D.U.P. NO. 2024-12

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

In the Matter of

VINELAND BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2023-171

VINELAND EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Vineland Education Association (Association) against the Vineland Board of Education (Board). The charge alleged the Board violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) by (1) subcontracting the work of certificated teaching and nursing personnel without complying with requirements of P.L. 2020, c. 79 (Chapter 79); (2) unilaterally transferring unit work in contravention of the unit work rule; and (3) violating several provisions of State education law.

The Director found that Chapter 79, which restricts a school district's ability to subcontract, was not violated because using non-employees to fill teaching vacancies temporarily during a teacher shortage does not meet the statutory definition of subcontracting and Chapter 79 does not apply to contracts which predate the legislation. In addition, the Director found that the Board's actions did not implicate the unit work rule because the Board did not shift unit work to another group of its own employees and also because the Board had a managerial prerogative to utilize non-unit members to perform the work. Lastly, the Director concluded that the Commission does not have unfair practice jurisdiction over alleged violations of State education law.

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Appearances:

For the Respondent,
Blaney, Donohue, & Weinberg, P.C., attorneys
(Nicole J. Curio, of counsel)

For the Charging Party,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 12, 2023, June 29, 2023, and September 6, 2023, the Vineland Education Association (Association) filed an unfair practice charge, an amended charge, and a second amended charge, respectively, against the Vineland Board of Education (Board). The second amended charge alleges the following: (1) the Board subcontracted the work of certificated teaching and nursing personnel in violation of P.L. 2020, c. 79 (Chapter 79)[1/] by not providing notice and not offering the Association an opportunity to negotiate over the impact of the decision to subcontract; (2)

1/ Codified as N.J.S.A. 34:13A-44 to -49.

the Board's decision to subcontract the teaching and nursing work constituted a unilateral transfer of unit work in violation of the unit work rule; and (3) the Board violated several provisions of Title 18A of the New Jersey Statutes when it subcontracted the teaching work. The Association contends that the Board's actions violated sections 5.4a(1) and (5)[2/] of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq.

On May 16, 2023, July 20, 2023, and October 5, 2023, the Board filed and served upon the Association position statements with exhibits. According to the Board, there currently exists a Statewide shortage of teachers, which is evidenced by Executive Order 309 issued by New Jersey Governor Philip D. Murphy (Governor Murphy) on November 10, 2022. The Board contends that it has not been immune to the teaching shortage and has therefore struggled to fill teaching vacancies due to a lack of qualified applicants. The Board maintains that, as a result of the teaching shortage, it contracted with ESS Substitute Staffing Services (ESS) and Educere to fill vacant teaching positions

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2/ 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."

temporarily in order to provide a proper education to the students of the district.

In addition, the Board acknowledges the use of adjunct faculty from Rowan College of South Jersey (Rowan) to teach the dual credit program that the school district has with Rowan. The Board asserts that Association members are normally assigned to teach the dual credit classes. However, given the current lack of Association members qualified to teach certain dual credit courses, the Board has been forced to use Rowan adjunct faculty to continue providing the dual credit courses to its students.

The Board insists that it is not attempting to replace or displace any teachers in the collective negotiations unit, but rather, is merely using ESS, Educere, and Rowan adjunct faculty to teach temporarily until it can hire qualified teachers. The Board denies any violation of the Title 18A education laws and also asserts that the Commission does not have jurisdiction over the alleged violations of education law. Further, the Board denies that it violated the Act with respect to filling the vacant teaching positions with non-unit members because (1) the Board's use of ESS, Educere, and Rowan faculty was limited to positions that could not otherwise be filled; (2) teaching is not within the exclusive province of unit personnel, as the Board regularly utilizes substitute teachers to perform teaching duties on a temporary basis; and (3) the Board's overwhelming interest

in providing a proper education and setting educational policy outweighs the Association's interest in negotiating to control unit work.

With regard to the allegation that the Board impermissibly subcontracted the work of nursing personnel, the Board acknowledges entering into an agreement with Complete Care Health Network (Complete Care) on July 1, 2020 to establish a school-based health care center at Vineland High School North. However, the Board refutes that it is subcontracting work performed by unit members because it maintains that Complete Care is providing services that unit members cannot perform. The Board further argues that, even if the Complete Care contract were construed as a subcontracting agreement, Chapter 79 is not applicable because the agreement was executed before Chapter 79 went into effect.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. 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 will decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts.

