

P.E.R.C. NO. 2023-9

STATE OF NEW JERSEY
BEFORE 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

The Public Employment Relations Commission denies the Board's motion for summary judgment in an unfair practice charge filed by the Association, which alleges the Board committed an unfair practice when it breached a sidebar agreement with the Association and refused to negotiate the potential subcontracting of paraprofessional work. The Commission finds that, on this factual record, there are numerous disputed material facts that require an evidentiary hearing, and thus, resolution of the unfair practice charge through summary judgment is inappropriate.

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.

STATE OF NEW JERSEY
BEFORE 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.

Appearances:

For the Respondent, Parker McCay, attorneys
(Jeffrey P. Catalano, of counsel and on the brief)

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

DECISION

On March 13, 2019, Buena Regional Supportive Staff Association (Association) filed an unfair practice charge (UPC) against the Buena Regional Board of Education (Board). The Association's UPC alleges that the Board violated the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} when it breached a sidebar

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

agreement with the Association and refused to negotiate the potential subcontracting of paraprofessional work.

On April 19, 2022, the Board filed a motion for summary judgment on the UPC. The Board's motion was supported by a brief and exhibits. The Association filed a brief with an exhibit in opposition to the Board's motion for summary judgment. Neither party submitted certifications in support of their factual assertions. The Board's motion for summary judgment was referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a). Based upon the parties' March 14, 2022 "Statement of Uncontested Material Facts," we find the following undisputed facts.

FINDINGS OF FACT

1. The Association is the exclusive majority representative of a bargaining unit consisting of, inter alia, all buildings and grounds personnel, floating custodians, security personnel, secretaries, and assistants employed by the Board.
2. The Board is the body corporate and politic of the State of New Jersey, County of Atlantic, charged with the administration and supervision of the Buena Regional School District, and is the

1/ (...continued)
rights guaranteed to them by this act. (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."

employer of all employees in the bargaining unit represented by the Association.

3. The Association and the Board have been parties to a series of collectively negotiated agreements (CNA), the most recent of which covers the period from July 1, 2017 through June 30, 2020, which continues to be in effect.

4. On September 1, 2016, pursuant to a Request for Proposals (RFP), the Board entered into a Substitute Placement Agreement with Insight Workforce Solutions (Insight) which designated Insight as the exclusive provider of substitute teacher, paraprofessional, and secretarial staff for the Board on an as-needed basis, including but not limited to, daily and long term positions.

5. During the 2017-2018 school year, the Board contemplated the subcontracting of Classroom Assistants during the 2018-2019 school year for purely economic reasons.

6. The Board gave notice to the Association and the parties engaged in concession bargaining accordingly. Pasquale Yacovelli, the Board's School Business Administrator/Board Secretary, notified the Association via email on March 27, 2017 of his intention to recommend subcontracting for Classroom Assistants covered under the B-1, B-2, and B-3 salary schedules of the CNA for purposes of budget efficiency.

7. As a result of concessions bargaining, the parties entered

into a "Sidebar Agreement for Classroom Assistants" (Agreement) dated April 20, 2018, which provides, in pertinent part:

The Board and the Association, having engaged in discussions under N.J.S.A. 18A:18A 4.5(c) to avoid subcontracting of the Classroom Assistants for the 2018-2019 school year, agree as follows:

1. All current full time Classroom Assistants who have 9 or more years of pensionable service qualify for health, prescription, and dental benefits. Classroom Assistants with 8 or fewer years of pensionable service do not qualify for health, prescription, or dental benefits.

2. Article VI E- Work Day is revised to read as follows:

(existing text)...Teacher assistant- Length of day shall equal that of a regular teacher, 6 hours, 45 minutes for those with 9 years or more of pensionable service as of June 30, 2018. The Board may hire part-time Classroom Assistants (who will work a minimum of 24 hours per week and a maximum of 28 hours, 45 minutes per week) beginning July 1, 2018. Length of lunch for all Classroom Assistants shall be a ½ hour.

(Inserted text underlined)

* * *

4. Article XV(F) is revised to read as follows:

In the event that a vacancy occurs, a laid off Support Staff member that has served the probationary period shall be entitled to recall thereto in the order of his/her job category seniority. This provision applies to any Classroom Assistant whose position was reduced in force from full time to part time in event a full time position becomes available. (Inserted text underlined).

8. On or about November 19, 2018, the Association notified the Board that Insight Classroom Assistants were reporting for work daily on a full-time basis. The Board denied violating the Agreement. Gretta Bohren, then-Association President, corresponded with Superintendent David Cappuccio via email on November 27 and 28, 2018 about the situation.

9. On or about February 15, 2019, the Association was told by a supervisory employee that the Agreement was not cost efficient for the District.

