D.U.P. NO. 2023-18

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

In the Matter of

PINELANDS REGIONAL BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-2022-063

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Pinelands Education Association (Association) against the Pinelands Regional Board of Education (Board). The charge alleges that on or about September 22, 2021 the Board violated section 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., by threatening Association members for protected activity after members displayed signs in their vehicles during "Back to School Night" which read:[h]ere for the kids, without a contract" and intentionally misrepresenting the status of collective negotiations with the Association.

The Director dismissed the section 5.4a(1) and (3) allegations about the signs finding that comments were protected free speech that did not have a tendency to interfere, coerce or discourage employees from exercising their rights under the Act and Association members did not suffer an adverse employment action. The Director also dismissed the Association's 5.4a(1) and (5) allegations about the misrepresentation of the status of negotiations finding that the Superintendent's language was protected free speech under Black Horse Pike.

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Appearances:

For the Respondent,
Cooper Levenson, attorneys
(Kasi Marie Gifford, of counsel)

For the Charging Party,
Mellk Cridge, LLC, attorneys
(Arnold M. Mellk, of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 23, 2021, the Pinelands Education Association (Association or Union) filed an unfair practice charge against the Pinelands Regional School District Board of Education (Board). The charge alleges that on or about September 22, 2021, the Board violated section 5.4a(1), (3), and (5)[1/] of the New

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 (continued...)

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by threatening Association members for protected activity after members displayed signs in their vehicles during "Back to School Night" which read: "[h]ere for the kids, without a contract" and intentionally misrepresenting the status of collective negotiations with the Association.

On November 12, 2021, the Board filed and served on the Association a position statement arguing that the charge should be dismissed. The Board asserts that email sent by the Superintendent and Board President about the signs did not threaten to discipline or discriminate against any unit employees. Rather, the Board contends that the emails "rightly demonstrated that Back to School Night was not the place to try and negotiate in public, and also clarifying the record as to where negotiations stand, and why they have not progressed any further."

On December 9, 2021, the Association filed a position statement in support of the charge. The Association asserts the two emails at issue intended to, "[1] chill and threaten Association members as against exercising their right to engage

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1/ (...continued)
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."

in protected activity; to wit, displaying signs in their personal vehicles which said [h]ere for the kids, without a contract; [2] accuse Association members of engaging in "conduct unbecoming" for displaying the aforesaid signs-a clear threat of discipline; and [3] misrepresent the actual status of negotiations to the communications' recipients."

The Commission has the 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-5.4c; 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:

The Association is the exclusive majority representative of a negotiations unit of regularly employed teaching staff members, special services staff, library/media specialist, school nurses, guidance counselors, secretaries, bookkeepers, accounting clerks, attendance officers, clerk typists, teacher aides, custodial staff, maintenance staff, sign-language interpreters and receiving personnel. The Association and the Board are parties to a collective negotiations agreement (CNA) extending from July 1, 2018 through June 30, 2021. The parties currently are in negotiations for a successor agreement.

On September 21, 2021, the Pinelands Regional School District held a "back to school night." Some Association members displayed signs in their personal vehicles which stated: "[h]ere for the kids, without a contract." On the same night, the Superintendent sent a email to all staff indicating:

> Thank you for a very successful Back to School Night! It was great seeing parents back in the school!
>
> It was, however, disheartening, seeing signs in car windows regarding contracts. First and foremost, you are working under a contract. You receive a paycheck and are working under a contract. Hopefully your leadership will present your suggestions and a proposal is presented to the Board Committee so this process can move forward.

The email also contained an attachment of a photograph of one Association member's vehicle which had the sign displayed.

On September 22, 2021, the Board's President sent an email to the Association's leadership, District administrators, and the Board's labor attorney. The email indicated the Board President felt that the behavior of Association members (displaying the aforementioned signs) was "disheartening and unbecoming of our Pinelands family."

ANALYSIS

The Signs

Public employees have the right to engage in "protected" conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). Section 5.4a(1)

cases require a balancing of two important but conflicting rights, the employer's right of free speech and the employees' right to be free from coercion, restraint or interference in the exercise of protected rights. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987); Cty. of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985).

The standards for establishing whether an employer has violated section 5.4a(3) is set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) ("Bridgewater"). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. At 246.

