

P.E.R.C. NO. 2014-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-333

HOWELL TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms the Hearing Examiner's recommended dismissal of a complaint issued in an unfair practice case filed by the Howell Township Education Association against the Howell Township Board of Education. The Association alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it placed all replacement teachers (long-term substitutes) at step one of the salary guide instead of continued with past practice by crediting them for previous years of experience. The Commission rejects the Association's exceptions, holding that the Hearing Examiner did not err in finding that the replacement teachers are not members of the negotiations unit, and therefore the Board did not violate the duty to negotiate changes in their terms and conditions of employment.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys (Robin T. McMahon, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys (Richard A. Friedman, of counsel)

DECISION

On June 28, 2013, the Howell Township Education Association filed exceptions to a Hearing Examiner's report and recommended decision. H.E. No. 2013-19, 40 NJPER 47 (¶19 2013). In that decision, the Hearing Examiner recommended dismissal of the complaint issued in an unfair practice case filed by the Howell Township Education Association against the Howell Township Board of Education. The unfair practice charge alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the Board placed all replacement teachers (long-term substitutes) at step one of the salary guide, instead of at higher steps, and, failing or refusing to credit the

teachers for their previous years of experience which allegedly changed the parties' past practice. The charge further alleges a repudiation of the parties' collective negotiations agreement (CNA).

On December 12, 2011, a Complaint and Notice of Hearing issued on the charging party's allegations that the Board violated sections 5.4a(1) and (5) of the Act. The other alleged violation of 5.4a(3)^{1/} did not meet the Commission's complaint issuance standard and was dismissed by the Director of Unfair Practices.

Hearing Examiner Patricia Taylor Todd conducted a hearing on July 24, and August 3, 2012. The parties examined witnesses and prepared documentary evidence. The parties filed post-hearing briefs by November 19, 2012. On June 20, 2013, the Hearing Examiner issued her report and recommended decision. She concluded that the replacement teachers are not members of the Association's negotiations unit, and therefore the Board did not

^{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. . . . (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

violate the duty to negotiate changes in their terms and conditions of employment.

The Association filed exceptions to the Hearing Examiner's decision arguing that her conclusion that long-term replacement teachers are not part of the negotiations unit was in error as they are included in the plain language of the recognition clause. Further, the Association argues that the terms and conditions of employment for nonreplacement teachers apply to long-term replacements, so there was no need for the parties to negotiate for long-term replacements separately.

The Board responds that the Hearing Examiner correctly held that substitutes were not represented by the Association and did not err in considering the fact that the parties never negotiated terms and conditions of employment for replacement teachers.

The Hearing Examiner made comprehensive findings of fact. We adopt them. A brief summary follows. The Board and Association are parties to a CNA effective from July 1, 2008 through June 30, 2011. The Recognition Clause provides:

The Howell Township Board of Education [...] agreed to and hereby does recognize the Howell Township Education Association [...] as the exclusive and sole representative for collective negotiations pursuant to the provisions of Chapter 303, Public Laws of 1968 for the following described unit: all professionally certified classroom teachers, special education teacher assistants, auxiliary teachers, media specialists, special services personnel, occupational therapists, certified occupational

therapists, assistant (COTA), substance abuse coordinators, nurses, psychologists, principal secretaries, office assistant secretaries, media assistants, interpreters for the hearing-impaired and support staff.

A footnote defines "Support Staff" as "all employees of the Board employed in the Transportation, Maintenance, Custodial, Security, and Food Service Departments, exclusive of supervisors and clerical employees in said departments. The recognition clause has remained the same from at least the 1999 agreement. There are approximately 800 teachers employed by the Board and one other negotiations unit for principals and supervisors. The Board regularly uses two types of substitute teachers: per diem, or short term substitutes, and long-term replacement teachers. The recognition clause does not make a specific reference to either substitute, but the parties agree that per diem substitutes are not included in the unit.

In June 2010, the Board instituted a reduction-in-force to (RIF) to bridge a \$6 million budget shortfall. Several non-tenured teachers were terminated. The Board and Association met several times following the announcement of the RIF and neither the Board nor the Association requested negotiations over replacement teachers. The Board required several replacement teachers for September 2010 and voted to return 15 terminated teachers who were laid off in the RIF. The Board appointed the teachers to "non-tenure track leave replacement positions for the

2010/2011 school year." The Board discussed and determined to hire the teachers at step one of the guide.^{2/} The teachers accepted and signed a "Substitute Teacher Limited Employment Contract" and none of the teachers refused employment. Some teachers noted that by signing the agreements, they did not waive their or the Associations's rights to object to the step one salary. After school began in 2012, the Association was contacted by one of the replacement teachers. The Association filed a grievance. The Board responded that it hired the teachers to ameliorate the effect of the RIF on them and that the Board did not consider replacement teachers as members of the Association.