10. On March 13, 2019, the Association filed the instant UPC.

11. On April 16, 2019, the Board filed an Answer to the UPC.

12. On April 29, 2019, the Board filed a Position Statement with the Commission.

13. On January 11, 2021, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing in the instant UPC, following which the Board re-filed its April 16, 2019 Answer on January 21, 2021.

Additionally, the Board asserts the following facts, which were not supported by certification:

14. Part-time Classroom Assistants, who work just 4.5 hours a day with a 30-minute lunch break, have a high rate of turnover due to the challenging work and lack of full-time employment. On numerous occasions part-time Classroom Assistants have left with less than a week's notice. Like any position, employees call out

sick frequently. Since July of 2018, representatives of the Board have interviewed 51 part-time Classroom Assistant applicants, having publicly posted the position on four occasions. The Board has hired approximately 20 part-time Classroom Assistants since September of 2019. Approximately 15 part-time Classroom Assistants have quit this school year alone. (See Board's Brief at 6).

15. When the Board is left with vacancies and is seeking to hire part-time Classroom Assistant employees, it fills temporary vacancies with substitute aides. The substitute aides provided by Insight are not employees, but serve as temporary and on-demand fill-ins to ensure that the Board provides students with a Free and Appropriate Education, even if numerous Classroom Assistants quit or call in sick. Without the services of a company like Insight, portions of Buena's special education student population would be left without a 1:1 aide. (See Id. at 6-7).

16. None of the currently employed, full-time Classroom Assistants were terminated or reduced in their employment benefits. (See Id. at 10).

17. At the May 1, 2018 Board Meeting, the Board approved the rejection of all proposals submitted for the March 30, 2018 Request for Proposal (RFP) as per the Agreement. There were no other RFPs for Classroom Assistants during the 2018-2019 school

year. (See Id. at 9).

The Association asserts the following disputed facts:

18. Regarding the February 15, 2019 alleged statement made by a Board supervisory employee, the Association asserts that Joyce Soboloski, the Board's former Child Study Team Director, told Gretta Bohren, the former Association President, that the Agreement was not cost-efficient for the school district and that part-time Classroom Assistants should work for Insight because they would make more money than they would as Board employees, as they would not need to pay union dues or make pension contributions working for Insight. (See Board Exhibit C, Association's Motion to Compel Discovery at p. 3).

19. The Board disputes the Association's factual assertions about Soboloski's alleged comments on February 15, 2019 as follows:

At the referenced meeting, Ms. Bohren indicated to Joyce Soboloski that when full-time Classroom Assistants left employment the Board would hire full-time replacements. Ms. Soboloski explained to Ms. Bohren that such an arrangement was not required by the April 20, 2018 agreement. Ms. Bohren was frustrated by the facts as recited by Ms. Soboloski. At that time, Ms. Soboloski (who, like Ms. Bohren, is the President of her own Association) lamented to Ms. Bohren that if the Association replaced all of their part-time Classroom Assistants with some full-time Classroom Assistants, that at least those new full-time employees could collect unemployment over the summer.

Ms. Soboloski, who is charged with filling

the vacant Classroom Assistant positions, never said that members of the Association should go to work for Insight; she can't afford to lose any more Classroom Assistants. What she did say was that the District has a high rate of turnover and difficulty filling the positions because substitute providers, like Insight, pay much better as there are more hours, no pension deductions, no union dues, and they offer health benefits.

[See Board's Brief at 13.]

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill,

142 N.J. at 540. We “must grant all the favorable inferences to the non-movant.” Id. at 536. A motion for summary judgment should be granted with extreme caution and may not be substituted for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183, 185 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981). Summary judgment “should be denied unless the right thereto appears so clearly as to leave no room for controversy.” Saldana v. DeMedio, 275 N.J. Super. 488, 495 (App. Div. 1995).

ARGUMENTS

The Board argues that the Commission should grant its motion for summary judgment because it never subcontracted the Classroom Assistants in violation of the Agreement, but rather hired temporary substitutes from Insight to fill in for the absences, caused by resignations or sick leave, of the regularly employed Classroom Assistants. The Board argues that it was its non-negotiable, managerial prerogative to enter into the agreement with Insight to provide substitute services and to utilize those substitute services to ameliorate its shortage of Classroom Assistants. The Board further argues that its use of Insight’s substitutes did not breach the Agreement, which was reached to avoid the subcontracting of all the then-existing Classroom Assistants for the 2018-2019 school year. The Board asserts that it complied with the Agreement as no Classroom Assistants were laid off or reduced from full-time to part-time nor did they

suffer any other change to their terms and conditions of employment. The Board further asserts that the Agreement does not require, but rather, leaves it to the Board's discretion whether to hire part-time Classroom Assistants, and that the Agreement has since expired. The Board also asserts that it has attempted to hire part-time Classroom Assistants; however, these positions are difficult to fill and retain, and many part-time Classroom Assistants who have been hired have already quit, thereby requiring the use of Insight substitutes to provide the needed special educational services to the students. The Board also argues that it is not pursuing privatization of the Classroom Assistants through attrition, and has no need to do so, because it has the non-negotiable, managerial prerogative to subcontract the position for economic reasons. Lastly, the Board argues that alleged anti-union statements made by Soboloski to Bohren did not constitute an unfair labor practice because the comments were a permitted expression of opinion about labor relations and they were not coercive, a threat, or a promise of benefit. Because there are no material facts in dispute, the Board argues the Association's UPC should be dismissed as a matter of law.

