonably calculated to lead to the discovery of admissible evidence for the same reasons set forth above.

However, I find that the information sought in Interrogatories 4 and 5 as it applies to the 2018-2019 school years is reasonably calculated to lead to the discovery of

admissible evidence. There may be other contractors that the Board used or considered using besides Insight to provide classroom assistants, substitute or otherwise. The identity of such contractors and the Board's reliance on them for classroom assistant services during the 2018-2019 school year may reasonably be expected to lead the discovery of admissible evidence to show repudiation (not merely breach) of the Sidebar as well as potential defenses to that allegation.

Therefore, the Association's motion to compel is denied in part and granted in part.

**ORDER**

The Association's motion to compel with respect to Interrogatories 4 and 5 as they apply to the 2018-2019 school year is granted. The remainder of the Association's motion is denied. The Board shall provide the following responses no later than **5:00 p.m. on January 31, 2022:**

- Interrogatory 4: The Board is directed to produce information concerning the identity of "every corporation, partnership, proprietorship, business entity of any kind and individual who asked for or received requests for proposals and/or bid specifications for the contracting or subcontracting of the Board's paraprofessional services for the 2018-2019 . . . school year[]."
- Interrogatory 5: The Board is directed to produce information concerning the identity of "every interested vendor who submitted a proposal and/or bid specifications for the contracting or subcontracting of the Board's paraprofessional services for the 2018-2019 . . . school year[] pursuant to N.J.S.A. 18A:18A-4.5(b).

/s/Christina Gubitosa  
Christina Gubitosa  
Hearing Examiner

DATED: January 7, 2022  
Trenton, New Jersey

**Pursuant to N.J.A.C. 19:14-4.5, -4.6 this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.**

**Any request for special permission to appeal is due by January 14, 2022.**