

P.E.R.C. NO. 81-145

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONROE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-196-119

MONROE TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission determines that the Monroe Township Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused to negotiate its decisions to employ non-unit nurses in a position formerly held by a nurse who was in the negotiations unit represented by the Monroe Township Education Association.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONROE TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-80-196-119

MONROE TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Aron, Till & Salsberg, Esqs.
(Lester Aron, of Counsel)

For the Charging Party, Schneider, Cohen, Solomon &
DeMarzio, Esqs. (J. Sheldon Cohen, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on January 14, 1980 by the Monore Township Education Association (the "Association") alleging that the Monroe Township Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). As amended on December 12, 1980 and March 19, 1981, the unfair practice charge contains several allegations of conduct by the Board said to be violative of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5).^{1/}

^{1/} These subsections 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
(Continued)

It appearing that the allegations of the unfair practice charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 10, 1980. Due to settlement efforts by the parties and scheduling delays, the parties appeared before Hearing Examiner Alan Howe on March 19, 1981. At that time, the parties stipulated certain facts in the case and testimony was taken from several witnesses. Pursuant to N.J.A.C. 19:14-6.7,^{2/} the parties then agreed to waive the Hearing Examiner's Recommended Report and Decision and to submit the matter directly to the Commission for a decision based on the stipulations of fact, the additional testimony, the transcript and post-hearing briefs. The matter is now properly before the Commission for determination.

The unfair practice charge is based on the following stipulated facts:

1. The Monroe Township Board of Education is a public employer within the meaning of the Act.

2. The Monroe Township Education Association is a public employee representative within the meaning of the Act and represents, among others, all certified nurses employed by the Board.

1/ (Continued) 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."

2/ N.J.A.C. 19:14-6.7 provides: "In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue. The parties may submit a stipulation of facts to the commission for a decision without a hearing. The parties may also agree to waive a hearing examiner's recommended report and decision."

3. In the school year 1978-79, the Board employed five certified nurses to provide health services in its schools.

4. After the 1978-79 school year, one certified nurse left the district. For the 1979-80 school year, the Board replaced that certified nurse with a non-certified substitute nurse who was not included in the same negotiations unit.

5. After the 1979-80 school year, the non-certified substitute nurse left the district. For the 1980-81 school year, the Board replaced the non-certified nurse with a "First Aid Person" who is a registered nurse, and contracted out certain testing services to a non-unit certified nurse.

The Association charges that the Board committed unfair practices in both the 1979-80 and 1980-81 school years by refusing to negotiate its decisions to employ non-unit nurses in a position formerly held by a nurse who was in the negotiations unit represented by the Association. The Association also alleges that the Board refused to negotiate in good faith when it repudiated an agreement of settlement in this matter.

As to the latter charge, we find that no such repudiation of agreement was established through stipulation or testimony at the hearing. To prove this charge, the Association would have to prove that Board representatives in settlement negotiations had actual or apparent authority to bind the Board to an agreement. See e.g. Borough of Wood-Ridge, P.E.R.C. No. 81-105, 7 NJPER 149 (¶12066 1981) and Bergenfield Board of Education, P.E.R.C. No. 90, 1 NJPER 44 (1975). The Association did not pursue these arguments below. Therefore, we hereby dismiss the repudiation aspect of the

Association's charge.

The remainder of the Association's charge concerns the series of events alluded to in the above stipulations of fact. The parties agree that non-unit nurses have been employed by the Board for the last two school years to perform work formerly done by a certified nurse who was represented by the Association.

The Board contends that its employment of non-unit nurses in both of the past two school years were exercises of the Board's inherent managerial prerogative to provide health services as it deems appropriate. Therefore, the Board asserts, it had no obligation to negotiate these employment decisions with the Association. State v. State Supervisory Employees Assn, 78 N.J. 54, 67 (1978).

This argument would guide our decision here if the Board made a policy decision to change the level of health services provided and implemented a corresponding personnel change. c.f. Ramapo-Indian Hills Education Association, Inc. v. Ramapo-Indian Hills Regional High School District Bd. of Ed., 176 N.J. Super. 35 (1980). However, the parties stipulated that "[d]uring the period from September 1979 through June 1980 the non-certified substitute nurse performed all the regular and customary duties of the certified nurses who were in the collective negotiations unit."^{3/} As for 1979-80, the parties have not stipulated the level of health services. Nonetheless, the Board introduced testimony by its director of student personnel services that health services in the

^{3/} Transcript at p. 8.

school with the First Aid Person, together with contract services, were "essentially equal [to] the kind of services that were [provided] in previous years."^{4/}

In Bd. of Ed. of Woodstown-Pilesgrove Regional School District v. Woodstown-Pilesgrove Regional Ed. Assn., 81 N.J. 582, 591 (1980), the New Jersey Supreme Court further refined the test stated in State Supervisory, supra. for examining the negotiability of matters which arguably concern inherent managerial prerogatives:

The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate....

