

P.E.R.C. NO. 2024-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-118

MIDDLESEX EDUCATION ASSOCIATION,

Charging party.

SYNOPSIS

The Public Employment Relations Commission denies the Association's exceptions and adopts a Hearing Examiner's decision on unfair practice charges alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by refusing to negotiate additional compensation for speech therapists to prepare and submit billing for the Special Education Medicaid Initiative (SEMI) program. The Commission finds that the task of completing billing paperwork for the SEMI program is incidental to or comprehended within the job description and regular job duties of the speech therapist position. Therefore, the Commission finds the Board had a non-negotiable prerogative to unilaterally assign such duties without negotiating over additional compensation.

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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For the Respondent, Busch Law Group, LLC
(Ari D. Schneider, of counsel)

For the Charging Party, Detzky Hunter & DeFillippo, LLC
(David J. DeFillippo, of counsel)

DECISION

This case comes before the Commission by way of exceptions filed by the Middlesex Education Association (Association) to a Hearing Examiner's decision dismissing its unfair practice charge. H.E. No. 2024-7, _ NJPER _ (¶ 2024). The Association's January 18, 2023 charge alleges that the Middlesex Board of Education (Board) violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5)^{1/}, by refusing to negotiate

^{1/} These provisions prohibit public employer, 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
(continued...)

additional compensation for requiring Speech-Language Therapists (Speech Therapists) to prepare and submit billing for the Special Education Medicaid Initiative (SEMI) program. On May 16, 2023, the Deputy Director of Unfair Practices and Representation issued a Complaint and Notice of Pre-Hearing on the Association's allegations.

On September 21, 2023, the Association filed a motion for summary judgment, together with a brief, exhibits, and the certifications of Association President C.M. and Speech Therapist R.S. On October 10, the Board filed a cross-motion for summary judgment along with a brief. On October 17, the Association filed a response to the Board's cross-motion. On October 17, the Commission referred the motion and cross-motion for summary judgment to the Hearing Examiner. N.J.A.C. 19:14-4.8(a).

On March 1, 2024, the Hearing Examiner issued her decision denying the Association's motion for summary judgment, granting the Board's cross-motion for summary judgment, and dismissing the Complaint. H.E. 2024-7. The Hearing Examiner found that the task of completing paperwork associated with SEMI billing is incidental to or comprehended within the job description and normal job duties of the Speech Therapist position. H.E. at 7-11. She found that even though Speech Therapists are not

1/ (...continued)
refusing to press grievances presented by majority representative.

required to hold private licenses/certifications, those that do are eligible and have been required by the Board to prepare and submit SEMI billing paperwork with no additional compensation as part of their regular duties to complete necessary paperwork to participate in government programs. Id. The Hearing Examiner therefore granted the Board's motion for summary judgment and recommended dismissal of the Association's subsection 5.4a(5) and 5.4a(1) charges alleging that the Board refused to negotiate in good faith over additional compensation for SEMI billing.

On March 11, 2024, the Association filed exceptions with the Commission to the Hearing Examiner's decision. N.J.A.C. 19:14-7.3. On March 14, the Board filed a brief in opposition to the Association's exceptions.

STANDARD OF REVIEW

This matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the

decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

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. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (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).

SUMMARY OF FACTS

We have reviewed the Hearing Examiner's Findings of Fact and find that they are supported by the record. H.E. at 3-6. We summarize the pertinent facts as follows.

The Association is the exclusive majority representative of all regular full-time and part-time certified and non-certified personnel (with some exceptions) employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) effective from July 1, 2021 through June 30, 2024. The position of Speech Therapist is represented by the Association. The Board currently employs five Speech Therapists.

The job description for Speech Therapists includes, in pertinent part:

- "8. Keeps those records necessary for each child and completes all required local, state and federal reports."; and
- "15. Assumes other related duties as assigned by the superintendent of schools or the student personnel director."

Although not required by the Board, several of the Board's Speech Therapists hold private licenses/certificates that qualify them to provide services that qualify for SEMI reimbursement.

