P.E.R.C. NO. 2023-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2020-186

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission largely denies the Board's exceptions and adopts a Hearing Examiner's decision granting TESA's motion for summary judgment on its unfair practice charge. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it sent an employee a letter limiting her right to union representation during a DCF interview investigating an allegation of child abuse at school. The Commission finds that the DCF witness interview had the potential to impact the employee's terms and conditions of employment and that the Board was legally required to cooperate and arrange the interview. The Commission partially grants the Board's exception to the Hearing Examiner's characterization of the Board's letter as implying that the employee's "continued employment" was at risk. However, the Commission finds that even without that specific implication, the Board's letter reasonably implicated the employee's terms and conditions of employment, including potential discipline. Therefore, the Commission holds that the Board's letter restricting TESA to only non-participatory representation during the DCF interview violated subsection 5.4a(1) of the Act because it objectively had the tendency to interfere with the employee's rights under the Act to be represented by and communicate with her union, and the Board did not prove a substantial, legitimate business justification for the restrictions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Elesia L. James, Assistant General Counsel

For the Charging Party, Mellk Cridge LLC, attorneys (Edward A. Cridge, of counsel)

DECISION

This case comes before the Commission on exceptions filed by the Trenton Board of Education (Board) to a Hearing Examiner's decision on a motion for summary judgment filed by the Trenton Educational Secretaries Association's (TESA) and a cross-motion for summary judgment filed by the Board. H.E. No. 2023-5, __ NJPER __ (¶__ 2023). On January 16, 2020, TESA filed an unfair practice charge against the Board alleging that it violated subsections 5.4a(1) and (3)[1/] of the New Jersey Employer-Employee

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"; and "(3) (continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it sent TESA unit member Teresa Mendenhall a letter that curtailed her right to effective representation during an interview with the New Jersey Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU), by stating that any union representative or legal counsel could only be present at the interview in a non-participatory role. On October 17, 2022, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing on the 5.4a(1) allegations and declined to issue a Complaint on the 5.4a(3) allegations. On October 17, the Board filed an Answer denying the allegations.

On November 18, 2022, TESA filed a motion for summary judgment, together with a brief and exhibits. On December 9, the Board filed opposition to TESA's motion for summary judgment and a cross-motion for summary judgment, together with a brief, exhibits, and certifications of Board General Counsel, James Rolle, Jr., and Assistant General Counsel, Elesia L. James. On December 19, TESA filed a reply brief and the certification of its attorney, Edward A. Cridge. On December 20, the motion and cross-motion for summary judgment were referred to a Hearing Examiner for decision pursuant to N.J.A.C. 19:14-4.8(a).

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1/ (...continued)
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."

On February 23, 2023, the Hearing Examiner issued a Report and Recommended Decision, H.E. 2023-5, granting TESA's motion for summary judgment and denying the Board's cross-motion. The Hearing Examiner found that Mendenhall had a right under the Act to have her employment-related interests represented by TESA and to communicate with TESA concerning terms and conditions of employment. H.E. at 22-23, 30. The Hearing Examiner found that the Board's letter had the propensity to discourage Mendenhall from seeking representation for a DCF investigatory interview which could potentially expose her to disciplinary consequences from the Board and/or criminal liability. H.E. at 31-32. The Hearing Examiner held that the Board violated subsection 5.4a(1) of the Act because its statements that union representation during a DCF interview could only be non-participatory and that the Board expected her full cooperation with the DCF investigator had a tendency to interfere with, restrain, or coerce Mendenhall in the exercise of the rights guaranteed to her under the Act. H.E. at 30-34. On March 6, 2023, the Board filed exceptions to the Hearing Examiner's decision and TESA filed a brief opposing the Board's exceptions.

## STANDARD OF REVIEW

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). The standard we apply in reviewing a Hearing

Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

> The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the

light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981).

SUMMARY OF FACTS

We have reviewed the Hearing Examiner's Findings of Fact and find that they are supported by the record. We accordingly adopt and incorporate the Hearing Examiner's Findings of Fact. (H.E. at 5-19). We summarize the pertinent facts as follows.

TESA is the majority representative of a unit of secretarial employees employed by the Board. The Board and TESA are parties to a collective negotiations agreement (CNA) effective from July 1, 2009 through June 30, 2012 and a memorandum of agreement (MOA) effective from July 1, 2012 through June 30, 2016. The parties are in negotiations for a successor agreement.