The Board is a public employer within the meaning of the Act. The Association is the majority representative for all

permanent certificated teaching and nursing personnel employed by the Board. Substitute teachers are excluded from the unit.

The Board and Association are parties to a collective negotiations agreement (CNA) extending from July 1, 2018 through June 30, 2021 and have ratified a memorandum of agreement for a successor CNA extending from 2021 through 2025.

The Board has been utilizing ESS, Educere, and Rowan adjunct faculty to fill teaching vacancies. The Board also entered into an agreement with Complete Care to have Complete Care provide health care services at Vineland High School North. The agreement was executed on July 1, 2020 and is effective from July 1, 2020 through June 30, 2025.

I take administrative notice that on November 10, 2022, Governor Murphy issued Executive Order 309, which acknowledged teacher staffing shortages at school districts throughout the State of New Jersey and established a task force to address said shortages.

ANALYSIS

Alleged Violations of the Chapter 79 Subcontracting Amendments

Chapter 79, N.J.S.A. 34:13A-44 to -49, became effective on September 11, 2020 and amended the Act by placing certain restrictions on a school district's ability to subcontract work. A school district is now prohibited from entering into a subcontracting agreement that will affect the employment of

represented employees during the term of an existing CNA and may only enter into a subcontracting agreement upon the expiration of a CNA if it provides written notice of at least ninety (90) days to the majority representative of the affected employees and the Commission, and also offers to meet and consult with the majority representative and negotiate over the impacts of subcontracting. N.J.S.A. 34:13A-46(a)-(b). A school district that violates any of the subcontracting provisions of the Act is deemed to have committed an unfair practice. N.J.S.A. 34:13A-48.

Both parties acknowledge that there are teaching vacancies within the district, although the number of vacancies is disputed.[3/] Importantly, the Association does not aver anywhere in its second amended charge or in its position statements that there are sufficient qualified applicants to fill the teaching vacancies or that any teachers in the negotiations unit have been displaced. Nevertheless, the Association contends that the Board's actions constitute subcontracting, which obligated the Board to comply with the requirements of N.J.S.A. 34:13A-46.

When interpreting statutory amendments, the Commission has noted:

> When interpreting a statute, our goal "is to interpret the statute consistent with the

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3/ The Board acknowledges the existence of sixteen (16) teaching vacancies in its initial position statement whereas the Association alleges that thirty-four (34) vacancies exist in its initial position statement.

> intent of the Legislature." Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568, 940 A.2d 1202 (2008). We should consider "not only the particular statute in question, but also the entire legislative scheme of which it is a part." Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129, 527 A.2d 1368 (1987). We start with the plain language of the statute. Oberhand, *supra*, 193 N.J. at 568, 940 A.2d 1202; DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005). Each word must be given its proper effect, and we cannot assume that "the Legislature used meaningless language." Med. Soc'y of N.J. v. N.J. Dep't of Law & Pub. Safety, 120 N.J. 18, 26, 575 A.2d 1348 (1990). We examine legislative history only if the language of the statute is unclear. Oberhand, *supra*, 193 N.J. at 568, 940 A.2d 1202; DiProspero, *supra*, 183 N.J. at 492-93, 874 A.2d 1039.

State of N.J. (Division of State Police), P.E.R.C. No. 2012-71, 39 NJPER 54 (¶24 2012), aff'd 41 NJPER 485 (¶150 App. Div. 2015) (citing In re Galloway Tp. & City of Bridgeton, 418 N.J. Super. 94, 102 (App. Div. 2011)). Under the broad reading of the subcontracting amendments advanced by the Association, an employer engages in subcontracting every time it fills vacant negotiations unit positions with non-employees. However, such an expansive reading of the Act is untenable for the reasons set forth below.

Under Chapter 79, subcontracting is defined as "any action, practice, or effort by an employer which results in any services or work performed by any of its employees being performed or provided by any other person, vendor, corporation, partnership or entity." N.J.S.A. 34:13A-44 (emphasis added). In interpreting

this definition, "we must presume that every word in [the] statute has meaning and is not mere surplusage." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 587 (2013) (internal quotation marks omitted). Looking first at the plain language of N.J.S.A. 34:13A-44, the definition of subcontracting contemplates that there must be an actual, incumbent employee performing work who is being displaced by a non-employee. The Association, however, has not made any allegations in its charge that any of its members suffered loss of employment, hours, or opportunities as a result of the Board's decision to utilize ESS, Educere, or Rowan adjunct faculty. Because this teaching work was not being "performed by any of its employees" given that the positions were vacant, the Board's actions did not result in the displacement of any unit members. Therefore, the Board's conduct did not meet the statutory definition of subcontracting.

