

D.U.P. NO. 2023-19

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

In the Matter of

UNION COUNTY VOCATIONAL
TECHNICAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2020-027
CI-2020-029

PATRICK H. WRIGHT,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses two unfair practice charges filed by Patrick Wright (Wright) against Union County Vocational Technical Board of Education (Board). In the first charge, Wright, a former nontenured evening custodian employed by the Board, alleges that he was inappropriately reprimanded by the Board's business administrator, and that at a meeting with the business administrator and another Board employee, the business administrator "forced" Wright to use union representation by the NJEA, despite Wright's requests that he be represented by an attorney of his choice, and despite the fact that Wright opted out of union membership. Wright further alleges that those actions constituted verbal intimidation, retaliation, harassment, and created a hostile work environment, and violate subsection 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). In the second charge, Wright alleges that the Board's non-renewal of his contract as an evening custodian for the 2020-2021 school year was in retaliation for Wright's whistle-blowing activities in December 2019 against his immediate supervisor. Wright alleges that he witnessed and reported that his supervisor committed fraud against the Board by having an employee of an outside custodial vendor punch Wright's supervisor's time card in the time clock when the supervisor was not present at work. Wright alleges that since he reported this fraud, he was retaliated against by his supervisor and the Board, culminating in Wright's non-renewal. Wright alleges that the Board's actions violate subsection 5.4a(1) of the Act.

The Director determined that Wright did not allege any facts in either charge indicating that the Board violated subsection 5.4a(1) of the Act, and did not allege any facts in the first charge that the Board violated subsections 5.4a(2), (3), (4), (5), (6) and (7) of the Act. Thus, the Director dismissed both charges.

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Appearances:

For the Respondent,
Florio, Perrucci, Steinhardt, Cappelli, Tipton &
Taylor, LLC, attorneys
(Lena K. Kim, of counsel)

For the Charging Party,
(Patrick H. Wright, pro se)

REFUSAL TO ISSUE COMPLAINT

On May 28, 2020, Patrick Wright filed an unfair practice charge against his employer, Union County Vocational Technical Board of Education (Board) (Docket No. CI-2020-027). Wright, a former nontenured evening custodian employed by the Board, alleges that he was inappropriately reprimanded by the Board's business administrator, Janet Behrmann. Wright also alleges that at a meeting with Behrmann and another Board employee, principal Jeff Lerner, on December 18, 2019, Behrmann "forced" Wright to use union representation by the NJEA, despite Wright's requests

that he be represented by an attorney of his choice, and despite the fact that Wright opted out of union membership. Wright further alleges that Behrmann's action constituted verbal intimidation, retaliation, harassment, and created a hostile work environment. Wright alleges that the Board's actions violate subsection 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).^{1/2/}

On May 26, 30, and 31, 2020, Wright filed a second unfair practice charge, an amended charge, and a second amended charge, respectively, against the Board (Docket No. CI-2020-029). In

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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 the unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (7) Violating any of the rules and regulations established by the commission."

2/ Wright also alleges that the Board's actions violate N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-29(a) and (b), but as these sections of the Act are not subject to unfair practice charges, they are not addressed here.

this second charge, Wright alleges that the Board's non-renewal of his contract as an evening custodian for the 2020-2021 school year was in retaliation for Wright's whistle-blowing activities in December 2019 against his immediate supervisor. Specifically, Wright alleges that he witnessed and reported that his supervisor committed fraud against the Board by having an employee of an outside custodial vendor punch Wright's supervisor's time card in the time clock when the supervisor was not present at work. Wright alleges that since he reported this fraud, he was retaliated against by his supervisor and the Board, culminating in Wright's non-renewal. Wright alleges that the Board's actions violate subsection 5.4a(1) of the Act.

On February 22, 2021, the Board submitted a position statement, which it also served on Wright, arguing that Wright's claims in both charges do not constitute violations of the Act, but rather constitute alleged contractual violations of the negotiated grievance procedures set forth in the collective negotiations agreement (CNA) between the Board and the Union County Vocational Technical Maintenance Personnel and Custodial Association (Association). Therefore, the Board argues that Wright's claims should be resolved through the CNA's grievance procedures. The current CNA between the Board and the Association runs from July 1, 2017 through June 30, 2020. The

Board also argues that Wright has not alleged any facts to support his claims that the Board has violated the Act.

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-5.4c; 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.

Wright was employed as a nontenured evening custodian by the Board, with an employment contract with a term of July 1, 2019 through June 30, 2020. On May 11, 2020, Wright received notice from the Board's superintendent that his employment contract was not being renewed for the 2020-2021 school year at the expiration of his contract on June 30, 2020. On May 21, 2020, Wright was provided with a written statement from the superintendent detailing the reasons for the non-renewal, including Wright's failure to adhere to directives and instructions, failure to follow district defined communications systems, such as his district issued email address, failure to report work matters to direct supervisors, resistance to meet with supervisory staff, his confrontational approach, and unclear communications.

On June 19, 2020, the superintendent confirmed with Wright via email that a informal hearing would be held virtually with

the Board on June 22, 2020. On June 20, 2020, Wright requested that the informal appearance before the Board take place during the public portion of the June 22, 2020 meeting. On June 22, 2020, Wright participated in the hearing before the Board.

ANALYSIS

The 5.4a(1) Allegations in CO-2020-027 and CO-2020-029

N.J.S.A. 34:13A-5.4a(1) prohibits employers from “interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.” The standards for evaluating 5.4a(1) charges were initially set forth in New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, (¶4189 1978), and revised and restated in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73 5 NJPER 550 (¶10285 1979):

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tends to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. Id. at 551, n.1.

The first inquiry is whether the employer’s actions tend to interfere with protected rights and the second is whether the employer had a legitimate and substantial business justification for its actions. See Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); NJ Sports & Exposition Auth., supra.

