

P.E.R.C. NO. 2014-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2011-163

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES, LOCAL 5089

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the University of Medicine and Dentistry of New Jersey's (UMDNJ) motion for summary judgment and the Health Professionals and Allied Employees, Local 5089's (HPAE) cross-motion for summary judgment in an unfair practice case filed by HPAE. HPAE alleges that UMDNJ violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4b(1) and (5), when it unilaterally created a new employee status resulting in changes to wages, benefits, and working conditions of certain unit employees. Finding that material facts are in dispute, the Commission denies the parties' motions for summary judgment.

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, Jeffrey S. Chiesa, Attorney General
(Frank Marasco, DAG, of counsel; Eva M. Serruto, DAG,
on the brief)

For the Charging Party, Loccke, Correia, Limsky &
Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

The University of Medicine and Dentistry of New Jersey ("UMDNJ") has moved for summary judgment in an unfair practice proceeding initiated by Health Professionals and Allied Employees, Local 5089 (HPAE). HPAE has cross-moved for summary judgment. The case involves an unfair practice charge and amendment filed by HPAE that alleges UMDNJ violated its obligation to negotiate in good faith when it unilaterally created a new employee (.9) status resulting in changes to wages, benefits, and working conditions of certain unit employees in violation of the New Jersey Employer-Employee Relations Act.

Specifically, HPAE alleges a violation of N.J.S.A. 34:13A-5.4a(1) and (5). ^{1/}

The parties have filed briefs. HPAE has filed exhibits attached to the certification of counsel. UMDNJ has filed the certification of Patricia Scully, Collective Bargaining Agreement Coordinator for UMDNJ.

UMDNJ operates eight schools, University Hospital and several other healthcare facilities. University Hospital (UH), located in Newark, is the principal teaching hospital for New Jersey Medical School. There are 18 medical departments at UH, including the Family Health Unit (FHU) which includes: Neonatal Intensive Care (FICN); Intermediate Nursey (FIN); Newborn Nursery (FNN); Obstetrics and Gynecology (F-Green); Pediatric Intensive Care (PICU); and Pediatrics (F-Blue).

HPAE represents a unit of non-supervisory full and part time University employees who are employed to function as registered nurses and have satisfactorily completed their initial probation period, including graduate nurse, and regularly employed nurses employed by UMDNJ. HPAE and UMDNJ are parties to a collective

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."

negotiations agreement (CNA) for the period July 1, 2006 through June 30, 2010. The parties further signed memorandum of agreements (MOA) dated November 3, 2001 and most recently signed an MOA covering the period of June 1, 2010 through June 30, 2013, Article 4.04 provides:

A part time employee is an employee who works twenty (20) hours or more each week, but less than the full time equivalent for the title. A part time employee shall be entitled to pro-rated benefits.^{2/}

Full time positions are designated as 1.0. A full-time employee works 40 hours per week. Over a two-week period, a full-time employee works 80 hours. The full time positions serve three 12-hour shifts three weeks per month, four 12-hour shifts one week per month^{3/}, and 39 12-hour shifts per year. The part-time .9 employees work 72 hours over a two-week period; serve three 12-hour shifts per week; and 26 weekend 12-hour shifts per year.^{4/}

According to Scully, the .9 position has been utilized for unit members in other departments since at least 2006. UMDNJ bi-annually provides HPAE with a complete list of its members that includes employee classification status. Prior to 2010, as a

2/ Neither the November 3, 2001 nor the June 1, 2010 agreements changed the definition of part time employees.

3/ Eight hours of this week is paid at the overtime rate.

4/ UH also utilizes .5, .6, .7, and .8 positions,

consequence of declining patient population, FHU was overstaffed with nurses. The FIN unit and FHU unit were closed in August 2009 due to low patient population resulting in the FIN unit merging with the FICN. As a consequence, FICN had excess nurses who were offered the use of benefit time, special duties, or were assigned to other units. Patient population continued to decline in FHU, resulting in HPAE and UMDNJ discussing staff reconfiguration in December 2009. In October 2010, UMDNJ began using .9 positions to address the excess staffing instead of 1.0 full time positions in FHU.

Scully further certifies that 42 full-time FHU nurses were affected by the decision to use .9 employees. A letter was sent to the nurses from Theresa Rejrat, Vice President, Patient Care Services/CNO explaining:

ongoing efforts to respond to operational needs and improve efficiency, while continuing to provide safe and high quality patient care ... resulted in the decision to make some changes to the nurse staffing configuration at [FHS]. Over the last several months data shows that there has been a significant decrease in the patient census in some units of [FHS].

The nurses affected were given the option to remain in FHU as a part-time .9 nurse or transfer to 70 available positions in other departments as full-time nurses. The nurses who chose .9 positions kept the same hourly rate, level of health benefits and pension percentage contribution of those staying in full time

positions. However, vacation, sick and float time accrues at a reduced rate per the parties' CNA.