DCF was established to protect children and strengthen families and its primary concern is to ensure the safety, well-being, and best interests of the child. See N.J.S.A. 9:3A-2d; N.J.S.A. 9:6-8.8. Failure to report child abuse, where one has reasonable cause to believe it has been committed, may constitute a criminal offense. See N.J.S.A. 9:6-8.14. DCF is required to

conduct an investigation whenever it receives a report of at least one allegation which, if true, would constitute child abuse or neglect as defined in N.J.A.C. 3A:10-1.3. N.J.A.C. 3A:10-1.1, 2.1. IAIU is a child protective service unit of DCF that investigates allegations of child abuse and neglect in out-of-home settings such as schools. IAIU investigators interview the alleged child victim, the reporter, each person identified as having knowledge of the abuse, and the alleged perpetrator. See N.J.A.C. 3A:10-4.1(a), (d)-(e). When an IAIU investigation arises in a school setting, the IAIU investigator is required to advise the chief administrator of its findings when the investigation has been completed. N.J.A.C. 3A:10-7.6(e). New Jersey school districts are required to develop and adopt policies and procedures for school district employees to detect and report child abuse or neglect. N.J.A.C. 6A:16-11.1(a). These policies must, at a minimum, provide for school district cooperation with child abuse investigations by child welfare agencies and law enforcement, including "[s]cheduling interviews with an employee, volunteer, or intern working in the school district who may have information relevant to the investigation;..." N.J.A.C. 6A:16-11.1(a)(5)ii.

In accordance with N.J.A.C. 6A:16-11.1, the Board promulgated District Policy 8642, entitled "Reporting Potentially Missing or Abused Children," which provides in pertinent part:

- School employees must notify child welfare authorities of alleged child abuse and may notify school officials of alleged abuse prior to notifying child welfare authorities;

- School officials must notify appropriate law enforcement authorities of reports of alleged child abuse; and

- "School district officials will cooperate with designated child welfare and law enforcement authorities in all investigations of potentially missing, abused, or neglected children in accordance with the provisions of N.J.A.C. 6A:16-11.1(a)(5)."

In accordance with N.J.A.C. 6A:16-11.1, the Board promulgated District Regulation 8642, entitled "Reporting Potentially Missing or Abused Children," which provides in pertinent part:

- "The school district will cooperate with designated child welfare and law enforcement authorities in all investigations of potentially missing, abused, or neglected children"; and

- "District administrative and/or supervisory staff members will assist designated child welfare and law enforcement authorities in scheduling interviews with any employee, volunteer, or intern working in the school district who may have information relevant to the investigation."

District Regulation 8642 also provides for the Board to release student records relevant to child abuse investigations and ensure the confidentiality of child abuse investigations. The Board also promulgated District Policy and Regulation 8330, entitled "Pupil Records," which requires the school district to control access to, disclosure of, and communication regarding student education records and limits disclosure to authorized persons.

On December 18, 2019, the Board's confidential secretary Denyce Carroll sent an e-mail on behalf of Rolle to Mendenhall

and TESA representatives Judy Martinez and Marizol Tirado, copied to DCF-IAIU Investigator Brianne E. Regan, seeking to schedule a meeting for Mendenhall to be "interviewed as a witness by Ms. Brianne Regan, Investigator with IAIU." The e-mail referred to an attached letter dated December 18, 2019 from Rolle to Mendenhall, which provided (emphasis added):

> Please be advised that you are being asked to be interviewed as a witness by Ms. Brianne Regan, Investigator with IAIU. The interview will take place at the Trenton Restorative Program on either Thursday, December 19, 2019 at 10:00 a.m. or Friday, December 20, 2019 at 8:45 a.m. The interview should last approximately 15 minutes. Please note that you may have a union representative or legal counsel present at the interview in a non-participatory role. Kindly reply to Denyce Carroll, Confidential Secretary with the Division of Law, with the date(s) and time(s) you will be available. If you are not available on the above dates and times, kindly advise when you will be available as Ms. Regan needs to close out this case as soon as possible. As a witness in this confidential investigation, you are also reminded not to share any information you become privy to with other staff and/or members of the public. The District is committed to working with IAIU on any and all investigations. Accordingly, we expect our employees to cooperate fully and provide accurate information.

On December 18, 2019, Carroll sent an e-mail to DCF-IAIU's Regan, copying, among others, Rolle, Mendenhall, Martinez, and Tirado stating that she had spoken to Mendenhall and that Mendenhall "has elected to be interviewed in the absence of her Association." On December 18, Regan e-mailed Carroll and asked

"So Ms. Mendenhall does not want any representation?" Also on December 18, Carroll e-mailed Regan the following reply:

> Nope. She stated she will do the interview by herself. I also explained to her that she is being interviewed as a witness and to not disclose what transpires at the interview with anyone else as the interview is confidential. Let me know if you need anything else.
>
> [H.E. at 18.]

ARGUMENTS

The Board excepts to the Hearing Examiner's finding that Mendenhall had any representational rights or right to communicate with her union in the context of the DCF investigatory interview. It asserts that the Act only protects an employee's representational rights and right to communicate with his/her union under the following circumstances: at the negotiations table; in grievances; and in investigatory interviews or disciplinary disputes. The Board argues the DCF interview was not an "investigatory interview" because it is conducted by a third party (DCF) and not Mendenhall's employer, the Board. It contends that, while it is required to cooperate with the DCF interview, it does not conduct the interview, so Weingarten rights do not apply. It argues that its letter limiting union representation did not violate the Act because Mendenhall had no representational or communication rights relating to the DCF investigatory interview. (Exceptions 1-3).

