

D.U.P. NO. 2023-25

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2022-102

TRENTON EDUCATION ASSOCIATION,
TRENTON BUSINESS/TECHNICAL ASSOCIATION,
TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Trenton Education Association, Trenton Business/Technical Association, and Trenton Educational Secretaries Association against the Trenton Board of Education. The charge alleges that the Board violated N.J.S.A. 34:13A-5.4a(1) and (5) when it deprived unit members of union representation at investigatory interviews. The charge also alleges that the Board violated sections 5.4a(2) and (5) when its Executive Director of Human Resources made an isolated comment that he was actively refusing to deal with a particular union representative.

The Director dismissed the charge because the Associations: (1) failed to establish that the unit members were entitled to union representation, as there was no reasonable belief that they would be subject to discipline; and (2) failed to show that the isolated comment interfered with the administration of the unions or constituted a refusal to negotiate based on the Board's overall conduct.

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Appearances:

For the Respondent,
Adams, Gutierrez & Lattiboudere, LLC, attorneys
(Derlys M. Gutierrez, of counsel)

For the Charging Parties,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

REFUSAL TO ISSUE COMPLAINT

On November 1, 2021, the Trenton Education Association (TEA), Trenton Business/Technical Association (TBTA), and Trenton Educational Secretaries Association (TESA) (collectively, Associations) filed an unfair practice charge against the Trenton Board of Education (Board). The charge alleges that the Board's Executive Director of Human Resources, James DiDonato (DiDonato), (1) denied unit members union representation at investigatory meetings with Board officials to discuss their complaints that they were being subjected to an unhealthy work environment and

(2) stated to TBTA President Tanisha Smith (Smith) that he was actively refusing to deal with New Jersey Education Association (NJEA) Representative Susan Nardi (Nardi), the designated professional representative for the Associations. The Associations claim that these actions by the Board violated sections 5.4a(1), (2), and (5)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq. Specifically, the Associations allege that the denial of union representation violated sections 5.4a(1) and (5) and that DiDonato's comment to Smith violated sections 5.4a(2) and (5) of the Act.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. 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 will decline to issue a complaint. N.J.A.C. 19:14-2.3.

^{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;" "(2) Dominating or interfering with the formation, existence or administration of any employee organization;" 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."

I find the following facts.

The TEA is the exclusive majority representative of a negotiations unit that includes, but is not limited to, teachers, counselors, nurses, and librarians employed by the Board. The TEA and the Board are parties to a collective negotiations agreement effective September 1, 2015 through August 31, 2018.

The TBTA is the exclusive majority representative of a negotiations unit that includes, but is not limited to, various types of clerks and analysts employed by the Board. TBTA and the Board are parties to a collective negotiations agreement effective July 1, 2020 through June 30, 2022.

The TESA is the exclusive majority representative of a negotiations unit that includes secretarial staff employed by the Board. TESA and the Board are parties to a collective negotiations agreement effective July 1, 2012 through June 30, 2016.

On June 7, 2021, Nardi sent a letter to DiDonato asking him to reconsider his decision to deny TESA member Teresa Mendenhall (Mendenhall) the ability to have a TESA representative present with her at an interview to discuss her complaint that she was being subjected to an unhealthy work environment. The Associations assert that DiDonato did not respond to Nardi's request until "well after" the interview had already taken place.

On June 21, 2021, TEA President Janice Williams (Williams) submitted a series of written statements to DiDonato from additional unit members who believed they too had been subjected to an unhealthy work environment. On June 24, 2021, DiDonato replied to Williams stating that he would be reaching out to each employee to conduct an investigation during the month of July.

On July 9, 2021, Williams sent an e-mail to DiDonato requesting that TEA members be permitted to have TEA representation present at the investigatory meetings regarding their allegations of an unhealthy work environment. On July 14, 2021, DiDonato informed Williams that the TEA members were not entitled to union representation at the meetings.

Finally, according to the Associations, on June 14, 2021, DiDonato stated to TBTA President Smith that he was actively refusing to deal with Nardi, who is the designated representative for the Associations.