HPAE relies on its answers to interrogatories to set forth its version of the facts. The interrogatories were certified by Chris Whalen, HPAE Lead Organizer. According to Whalen, HPAE first became aware of the staffing changes in the FHS unit on or about July 16, 2010 when Jasmine Castillo, Assistant to Director of Labor Relations Abdel Kanan issued an e-mail requesting a meeting between UMDNJ representatives and Whalen to discuss staffing changes at UH. The parties met on July 21, and HPAE was advised about several staffing changes, including the staffing reconfiguration and the closing of positions. After the meeting, Whalen sent a request for information via e-mail to Kanan seeking an outline of the reconfiguration and an updated seniority list. Scully responded in a July 23 e-mail to Whalen and UMDNJ representative Elmer Daniels attaching a spreadsheet with information about the staffing reconfiguration and stating, in part:

Attached you will find a spreadsheet with information about the upcoming staffing reconfiguration which will affect HPAE 5089 members. The spreadsheet contains two worksheets: one indicated where positions will be closed, and the other is a listing of Staff Nurse vacancies at UH. Please note that there are a number of .9 positions which are being created in this staffing model which are in FHS.

According to Whalen, the spreadsheet indicated that full time positions that were being closed were now opened as .9 positions. A subsequent meeting was held on July 27, 2010 during which HPAAE was formally notified of UMDNJ's intent to reorganize the Family Health Unit by creating .9 positions. On August 6, Whalen issued a demand to negotiate over the decision to create the .9 positions and its impact on the unit members. On August 9, Kanan responded:

Chris- Please clarify for me what the Union intends to negotiate. Management has the right and responsibility to staff UH effectively and efficiently. We are not creating a new classification (title), but are simply creating additional part time positions in an already existing title. This will allow more flexibility in staffing to meet the needs of UH.

On August 11, Whalen responded:

The union maintains the we have a right to bargain over the reorganization especially with regards to the .9 positions. We have to address how the .9 positions would accrue and use benefit time and be scheduled for weekend rotation, among other related issues. With that being said, we renew our initial request to bargain.

According to HPAAE, no other meetings, communications, or negotiations were held addressing HPAAE's request for negotiations. On or about September 2010, reassignment notifications letters were sent to the affected nurses.

On October 20 and November 5, 2010, HP AE filed the unfair practice charge. On November 10, 2011, the Director of Unfair Practices issued a Complaint.

UMDNJ argues it has a managerial prerogative to use part-time positions to provide nursing care to operate an efficient, effective and productive hospital; the parties' agreement contemplates the use of part-time positions; the parties' agreement was followed as well as the past practice; and the charge is untimely as the .9 positions were first utilized in 2006 in other areas of UMDNJ.

HP AE argues that .9 positions have never been used by UMDNJ and are not contemplated in the parties' agreement. It asserts UMDNJ has unilaterally reduced the employees working hours and refused to negotiate over seniority, salary placement, health insurance and layoff procedures.

N.J.S.A. 34:13A-5.3 authorizes the majority representative to negotiate terms and conditions of employment on behalf of all unit employees. Unilateral action undermines the employment relationship and violates the terms and goals of the Act. 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). Accordingly, section 5.3 provides that 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.

Court and Commission case law concerning work schedule negotiability holds that the work schedules of individual employees are, as a general rule, mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work schedule to effectuate governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982). We and the Courts have held that employers had a prerogative to unilaterally change the shifts of positions or individuals to achieve operational, supervisory or other governmental policy objectives. See, e.g., Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (employer had a prerogative, in order to correct supervision and discipline problems on midnight shift, to change shift assignments so that all patrol officers worked the same rotating shift as their superiors); City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002) (employer's unrebutted evidence that 12-hour shift had resulted in staffing, supervision, and fatigue problems - and had compromised officer safety because of reduced number of hours on evening shift - justified a mid-contract change); Borough of Roselle Park, P.E.R.C. No. 2006-43, 31 NJPER 396 (¶157 2005) (enforcement of an agreement providing for annual non-rotating shift selections would substantially limit governmental

policymaking given the chief's description of the problems experienced under that system).

UMDNJ does not dispute that work hours are generally negotiable, but has proffered a managerial prerogative defense. The facts supporting that defense are set forth in the Scully certification and relate to its organizational needs due to declining patient populations to place staff where needed to run UH in an efficient manner.

HPAE does not dispute the underlying facts surrounding the need to change the staffing of the FIN unit. HPAE asserts the parties' agreement was violated by the creation of the new .9 position as well as UMDNJ's refusal to negotiate the impact of that decision. These issues need to be determined on a full analysis of the facts and application of the balancing test. Local 195. UMDNJ makes a compelling argument for its decision, but has not addressed how negotiations over the other issues addressed by HPAE would significantly interfere with a determination of governmental policy. HPAE has disputed that .9 positions were previously used or contemplated by the parties agreement. On this record, we are unable to weigh the parties interests, we find material facts in dispute, and therefore deny the parties' cross-motions for summary judgment.

ORDER

The motion and cross-motion for summary judgment are denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones voted in favor of this decision. None opposed. Commissioners Voos and Wall were not present.

ISSUED: December 19, 2013

Trenton, New Jersey