N.J.S.A. 18A:55-3(d) provides: "As a condition of receiving State aid, a school district shall: . . . d. take appropriate steps to maximize the district's participation in the Special Education Medicaid Initiative (SEMI) Program, with maximum participation defined by the commissioner; . . ." N.J.A.C. 6A:23A-5.3(e) provides that any services submitted for SEMI reimbursement must be rendered by, or under the supervision of, a "Medicaid qualified practitioner" and sets forth the qualifications and documentation for "speech-language specialists" to be Medicaid qualified practitioners.

Prior to the Fall of 2021, the Board's Speech Therapists prepared and submitted SEMI billing, which requires them to record the length and types of speech therapy sessions with Medicaid eligible students. In the Fall of 2021, the parties began contract negotiations during which the Association proposed that Speech Therapists receive additional pay for performing the SEMI billing. In response, the Board rescinded the SEMI billing duties from Speech Therapists. The Association then dropped its demand for additional compensation for SEMI billing. The parties concluded negotiations and executed the 2021-2024 CNA.

On or about June 22, 2022, the Board's Director of Special Education notified the Speech Therapists that they would again be required to prepare and submit SEMI billing in the 2022-2023 school year. In response, the Association requested that the

Board contribute to the cost of the private licenses that qualified the Speech Therapists to do the SEMI billing. The Association prepared a draft Memorandum of Understanding (MOU) providing for 50% reimbursement from the Board for the cost of maintaining the Speech Therapists' private licenses. The Superintendent has not presented the draft MOU to the Board.

ARGUMENTS

The Association excepts to the Hearing Examiner's conclusion that the task of SEMI billing is incidental to or otherwise contemplated within the job description for Speech Therapists. The Association argues that because the private licenses required for SEMI billing are not an employment requirement for the Speech Therapist position, then SEMI billing should not be considered a part of their duties. The Association contends that while their job description includes completing all required government paperwork, SEMI billing is not mandated.

The Association excepts to the Hearing Examiner's rejection of its assertion that because the Board reassigned SEMI billing duties to other district personnel during the 2021-2022 school year, it recognized that SEMI billing was not incidental to Speech Therapists' job duties. The Association also excepts to the Hearing Examiner's finding that the Association did not allege that SEMI billing is a job duty of other district personnel.

The Board responds that SEMI billing falls within Speech Therapists' job duties to complete all required government records. It argues that these are required records pursuant to N.J.S.A. 18A:55-3(d) and N.J.A.C. 6A:23A-5.3 in order to receive State aid for speech and language services. The Board asserts that the private licenses held by the Speech Therapists are not required to complete the necessary SEMI billing. The Board contends that while Speech Therapists have historically performed SEMI billing, the fact that the Board briefly reassigned these duties to other (non-licensed) staff members does not mean that SEMI billing is no longer incidental to or comprehended within the job duties of Speech Therapists.

ANALYSIS

Public employees have an interest in not being required to perform duties outside their job description. See Bloomfield Tp., P.E.R.C. No. 2005-36, 30 NJPER 470 (¶157 2005); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 110-112 (¶28054 1997). Thus, public employee unions may negotiate for contractual protections against employees being required to assume duties outside their job titles and beyond their normal duties. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977) (teachers may not be required to move furniture and do other custodial tasks); N.J. Hwy. Auth., 2003 N.J. Super. Unpub. LEXIS 20 (App. Div. 2003), aff'g P.E.R.C. No. 2002-76, 28 NJPER 261

(¶33100 2002) (toll plaza supervisors assigned to cover breaks of toll collectors was arbitrable); Camden Cty. College, P.E.R.C. No. 2006-21, 31 NJPER 308 (¶121 2005) (expansion of campus security patrol area to off-campus areas was arbitrable); Paterson State-Operated School Dist., P.E.R.C. No. 98-29, 23 NJPER 514 (¶28250 1997) (teacher may not be required to perform clerical tasks not incidental to normal teacher assignments).