ANALYSIS

Representation at Investigatory Interviews

The Associations allege that the Board violated sections 5.4a(1) and (5) of the Act when it denied the Associations' request that union representatives be allowed to attend investigatory interviews with several unit members who had complained about an unhealthy work environment. The Associations claim that the teachers were entitled to have a union

representative present because the interviews discussed their complaints about safety, which is a mandatory subject of negotiations.

An employer independently violates section 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287, 289 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526, 527 (¶17197 1986); N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n.1 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion, or motive is unnecessary; the tendency to interfere is sufficient. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190, 192 (¶4096 1978), aff'd Dkt. No. A-3562-77 (App. Div. 1979).

Section 5.4a(5) prohibits public employers from refusing to negotiate in good faith over terms and conditions of employment with the majority representative. N.J.S.A. 34:13A-5.4a(5). The duty to negotiate is not only limited to the period of negotiations for a new agreement but applies at all times when a public employer proposes to change any negotiable term or condition of employment. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 49 n.9 (1978). Further, a duty to negotiate exists even mid-contract as to subjects which were

neither discussed in the successor contract negotiations nor embodied in contract terms. N.J. Tpk. Auth., P.E.R.C. No. 99-49, 25 NJPER 29, 31 (¶30011 1998). A public employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a mandatorily negotiable term and condition of employment, even though the practice or rule is not explicitly or implicitly included under the terms of the parties' agreement. Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983) (citing Galloway Tp. Bd. of Ed., 78 N.J. at 49 n.9).

Although the Associations do not allege a Weingarten violation, Weingarten nevertheless governs the entitlement to union representation during investigatory interviews. See N.L.R.B. v. Weingarten, Inc., 420 U.S. 251 (1975); adopted E. Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, Dkt. No. A-280-79 (App. Div. 1980). Under Weingarten, an employee has a right to union representation at an investigatory interview that the employee reasonably believes could lead to discipline. 420 U.S. at 257; E. Brunswick Bd. of Ed., 5 NJPER at 399. The Supreme Court in Weingarten wrote:

The union representative . . . is safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer

does not initiate or continue a practice of imposing punishment unjustly.

420 U.S. at 260.

Under Commission precedent, a specific showing is required to establish a violation of an employee's Weingarten rights. The charging party must show that the meeting was investigatory; that the employee reasonably believed that discipline might result; that the employee requested representation; and that the employer denied the request and proceeded with the meeting. State of N.J. (Div. of State Police), P.E.R.C. No. 93-20, 18 NJPER 471, 472 (¶23212 1992). The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case. Dover Mun. Utils. Auth., P.E.R.C. No. 84-132, 10 NJPER 333, 339 (¶15157 1984); State of N.J. (Div. of Taxation)/Kupersmit, D.U.P. No. 91-2, 16 NJPER 421, 423 (¶21177 1990). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative. Union Cty. Vocational Technical Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, 138 n.1 (¶34 2021).

The instant charge alleges that the interviews with Mendenhall and other unit members were for the purpose of discussing complaints that they made about an unhealthy work environment. Here, the Associations do not allege any facts indicating the employees in question could, under an objective standard, reasonably anticipate discipline would result from an

investigation of their own complaints. Absent alleged facts to support a reasonable belief of discipline, they were not entitled to union representation. See Div. of State Police, 18 NJPER at 472.

The Associations contend that its members were entitled to union representation solely on the basis that the investigation concerned a mandatory subject of negotiations. It is immaterial that the complaints may have touched upon a mandatory subject of negotiations (i.e., employee safety), as Weingarten and Commission precedent allow for union representation at investigatory interviews only under the specific conditions already mentioned. Moreover, the fact that the complaints may have concerned a mandatory subject of negotiations is of no consequence because the employer does not have a duty to negotiate with a union representative or an individual employee attending an investigatory interview. See State of N.J. (Dep't of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167, 174 (¶32056 2001).

Even if the employees had been entitled to a union representative, the Board would have still been permitted to refuse the union's request. The charge alleges only that the union, and not the employees, made a request for representation at the interviews, but the right to union representation at an investigatory interview belongs to the employee and may not be

invoked by the union. See Bd. of Ed. of Camden Cty. Vocational Technical Sch., P.E.R.C. No. 82-16, 7 NJPER 466, 467 (¶12206 1981).