Moreover, the Board had a responsibility to hire sufficient qualified teachers as part of its constitutional obligation to provide its students with a "thorough and efficient" public education. See N.J. Const. art. VIII, § 4, ¶ 1; In the Matter of Cap Waiver Appeal of Middletown Tp. Sch. Dist., 94 N.J.A.R. 2d (EDU) 67, 1993 N.J. AGEN LEXIS 2043, final agency decision (Nov. 4, 1993) ("There is no question that provision for sufficient qualified teachers is an essential component of a thorough and efficient educational system"). Here, the Board's decision to

utilize the services of ESS, Educere, and Rowan adjunct faculty in response to a lack of qualified applicants was part and parcel of its obligation to provide a "thorough and efficient" education and its non-negotiable managerial prerogative to hire. See id.; Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983). Accordingly, the Board's actions are not the type that Chapter 79 seeks to proscribe.

This conclusion is further supported by a review of the entire legislative scheme of Chapter 79. See Kimmelman, 108 N.J. at 129 (noting statutory interpretation requires consideration of "the entire legislative scheme"). Under N.J.S.A. 34:13A-46, a school district is prohibited from entering into a subcontracting agreement which affects the employment of represented employees during the term of an existing CNA. If the Association's expansive interpretation of subcontracting were adopted, school districts would seemingly never be allowed to fill vacant teaching positions with non-employees during the term of an existing CNA, even in the event of a teacher shortage or emergency. This, in effect, would leave school districts with the unenviable options of increasing the student-teacher ratio in classrooms or leaving students without teachers, both of which might deprive students of their fundamental right to a "thorough and efficient" public education. See N.J. Const. art. VIII, § 4, ¶ 1; Robinson v. Cahill, 69 N.J. 133, 147 (1975). Because the

Association's broad and sweeping interpretation of subcontracting risks violating students' State constitutional rights, such an interpretation is disfavored. See N.J. Dep't of Envtl. Prot. v. Huber, 213 N.J. 338, 371 (2013); see also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 359-60 (2007) (explaining that principles of statutory construction obligate courts to interpret statutes to avoid unconstitutional applications). For these reasons, the Board's decision to fill the vacant teaching positions through ESS, Educere, and Rowan adjunct faculty does not constitute subcontracting under Chapter 79.

Turning to the Board's contract with Complete Care, the unfair practice allegations related to the contract can be resolved without deciding whether it is a subcontracting agreement. Even if I were to assume that the Complete Care contract is a subcontracting agreement, there is still no unfair practice. At the time the Board entered into the contract with Complete Care on July 1, 2020, it had a non-negotiable managerial prerogative to subcontract governmental services. See In re Local 195, IFPTE, 88 N.J. 393, 419-20 (1982). Given the fact that Chapter 79 modified existing law when it went into effect on September 11, 2020, it is treated as presumptively prospective in application because there was no unequivocal expression of contrary legislative intent. See NL Indus., Inc. v. State of

N.J., 228 N.J. 280, 295 (2017). Further, the Commission previously noted that identical subcontracting amendments made applicable to State colleges and universities, N.J.S.A. 34:13A-50 to -55, did not apply to a subcontracting agreement that predated the amendments. See State of N.J. (Kean Univ.), P.E.R.C. No. 2022-43, 48 NJPER 430 n.2 (¶98 2022). For these reasons, Chapter 79 does not apply to the Complete Care agreement because the contract was executed and went into effect prior to the enactment of Chapter 79.

Accordingly, Chapter 79 is inapplicable to the Board's actions and cannot serve as the basis for an unfair practice.

Alleged Violations of the Unit Work Rule

The Association contends that the Board's decision to use ESS, Educere, Rowan adjunct faculty, and Complete Care without negotiations constitutes a unilateral transfer of unit work in violation of the Act. The Board denies that it had a duty to negotiate over the assignment of teaching work because teaching has not been within the exclusive province of unit personnel. In addition, the Board denies that it was obligated to negotiate prior to having Complete Care employees perform health care services because the Board contends that Complete Care employees are not performing unit work.

The unit work rule provides that, subject to three exceptions, an employer must negotiate before using non-unit

employees to do work traditionally performed by negotiations unit employees alone. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 575 (1998). In Jersey City, the New Jersey Supreme Court cautioned that the unit work rule cannot be applied on a per se basis. Id. Instead, the Court held that the negotiability balancing test set forth in Local 195, *supra*, must be applied to the facts of each particular unit work claim. Id. Local 195 provides, in pertinent part:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> 88 N.J. at 404-05.