Replacement teachers fill vacancies created by teachers on lengthy temporary leaves of absence for maternity and short term illnesses who are expected to return at a set future date. Per diem substitutes typically work for fewer than 20 days at a time and their work is less predictable. Replacement teachers are required to have a standard teaching certificate issued by the State Department of Education. Per Diem substitutes are required to have a certificate issued by the County Superintendent.

2/ In anticipation of the Board meeting, the administration prepared two letters for the re-hired teachers. The first offered them a salary based on their experience. The second offered them a step one salary. The Board voted to pay replacement teachers at step one. The wrong letter was sent to the replacement teachers and the error was subsequently corrected.

Replacement Teachers are treated similarly to permanent teachers: their duties are the same, they create and teach from their own lesson plans and are similarly evaluated.

The parties have negotiated a series of CNAs over at least 25 years with teachers' salary guides consisting of step increases for experience and education. In the past, prior to 2010, replacement teachers were paid amounts identical to the steps in the negotiated salary guides and advanced on the guide after having worked for the Board for at least five months and one day, though nothing in the 2008-2011 Agreement specifies an experience requirement for replacement teachers to advance on the guide. Replacement teachers receive limited benefits - three leave days per year and single coverage health benefits.

Per diem teachers are paid according to a set daily rate which the Board determines each year; R-1 shows that the 2010-2011 per diem rate was \$85.00/\$100.00 per day.

The Association has filed grievances on behalf of replacement teachers. Article 9 of the Agreement provides that at step one, a grievant may discuss the matter with the principal "in an effort to settle the grievance informally". Most grievances are resolved at this step. Association President O'Brien has advocated for replacement teachers' advancement into tenure track, or regular, positions. O'Brien personally handled this issue on behalf of two replacement teachers. The

Association also filed a grievance for the replacement teachers who were filling in for a teacher on military leave longer than originally anticipated. No one from the Board questioned the Association's right to deal with those issues. O'Brien was never told by any administrator that he did not have standing or could not discuss replacement teachers' issues with the administration because they were not in the unit. Association Vice President Jacqueline Tennant filed a written grievance for a replacement teacher in 2007-2008. The grievance was about to be resolved at the initial step in the grievance procedure - discussion with the principal - but the grievant left the district. Tennant also cited a grievance the Association filed for an additional replacement teacher.

Nothing in the current collective agreement, or several agreements preceding the current agreement, specifically includes or excludes replacement teachers, in fact, there are no specific references to any terms or conditions of employment of replacement teachers in any collective agreement. Assistant Superintendent Dr. Karen Jones noted that nothing in the collective agreements excludes replacement teachers from the unit, but she noted that the issue of their unit membership was never discussed.

Over a long period - 30 years - neither the Board nor the Association specifically negotiated the terms and conditions of

employment of the replacement teachers; neither sought to add specific references to replacement teachers in any writing, or in their collective agreements, despite having reopened negotiations several times over the years over other issues. A Board member did not recall replacement teachers being discussed in negotiations and he assumed they were not in the unit. The Association never sought to negotiate separate terms of employment of replacement teachers.

N.J.S.A. 34:13A-5.3 prohibits a public employer from unilaterally establishing or changing terms and conditions of employment. However, the Board is only required to negotiate with Association if the replacement teachers are included in the unit. Having reviewed all the evidence, we hold that the Hearing Examiner did not err in finding that the replacement teachers are not in the unit. The evidence is conflicting, but the treatment of the teachers and whether they received any benefits of the collective agreement is a decision that has rested with the Board. We also do not find that the parties had a de facto negotiations relationship. We agree with the Hearing Examiner's conclusion that while the parties had a relationship as it related to the fact replacement teachers are teachers, the record is void of a negotiations relationship. The wording of the recognition clause, absent other benefits in the contract, can not fill this gap.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commission Bonanni recused himself. Commissioner Voos was not present.

ISSUED: September 26, 2013

Trenton, New Jersey