Accordingly, the unit members were not entitled to union representation at the meetings because the Associations have not alleged that discipline was reasonably anticipated by any of its members or that its members requested union representation. See id.; Div. of State Police, 18 NJPER at 472. I therefore dismiss the allegation that the Board violated sections 5.4a(1) and (5) of the Act by denying the union's request for union representation at the health and safety meetings.

Refusal to Deal with Union Representative

The Associations also claim that the Board violated sections 5.4a(2) and (5) of the Act when DiDonato told TBTA President Smith on June 14, 2021 that he was actively refusing to deal with NJEA Representative Nardi.

N.J.S.A. 34:13A-5.4a(2) prohibits public employers from dominating or interfering with the formation, existence or administration of any organization. This provision is designed to protect bona fide employee organizations representing groups of public employees from improper employer activity which threatens the formation, existence, or administration of the organization. Borough of Shrewsbury, D.U.P. No. 79-12, 5 NJPER 13, 14 (¶10007 1978), aff'd P.E.R.C. No. 79-42, 5 NJPER 45

(¶10030 1979), aff'd 174 N.J. Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980). Although motive is not an element of an a(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence, or administration of the employee organization. State of N.J. (Trenton State Coll.), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18268 1987); Borough of Middlesex, H.E. No. 86-58, 12 NJPER 471, 473 (¶17177 1986), aff'd P.E.R.C. No. 87-27, 12 NJPER 757 (¶17285 1986).

Section 5.4a(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with a majority representative and "implicitly prohibit[s] a public employer from interfering with, restraining, or coercing an employee organization's selection of its representatives." N.J.S.A. 34:13A-5.4a(5); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-46, 22 NJPER 35, 36 (¶27017 1995). Generally, parties must deal with one another's chosen representatives "absent extraordinary circumstances," such as instances where the presence of a particular union representative would make collective negotiations "impossible or futile." United Parcel Servs., 330 NLRB 1020, 1020 n.1 (2000); Meadowlands View Hotel, 368 NLRB 119, 2019 LRRM 460013 (2019) (citing Fitzsimons Mfg. Co., 251 NLRB

375, 379, 105 LRRM 1083 (1980)).^{2/} A determination that a party has refused to negotiate in good faith will depend on an analysis of the overall conduct and attitude of the party charged.

Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403, 404 (¶156 2010).

Although the Associations conclude that DiDonato's isolated comment to TBTA President Smith constitutes an unfair practice, the Associations have not alleged that DiDonato's remark actually interfered with the administration of the Associations, as is required for a section 5.4a(2) violation. See Trenton State Coll., 13 NJPER at 721. Further, an analysis of the Board's overall conduct does not support a finding that the Board failed to negotiate in good faith. See Teaneck Tp., 36 NJPER at 404. The Associations' section 5.4a(5) claim is solely based on DiDonato's one-off comment to Smith, in which he stated that he was refusing to deal with Nardi. However, there is no mention in the charge that DiDonato or anyone else at the Board actually refused to deal with Nardi in her capacity as a designated union representative. In fact, the only communication outlined in the

^{2/} Although these cases were decided under the National Labor Relations Act, "the 'experience and adjudications' under the federal act may appropriately guide the interpretation of the provisions of the New Jersey statutory scheme." See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1, 8 (1978) (quoting Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 424 (1970)).

charge from Nardi to DiDonato occurred via letter dated June 7, 2021, which DiDonato responded to.

The charge does not allege any facts that the Board actually interfered with the administration of the Associations. Furthermore, the Associations do not allege any specific instances where DiDonato or anyone else on behalf of the Board actually refused to deal with Nardi or any other union representatives. Therefore, for all of the reasons stated above, I dismiss the allegation that the Board violated sections 5.4a(2) and (5) of the Act as a result of DiDonato's isolated comment.

ORDER

The unfair practice charge is dismissed.

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

DATED: May 18, 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 May 30, 2023.