On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is pre-eminent, then bargaining is appropriate.

In view of the fact that, by its own admission, the Board did not intend to change the level of health services in its schools in 1979-80 and 1980-81, the "dominant issue" in the Board's decision to employ non-unit nurses to perform work formerly done by nurses represented by the Association was clearly not an educational goal. Instead, we find that the dominant issue in the Board's decisions to employ non-unit nurses concerned terms and conditions of employment of the certified nurses represented by the Association. Therefore, the Board's decisions should have been negotiated with

^{4/} Transcript at page 42.

the Association.

We are not persuaded by the alternative defenses proffered by the Board. While it is true that pending litigation before the New Jersey Supreme Court in 1979-80^{5/} was relevant to the Board's employment policies that year, this does not obviate the unfair practice. The Board did not establish that the pending Supreme Court case prevented it from hiring a nurse who would be in the unit; in fact, the Board's Director of Student Personnel Services conceded that the Board could have hired a certified nurse in 1979-80.

The Board also asserts that it committed no unfair practice in 1980-81 when it contracted out certain health services to a certified nurse and hired a First Aid Person to perform other health services. Citing In the Matter of Local 195, IFPTE, AFL-CIO v. State of New Jersey, 176 N.J. Super 85 (1980), appeal pending Sup. Ct. Docket No. 17,828, the Board argues that since subcontracting is a managerial prerogative, the Board's decision on the delivery of health services in 1980-81 need not be negotiated with the Association.

This argument, while briefed by the Board, was not pursued at the hearing. There is no information before us to indicate that what happened in this case was subcontracting within the meaning of Local 195, supra.^{6/} Moreover, even if the testing

^{5/} The decision was made in August 1980: In re Jamesburg High School Closing, 83 N.J. 540 (1980).

^{6/} In Local 195, supra at 91, the Court cited "outside contractors" with "specialized equipment" as an example of a subcontractor. Additional criteria for subcontracting in the public sector could also be relevant. c.f. State of New Jersey and NJCSA/SEA, E.D. No. 67, 1 NJPER 2 (1975).

services were proven to be subcontracting within the confines of Local 195, supra, and other relevant criteria, the decision to assign the remaining unit work to the First Aid Person would be mandatorily negotiable. A similar conclusion under an analagous factual pattern was reached in Piscataway Township Bd. of Ed. and Piscataway Township Ed. Assn., P.E.R.C. No. 78-81, 4 NJPER 246 (¶4124 1978). c.f. In re Middlesex County College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977).^{7/}

For the reasons stated above, we find that the Board has violated N.J.S.A. 34:13A-5.4(a)(5) and, derivatively, 5.4(a)(1) of the Act. The Association also charged that the Board violated 5.4(a)(3); however, the Association did not offer evidence of attempts by the Board to encourage or discourage employees in the exercise of their rights under the Act. Therefore, we dismiss that portion of the charge which alleges a violation of 5.4 (a)(3).

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the Monroe Township Board of Education shall:

(a) Cease and desist from interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act by refusing to negotiate in good faith with the

^{7/} Based on the record, it is not clear whether an actual subcontract has taken place as to the testing services or whether the certified nurse with whom the Board contracted is or is not a Board employee rather than a private subcontractor. However, the burden was on the Association to establish that the individual was an employee and not a contractor if it wanted to pursue the argument (see N.J.A.C. 19:14-6.8), particularly in light of Local 195, supra. Therefore, our remedy is limited to the work done by the First Aid Person who is indisputably a Board employee.

Monroe Township Education Association decisions to replace a certified nurse with non-certified nurses.

(b) Take the following affirmative action necessary to effectuate the policies of the Act:

1) Negotiate with the Monroe Township Education Association any decision to employ non-unit employees to perform unit work.


2) Restore the status quo pending such negotiations by including the Board employee performing the unit work to the unit represented by the Monroe Township Education Association.

3) Post at its central office building in Jamesburg New Jersey, and at all the schools in the school district, copies of the attached notice to public employees. Copies of said notice, on forms provided by the Commission, shall, after being signed by the Board's representative, be posted by the Board immediately upon receipt thereof and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced or covered by any other material.

4) Notify the Chairman, in writing, within twenty (20) days from the receipt of this Order what steps have been taken to comply herewith.

IT IS HEREBY ORDERED that so much of the Complaint as alleges a violation of N.J.S.A. 34:13A-5.4(a)(3) is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett and Suskin voted in favor of this decision. None opposed. Commissioners Hartnett, Newbaker and Parcells abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey

June 9, 1981

ISSUED: June 10, 1981

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Act by refusing to negotiate in good faith with the Monroe Township Education Association the decision to replace certified nurses with non-certified nurses aides.

WE WILL negotiate with the Monroe Township Education Association any decision to employ non-unit employees to perform unit work.

WE WILL restore the status quo pending such negotiations by including the Board employee performing the unit work in the unit represented by the Monroe Township Education Association.

MONROE TOWNSHIP BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.