An adverse employment action is an essential element of a 5.4a(3) claim. State of New Jersey (Dept. of Comm. Affairs), D.U.P. No. 2015-8, 41 NJPER 102; Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp. 2d 150 (¶133 App. Div. 1985). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because ". . . there was no

threat [or] change in any terms or conditions of employment." 10 NJPER at 438. Under PERC precedent, adverse employment actions normally require some personnel action impacting a term and condition of employment. See, e.g., Rutgers University, H.E. No. 2003-2, 28 NJPER 466 (¶33171 2002) (finding no adverse personnel action resulted from staff reorganization where charging party's title, salary, and benefits remained the same); Seaside Heights, P.E.R.C. No. 99-67, 125 NJPER 96 (¶30042 1999) (finding no violation where the charging party, a lifeguard, considered an assignment less desirable and prestigious, as well as a punishment and demotion, but suffered no loss in pay).

In Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission found that the Board of Education violated sections 5.4a (1) and (3) of the Act when it placed two letters in a teacher's personnel file that were critical of actions the teacher took while serving as a union representative in a meeting between another member and a principal. The Commission stressed in Black Horse Pike that writing letters critical of the teacher's Association-related functions is not *per se* improper, because "[a] public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations." Id. at 503. The employer may not, however, ". . . convert that criticism into discipline or other

adverse employment action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee." Id. at 504. Further, an employer make not make a statement to employees that has a tendency of discouraging them from engaging in protected activity and/or consulting with their majority representative. Trenton State College, 13 NJPER at 721 (Employer communication that could have a tendency to discourage faculty from discussing college dean's reorganization plan with union violated (a)(1) of Act); Warren Cty. College, D.U.P. No. 2018-4, 44 NJPER 159 (¶47 2017) (The College violated section (a) (1) of Act when the College President advised faculty that he did not intend to negotiate with the Association for a successor agreement as long as then-President and then-Vice President remained in their union positions.); Rockaway Twp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013). (The Board violated section (a)(1) when the Board President criticized the Association's negotiation efforts during a public meeting attended by numerous Association members and negotiation team members.); Compare, Somerset Hills Bd. of Ed., D.U.P. No. 2014-4, 40 NJPER 223 (¶85 2013) (Principal's comments did not violate section (a)(1) as they represent her opinion about teacher performance on work-related matters.)

Here, the emails sent by the Superintendent and Board President following "Back to School Night" do not violate section 5.4a(1). The comments generally fall under the category of protected employer free speech; they represent an expression not an opinion about the signs in question during "Back to School Night." Neither email had the tendency to interfere, coerce or discourage unit employees from exercising rights under the Act. Unit members were not told that they should or could not display the signs, nor were they threatened with any type of discipline or adverse personnel action for displaying the signs. I do not find that the Board President's use of the term "unbecoming" was a threat of discipline, but rather the expression of an opinion about the Association's labor relations activity that is protected free speech under Black Horse Pike. Accordingly, I dismiss the 5.4a(1) allegation.

Further, no facts were plead indicating any Association members suffered an adverse employment action in retaliation for protected activity. Association members were not disciplined for displaying the signs, nor were their terms and conditions of employment altered in any way in response to displaying the signs. Accordingly, I dismiss the 5.4a(3) allegation.

Status of Negotiations

N.J.S.A. 34:13A-5.4a(1) prohibits a public employer from interfering with, restraining, or coercing employees in the

exercise of the rights guaranteed to them by the Act. An employer violates this section independently of any other violation if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. An employer violates the section derivatively when it violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

The Act does not limit a public employer's right to express opinions about labor relations so long as the statements are not coercive. State of New Jersey (Trenton State College), 13 NJPER at 721. 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).

In Black Horse Pike, the Commission wrote:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations,

> which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

The Superintendent's language stating that unit members were "working under a contact" was devoid of any threat of reprisal or force or promise of benefits. The Superintendent's email expressed the employer's viewpoint on how collective negotiations should be handled, consistent with its view of what constitutes "good labor relations" between the Association and Board. As such, it is protected free speech under the Act. Black Horse Pike at 503. Under these circumstances, the Superintendent's actions did not reasonably tend to interfere with employees' statutory rights. Therefore, the 5.4a(1) and (5)[2/] claim related to the Superintendent's comments regarding "working under a contract" are dismissed.

2/ No facts were alleged indicating that the Board refused to negotiate in good faith.

ORDER

The unfair practice charge is dismissed.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: January 12, 2023
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 January 24, 2023.