Protected activity is conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual. North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (P4205 1978), aff'd, NJPER Supp. 2d 63 (P45 App. Div. 1979). Protected activity may include individual conduct, such as complaints, arguments, objections, letters or similar activity, related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. N.J. Turnpike Auth., P.E.R.C. No. 2022-38, 48 NJPER 393 (¶90 2022); Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶150 2009); State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005). However, mere "personal griping" does not constitute protected concerted activity. State of New Jersey, 31 NJPER at 279.

In North Brunswick Tp. Bd. of Ed., H.E. No. 79-1, 4 NJPER 269, 270-271 (¶4138 1978), the Commission held that an employee engaged in protected activity when she objected about a change in work hours -- an existing working condition that pertained to a negotiations unit but that was not in the negotiated agreement. Similarly, in Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994), the Commission relied on North Brunswick Tp. Bd. of Ed. in

finding that an employee engaged in protected conduct when, during a group meeting with management to discuss a new evaluation system, the employee questioned the proposed changes, because he was commenting on a working condition affecting all employees.^{3/} By contrast, in Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), the Commission found that where the college had a policy of distributing paychecks at 4 p.m., a part-time employee did not engage in protected activity when she complained to the college president about not receiving her paycheck at the end of her workday at 1:15 p.m. because she was not acting on behalf of an employee organization; she did not act in concert with anyone; and her complaint was on behalf of herself individually and did not relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself. See also State of New Jersey (Public Defender), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. 12 NJPER 199 (¶17026 1986), aff'd NJPER Supp.2d 169 (¶148 App. Div. 1987) (personal opinions about how office should be organized and the practice of law conducted were not related to terms and conditions of employment and did not constitute protected activity; complaints about office Christmas party were

^{3/} The charge in Atlantic Cty. was ultimately dismissed on the grounds that, while the employee's transfer was partly motivated by his protected conduct, he would have been transferred even absent that conduct. 19 NJPER at 57.

protected but employer showed that attorney was terminated for poor performance).

In CO-2020-027, Wright alleges that he was inappropriately reprimanded and "forced" to be represented by NJEA, despite his requests that he be represented by an attorney of his choice, and despite the fact that he opted out of union membership. In CO-2020-029, Wright alleges that he witnessed and reported that his supervisor committed time-keeping related fraud, and then was retaliated against by his supervisor and the Board, culminating in his non-renewal. These allegations do not demonstrate protected activity, as there was no conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or any individual other than Wright himself. Wright's objections were not related to preserving or protesting the working conditions of any employee other than himself.

Furthermore, even if Wright's actions were protected activity, the Board had a legitimate and substantial business justification for Wright's non-renewal for the 2020-2021 school year, as detailed in the Board's May 21, 2020 written statement, including Wright's failure to adhere to directives and instructions, failure to follow district defined communications systems, such as his district issued email address, failure to report work matters to direct supervisors, resistance to meet

with supervisory staff, his confrontational approach, and unclear communications. See State of NJ (Human Services), I.R. No. 2018-13, 44 NJPER 434 (¶122 2018) (denying interim relief where alleged whistleblower had not demonstrated that adverse employment actions were taken in retaliation for alleged protected activity rather than for other legitimate or non-legitimate reasons).

Accordingly, the 5.4a(1) allegations are dismissed.

The 5.4a(2) Allegation in CI-2020-027

In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), the Commission discussed the standards for a violation of section 5.4a(2) of the Act:

Domination exists when the organization is directed by the employer, rather than the employees Interference involves less severe misconduct than domination so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's . . . rights; it must be aimed instead at the employee organization as an entity. 12 NJPER at 765.

The type of activity prohibited by 5.4a(2) is "pervasive employer control or manipulation of the employee organization itself" North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). Here, Wright has alleged no facts that indicate pervasive manipulation or control of an employee organization by the Board.

Accordingly, the 5.4a(2) allegation is dismissed.

The 5.4a(3) Allegation in CI-2020-027

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven that protected conduct was a substantial or motivating factor in the adverse action, by showing that the employee engaged in protected activity, the employer knew of the activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Id. at 242. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove that the adverse action would have taken place absent the protected conduct. Id.

Again, Wright has not alleged any facts that demonstrate any of the Bridgewater elements: he has not alleged that he engaged in any type of protected activity, or that the Board knew of any

protected activity, or was hostile towards it.^{4/} Accordingly, the 5.4a(3) allegations are dismissed.

The 5.4a(5) Allegations in CI-2020-027

Individual employees normally do not have standing to assert an a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). In the absence of any such claim against the majority representative, I find that Wright does not have standing to allege that the Board violated 5.4a(5) of the Act, and I dismiss that allegation.

The 5.4a(4) and(6) Allegations in CI-2020-027

Section 5.4a(4) prohibits public employers from

^{4/} To the extent that Wright is alleging that the Board violated the CNA, alleged violations of a CNA do not constitute violations of the Act, as section 5.3 of the Act commands that any dispute covered by the terms of a CNA must be resolved in accordance with the negotiated grievance procedures. N.J.S.A. 34:13A-5.3.

"[d]ischarging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." Section 5.4a(6) prohibits public employers from "[r]efusing to reduce a negotiated agreement to writing and to sign such agreement." As Wright has made no allegations supporting either of these two charges, I dismiss the 5.4a(4) and (6) allegations.

In sum, Wright has not alleged any facts indicating that the Board violated 5.4a(1), (2), (3), (4), (6), or (7) of the Act. Accordingly, I conclude that these charges do not meet the Commission's complaint issuance standard and dismiss them.
N.J.A.C. 19:14-2.2 and 2.3.

ORDER

The unfair practice charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

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

DATED: February 2, 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 February 13, 2023.