With regard to the teaching work, the Association has failed to provide any examples of how the Board's decision to utilize ESS, Educere, or Rowan adjunct faculty intimately and directly affected the work and welfare of the unit members. Even if the Board's decision did intimately affect the working conditions of the teaching unit members, a subject is

nevertheless non-negotiable "[w]hen the dominant concern is the government's managerial prerogative to determine policy." Id. Here, I find that the Board's decision to utilize ESS, Educere, and Rowan adjunct faculty was a managerial prerogative because it involved the Board's exercise of its constitutional responsibility to provide students with a "thorough and efficient" education in response to a teacher shortage. See Wharton Borough Bd. of Ed., H.E. No. 86-55, 12 NJPER 402 (¶17157 1986), adopted P.E.R.C. No. 87-10, 12 NJPER 609 (¶17231 1986) (holding that a Board's decision was a managerial prerogative where it involved "the Board's exercise of responsibility to provide students with a thorough and efficient education"). Accordingly, the Board was not required to negotiate over its decision to fill the vacant teaching positions with non-unit members.

Further, the unit work rule does not apply to the Board's use of ESS, Educere, and Rowan adjunct faculty because "[t]he typical unit work case involves an employer shifting negotiations work from one group of its employees to another group of its own employees." Hudson Cty., P.E.R.C. No. 2008-43, 34 NJPER 13 (¶6 2008) (emphasis added); see also Rutgers Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp. 2d 132 (¶113 App. Div. 1983) (noting distinction between contracting out work to private contractors and shifting unit

work to non-unit employees of the same employer). Here, the Board did not shift negotiations unit work to another group of its own employees outside of the unit. Rather, the Board used ESS, Educere, and Rowan employees to perform the teaching work.

Even if the unit work rule did apply to the assignment of teaching work, a unit work rule exception applies to defeat the Association's claim. One of the recognized exceptions to the unit work rule states that a public employer need not negotiate over the transfer of unit work where the job is not within the exclusive province of unit personnel. Jersey City, 154 N.J. at 577. In its charge, the Association explicitly acknowledges that substitute teachers are not included in the unit. As teaching work is shared by unit members and non-unit substitute employees, teaching duties are not within the exclusive province of unit personnel. Accordingly, even if the unit work rule were applicable, the Board would not have had any obligation to negotiate over the assignment of teaching work because teaching work has not been performed exclusively by Association unit employees. See id.

The Association also alleges that the Board violated the unit work rule by contracting with Complete Care for health care services. It is important to note that "[s]ubcontracting and the unit work doctrine may have similar consequences, but the former is not negotiable while the latter is, depending on the

circumstances." Ocean Tp., P.E.R.C. No. 2011-90, 38 NJPER 72 n.4 (¶15 2011). Assuming that the Complete Care employees are performing unit work as alleged in the charge, the contract would constitute a subcontracting agreement. As a result, the Board would not have been required to negotiate over its decision to subcontract with Complete Care. See id.[4/]

For all of the foregoing reasons, the Board did not violate the unit work rule.

Alleged Violations of State Education Law

In its second amended charge and position statements, the Association alleges that the Board committed several violations of the Title 18A education laws when it used ESS, Educere, and Rowan adjunct faculty to fill teaching vacancies within the district. However, even if the Association is correct in its legal conclusion that the Board violated State education laws, the Association does not, in any of its submissions, point to any statute that expressly grants the Commission unfair practice jurisdiction over violations of education law. Rather, such disputes are reserved for the Commissioner of Education. See N.J.S.A. 18A:6-9 ("The [Commissioner of Education] shall have jurisdiction to hear and determine . . . all controversies and

4/ The Board also would not have had any obligation to negotiate under Chapter 79 because Chapter 79 is not applicable to the Complete Care agreement for all of the reasons previously mentioned.

disputes arising under school laws . . . ."). Accordingly, any claim that the Board committed an unfair practice by violating State education law must be dismissed. See id.; see also Pinelands Reg'l Sch. Dist. Bd. of Ed., D.U.P. No. 2024-11, 50 NJPER 261 (¶58 2023) (dismissing unfair practice charge, in part, because the Act does not confer unfair practice jurisdiction over OPRA disputes).

For all of the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.

ORDER

The unfair practice charge is dismissed.

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

DATED: January 24, 2024
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 February 5, 2024.