The Association argues that the Commission should deny the Board's motion for summary judgment because there exist genuine issues of material fact regarding the Board's intent to

subcontract the Classroom Assistant position through attrition, the violation of the Agreement through the Board's use of Insight employees, and the Board's anti-union comments to Association leadership and members encouraging part-time Classroom Assistants to work for Insight because of higher wages and lack of union dues. The Association argues that summary judgement should not be granted in a UPC when there are issues requiring the determination of a state of mind or intent. The Association further argues that it need not show that the Board took an adverse action against the Association due to Soboloski's comments, but rather, that her encouragement of Association members to work for Insight had a tendency to interfere with or discourage the Association from engaging in protected activity, namely joining or remaining in the Association. The Association also argues that the Board's claims of economic necessity requiring the use of Insight substitutes are unsupported by any certification or other documentary evidence, and thus, summary judgment is inappropriate and the Board should be left to their proofs at a hearing.

ANALYSIS

This issue before the Commission is whether the Board violated the Act when it used Insight employees to fill the vacancies and absences of Classroom Assistants without negotiations for the 2018-2019 school year, thereby breaching the

Agreement. We find that there is an insufficient factual record before us to resolve this issue by summary judgement, and thus, an evidentiary hearing is necessary.

N.J.S.A. 34:13A-5.3 requires that: "the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." "[U]nilateral imposition of working conditions is the antithesis of [the Legislature's] goal that the terms and conditions of public employment be established through bilateral negotiation." Atlantic Cty., 230 N.J. 237, 252 (2017), quoting Galloway Twp. Bd. of Educ., 78 N.J. 25, 48 (1978).

Public employers are prohibited from "[r]efusing 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." N.J.S.A. 34:13A-5.4a(5). Public employers are also prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004). Additionally, for a 5.4a(1) violation to be found, proof

of actual interference, intimidation, restraint, coercion or motive is unnecessary; the tendency to interfere is sufficient. Trenton Bd. of Ed., P.E.R.C. No. 2022-20, 48 NJPER 245 (¶55 2021) (internal citations omitted).

Here, we find there are numerous disputed material facts that require an evidentiary hearing. The parties dispute whether the Board repudiated the Agreement by using Insight substitutes to replace the Classroom Assistants. In addition, the parties dispute the Board's motivation for using the Insight substitutes and the economic necessity for their use. While the Board claims that it has attempted to fill the Classroom Assistant vacancies with permanent Classroom Assistants, and the use of Insight substitutes is only temporary, these factual assertions were not certified to and have not been established. The Association's factual assertions that Insight substitutes were reporting for work daily as full-time Classroom Assistants and substituting for no one, if proven true, may have had a tendency to interfere with the Association members' rights under the Act, which necessitates a hearing. Simply put, when viewed in the light most favorable to the Association, this factual record is not sufficient to support granting the Board's motion for summary judgment.

Further, there are disputed material facts concerning Soboloski's alleged comments to the Association that its members should go work for Insight because Insight could pay higher wages

and the members would not have to pay union dues. While this claim more appropriately invokes N.J.S.A. 34:13A-5.4a(3)^{2/}, which the Association did not plead in their initial UPC, these alleged comments may also touch on whether the Board negotiated in good faith when it entered into the Agreement and whether it was the Board's intent to permanently replace the Classroom Assistants with non-Association Insight employees. Summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind or intent such as bad faith. See generally, Current N.J. Court Rules, R. 4:46-2, Comment 2.3.4., p. 1491 (2022). Thus, we find the central issue of determining whether the Board refused to negotiate in good faith, thereby committing an a(5) violation, requires a hearing examiner's credibility determinations of witness testimony.

For the foregoing reasons, we deny the Board's motion for summary judgment as this matter presents numerous issues of disputed material facts that cannot be resolved through summary judgment and require credibility determinations by a hearing examiner. The parties are left to their proofs and affirmative defenses at a hearing.

2/ This provision prohibits public employers, their representatives or agents from: "(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."

ORDER

The Buena Regional Board of Education's motion for summary judgment is denied. The case shall be set for hearing.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: September 29, 2022

Trenton, New Jersey