However, public employers have a managerial prerogative to unilaterally assign duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., West Milford Bd. of Ed., P.E.R.C. No. 2024-14, 50 NJPER 237 (¶52 2023) (bus drivers required to pump own gas); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 2022-37, 48 NJPER 391 (¶89 2022) (assignment of Medicaid fair hearing duties to one employee instead of entire unit); North Caldwell Bor., P.E.R.C. No. 2010-51, 36 NJPER 10 (¶4 2010) (police officers assigned to dispatch duties); Town of Harrison, P.E.R.C. No. 2002-54, 28 NJPER 179 (¶33066 2002) (firefighters assigned to EMS and dispatch calls); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) (fire officers required to perform crossing guard/patrol duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (bus drivers required to pump own gas).

Here, the reassignment of SEMI billing duties to Speech Therapists for the 2022-2023 school year was a resumption of duties they had historically performed before the Board rescinded those duties during the 2021-2022 school year. The record supports that completion of this paperwork for purposes of Medicaid reimbursement is incidental to or comprehended within the Speech Therapists' job duties. Specifically, their job duties include completing all required local, state, and federal reports. The Association argues that participation in the SEMI program is not mandated by state law so it should not be considered a job duty. However, we find that, from the Board's perspective and as it pertains to the Speech Therapists' job duties, completion of SEMI billing is a "required" state report because "maximiz(ing) the district's participation in the [SEMI] Program" is a necessary "condition of receiving State aid" pursuant to N.J.S.A. 18A:55-3(d). As SEMI billing involves making a record of speech therapy sessions with Medicaid eligible students to receive Medicaid reimbursement and receive State aid, it is incidental to Speech Therapists' normal job duties. Cf. Hamburg Bd. of Ed., P.E.R.C. No. 2021-40, 47 NJPER 417 (¶100 2021) (in increment withholding case, a Speech Language Therapist's difficulty meeting speech therapy testing and reevaluation deadlines to comply with State regulations and "continue receiving funding from the State for special education

services, including speech therapy" was considered an evaluation of her job performance as a speech language therapist).

Furthermore, the Board's reassigning of SEMI billing duties to other staff during the 2021-2022 school year does not make the reassignment back to Speech Therapists an unfair practice. The Commission has held that the fact that certain job duties may also be performed by employees in other job titles does not mean the duties are no longer comprehended within the job description. State of N.J. (Dept. of Human Services), P.E.R.C. No. 2018-55, 45 NJPER 24 (¶6 2018) ("Performance of duties that may overlap between job titles, standing alone, does not necessarily constitute an unfair practice."); West Milford Bd. of Ed., P.E.R.C. No. 2024-14, supra, and Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, supra (even though mechanics had previously been assigned to fueling duties at times, refueling their own bus was still incidental to bus drivers' regular duties).

Based on this precedent, we find that the Board had no duty to negotiate with the Association over the assignment of and additional compensation for the performance of SEMI duties which are incidental to and comprehended within the Speech Therapists' job description and normal job duties. We therefore concur with the Hearing Examiner's recommendation that the Association's unfair practice charge be dismissed.

Finally, we note that, during CNA negotiations in 2021, the Association only withdrew its request to negotiate the issue of SEMI billing because the Board had rescinded that work assignment during negotiations. Although we find here that additional compensation for SEMI billing that is comprehended within Speech Therapists' job duties is non-negotiable, the Association has sought to negotiate other forms of compensation related to their maintenance of private licenses and/or certifications that make their speech therapy services eligible for reimbursement through the SEMI Program.^{2/} See N.J.A.C. 6A:23A-5.3(e). The Board still has an obligation to negotiate with the Association, upon demand, regarding any negotiable impacts of the reassignment of SEMI duties to Speech Therapists.

ORDER

The Middlesex Education Association's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Eaton, Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed.

ISSUED: April 25, 2024

Trenton, New Jersey

^{2/} The record indicates that the Board has not yet considered the Association's draft MOU providing for 50% reimbursement of licensing costs.