

D.U.P. NO. 2020-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

ACADEMY URBAN LEADERSHIP
CHARTER SCHOOL,

Respondent,

-and-

Docket No. CO-2017-257

ACADEMY URBAN LEADERSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Academy Urban Leadership Education Association (Association) against the Academy Urban Leadership Charter School (Respondent). The charge alleges that the Respondent violated section 5.4a(1), (3), and (5) of the New Jersey Employer-Employee Relations Act (Act) when during a May 18, 2017 negotiations session, Respondent's representatives engaged in threatening behavior towards one of the Association's representatives and ended the session early. The Director finds that the threat attributed to the Respondent representative identified only as "Ernesto" does not meet the complaint issuance standard because the charge did not specify the name of the person who made the statement or the place where it was made. The Director finds that the alleged threatening behavior exhibited by Respondent's representative, Lead Person Dr. Nestor Collazo, was not coercive and remained within the wide latitude of speech and conduct afforded to representatives in negotiations. The Director also finds that the charge did not allege any facts suggesting that that the Respondent engaged in any adverse action. Lastly, the Director finds that the Respondent's decision to prematurely conclude one negotiations session following a concededly heated exchange between the parties' representatives did not violate its duty to negotiate in good faith.

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Appearances:

For the Respondent,
Genova Burns, LLC, attorneys
(Nicholas J. Repici, of counsel)

For the Charging Party,
Oxford Cohen, attorneys
(Gail Oxford Kanef, of counsel)

REFUSAL TO ISSUE COMPLAINT

On October 3, 2017, the Academy Urban Leadership Education Association (Association) filed an unfair practice charge against Academy Urban Leadership Charter School (Respondent). The charge alleges that Respondent violated section 5.4a(1), (3), and (5)^{1/}

^{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
(continued...)

of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when, during a May 18, 2017 negotiations session, Respondent's representatives engaged in threatening and intimidating conduct towards one of the Association's representatives and ended the session early.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts.

Since June 1, 2016, the Association has been the exclusive majority representative of all regularly employed non-supervisory certificated employees of the Respondent. Respondent is a public charter school located in Perth Amboy, New Jersey. The parties are currently negotiating their first collective negotiations agreement. They held their first session on or around January 26, 2017.

1/ (...continued)
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."

On May 18, 2017, the parties met for a scheduled session. Before meeting, the parties exchanged proposals and responses. In attendance on behalf of Respondent were Lead Person Dr. Nestor Collazo, Respondent's counsel, its Business Administrator, and two other members of its Board of Trustees. In attendance on behalf of the Association were UniServ Field Representative Brian Furry and the then-union president James O'Brien. According to the charge, following a heated exchange at the negotiations table, one of Respondent's representatives, identified only as "Ernesto," said to UniServ Representative Furry, "Be lucky I don't smack you in the face." Lead Person Dr. Collazo allegedly threw his pen across the table, walked away from Respondent's side of the table, pointed his finger at UniServ Representative Furry and used threatening body language. Dr. Collazo also repeatedly called Representative Furry a "punk" and told him "you are outta here." Respondent's counsel then discontinued the negotiations session. At the time of this event, O'Brien was an employee of the Respondent. No facts indicate that the Respondent took any sort of adverse personnel action against O'Brien due to his union activity. To date, the parties have continued to conduct negotiations sessions.

ANALYSIS

The Association asserts that the behavior of Respondent's representatives at the May 18, 2017 negotiations session and its

decision to discontinue the session violated sections 5.4a(1), (3) and (5) of the Act.

A public employer violates section 5.4a(1) of the Act if its statement or conduct tends to interfere with the free exercise of employees' statutory rights. Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). Proof of actual interference, restraint or coercion is unnecessary to establish an independent section 5.4a(1) violation. Id. The "focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it." Tp. of South Orange Village, D.U.P. No. 92-6, 17 NJPER 466 (¶22222 1991). In addition, a charge alleging any violation of the Act must set forth a "clear and concise statement of the facts constituting the alleged unfair practice." N.J.A.C. 19:14-1.3(a)(3). A charging party must also "specify the date and place the alleged acts occurred" and the "names of the persons alleged to have committed such acts." Id. It is well-settled that "[i]n negotiations and grievance discussions, management officials and union representatives meet as equals and exchange views freely and frankly. Passions may run high and epithets and accusations may ensue so courts have refused to impose a 'rigid standard of proper and civilized behavior' on participants and have allowed leeway for adversarial

and impulsive behavior." State of New Jersey (Treasury Dept.), P.E.R.C. No. 2001-51, 27 NJPER 167, 173 (¶32056 2001) (citing Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724 (5th Cir. 1970) (internal citations omitted)). Although the Commission does not condone inappropriate behavior, it has consistently recognized that the Act affords representatives in a labor dispute a "wide latitude of speech and conduct" Id., 27 NJPER at 173.

In the specific context of employer speech, the Commission has balanced employers' right to free speech, with employees' right to the free exercise of their statutory rights, and it concluded that the Act permits employers to express opinions about labor relations, provided such statements are not coercive. State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987). To determine whether employer speech is coercive, the Commission has applied the standard set forth in the National Labor Relations Act (NLRA) 29 U.S.C. §151 et. seq., which prohibits communications that contain a "threat of reprisal or force or promise of benefit." See City of Camden, P.E.R.C. 82-103, 8 NJPER 309 (¶13137 1982) adopting H.E. No. 82-34, 8 NJPER 181 (¶13078 1982); Rutgers, the State University, P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983), adopting H.E. No. 83-26, 9 NJPER 177 (¶14083 1983).

Under the above principles, the allegations involving the statement attributed to one of Respondent's negotiations representatives - "Be lucky I don't smack you in the face" - does not appear to meet the complaint issuance standard. The charge only provides the name, "Ernesto" and does not identify the place where the alleged threat was made.

The allegations against Dr. Collazo also do not establish a Section 5.4a(1) claim. Throwing a pen, finger-pointing, name-calling and aggressively approaching an adversary during negotiations all remain within the "wide latitude of speech and conduct" afforded to representatives. Such behavior, which followed an admittedly heated exchange between adversarial parties who were meeting as equals for negotiations, was devoid of any threat of reprisal or force or promise of benefit.

Compare Trailmobile Trailer, LLC, 342 NLRB 94, 95-96 (2004) (explaining that a manager's statements to employees that people in the Union were stupid and that the union representative was a "fat [expletive] . . . living it up at the Holiday Inn on the employees' dues" were lawful because the NLRA "countenances a significant degree of vituperative speech") with Jimmy John's, 361 NLRB No. 27, slip op. at 35-38 (2014), 818 F.3d 397 (2016) (finding supervisors' postings on employees' anti-union Facebook page encouraging employees to widely share a degrading picture of an employee who was a union supporter would reasonably tend to

dissuade employees from supporting the union). Under these circumstances, Dr. Collazo's behavior did not reasonably tend to interfere with employees' statutory rights.

The facts as alleged also do not establish a violation of section 5.4a(3) of the Act, which makes it an unfair practice for an employer to retaliate against employees for exercising their statutory rights or discourage employees in exercising those rights. See In re Bridgewater Tp., 95 N.J. 235 (1984). The charge does not allege any facts suggesting that the Respondent took any personnel action or other form of retaliation against Association President O'Brien, who was an employee at the time of the events in the charge. Respondent does not employ UniServ Representative Furry and therefore, Respondent has no control over the terms and conditions of his employment that would enable it to effectuate any sort of adverse personnel action against him.

The alleged facts also do not establish that the Respondent violated its duty under section 5.4a(5) of the Act to engage in good faith negotiations. In determining whether an employer is meeting this statutory obligation, the totality of the parties' conduct is examined. In State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). Respondent decided on one occasion to prematurely conclude a negotiations session only after there was a heated exchange

between the parties and allegedly impulsive behavior exhibited by its agents. Since that session, Respondent continued to meet and negotiate with the Charging Party for a contract. Under these circumstances, the Charging Party's allegations do not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: September 10, 2019
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by September 20, 2019.