The Board excepts to the Hearing Examiner's finding that, per N.J.S.A. 9:6-8.14, it could be a criminal offense if Mendenhall is found to not have reported child abuse. The Board argues it is too speculative to find that Mendenhall could have been subject to discipline or criminal liability. (Exception 4).

The Board excepts to the Hearing Examiner's finding that the December 18 letter implied that Mendenhall's continued employment was conditioned on satisfactory compliance with the DCF interview when it stated she was expected to cooperate fully and that any union representation would be non-participatory. (Exception 5).

The Board excepts to the Hearing Examiner's statement that its December 18 letter had the propensity to discourage Mendenhall from communicating with her union about being represented during the DCF interview. (Exception 6).

The Board excepts to the Hearing Examiner's finding that it failed to demonstrate a legitimate and substantial business justification for limiting union representation during Mendenhall's DCF interview to a non-participatory role. The Board argues it does not need to support a 5.4a(1) substantial business justification defense because Mendenhall had no right to union representation at the DCF interview. (Exceptions 7-8).

Finally, the Board excepts to the Hearing Examiner's finding that TESA's counsel has previously represented teaching staff during DCF investigatory interviews and has never had a school

district limit the parameters of his representation. H.E. at 19, 33-34. The Board argues that what other school districts and unions have done regarding representation during DCF investigatory interviews is not relevant to the alleged 5.4a(1) violation at issue in this case. (Exception 9).

TESA opposes the Board's exceptions. It asserts that the Board's exceptions rely on the erroneous assumption that a TESA member's rights to communicate with their union are strictly limited to communications made in negotiations, grievances, and Weingarten representation. TESA argues that the Hearing Examiner's decision correctly assessed the legal and practical implications and potential consequences of DCF investigatory interviews. TESA contends that the Hearing Examiner correctly assessed the objective impact that receiving the Board's December 18 letter would have upon an employee. H.E. at 30-34.

ANALYSIS

The Board's exceptions proffer a narrow right under the Act to union representation and to freely communicate with a union limited to: the negotiations table; in grievances; and in disciplinary disputes or investigatory interviews. However, the Act's protections are not so circumscribed. N.J.S.A. 34:13A-5.3 provides, in pertinent part (emphasis added):

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be

> responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

Employees have "the right . . . to communicate with each other about employment conditions." State of New Jersey (Dep't of Transp.), P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990)). "[T]he ability of employees to communicate in furtherance of the rights guaranteed by the Act" is a "condition of employment." Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976). "The Act confers a statutory right of communication between majority representatives and unit members, and same is considered a 'term and condition of employment.'" State Operated School District, City of Newark, P.E.R.C. No. 2017-14, 43 NJPER 106, 112 (¶32 2016). Therefore, a public employer's action that has the tendency to restrict communication between unit members and a union representative of their choosing "infringes on the rights of the unit and its members to have a majority representative function effectively on their behalf in order to resolve disputes, process grievances, and investigate issues, among other responsibilities." Id. at 113.

"An employer violates subsection 5.4a(1) if it engages in activities which tend to interfere with, restrain or coerce an

employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER (¶17197 1986), citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978). For a 5.4a(1) violation to be found, 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), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983); City of Linden, P.E.R.C. No. 2019-39, 45 NJPER 363 (¶95 2019); N.J. Turnpike Auth., P.E.R.C. No. 2017-51, 43 NJPER 354 (¶101 2017); and Paterson State-Op. Sch. Dist., P.E.R.C. No. 2014-10, 40 NJPER 173 (¶67 2013). Moreover, the standard for determining a 5.4a(1) violation is objective: the "focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it." South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466, 467 (¶22222 1991); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd, NJPER Supp.2d 58 (¶39 App. Div. 1979) (finding that it is the tendency to interfere - not the employer's motive or the consequences of the employer's conduct - that is essential for 5.4a(1) violation).

A violation of N.J.S.A. 34:13A-5.4a(1) requires an examination of the totality of the circumstances. See State of

NJ, P.E.R.C. 2012-024, 38 NJPER 205, 206 (¶70 2011); State of NJ (Dept. of Human Services), P.E.R.C. No 82-83, 8 NJPER 209, 215 (¶13088 1982). In deciding whether or not an employer statement violates section 5.4a(1), the Commission applies a balancing test acknowledging two important interests: the employer's right of free speech and the employee's right to be free from coercion, restraint, or interference in the exercise of protected rights. State of NJ (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987). The Act permits employers to express opinions about labor relations; however, an employer may 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. Id. at 721.

Initially, we clarify that TESA is not alleging a violation of its Weingarten rights.[2/] The Board's exceptions are largely

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2/ An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right. It applies in the New Jersey public sector as well. UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984). If an employee is to be interviewed as a witness, whether the employee has a right to representation will be

(continued...)

predicated on its assertion that because the DCF investigatory interview was not the Board's interview, then Weingarten rights technically do not apply and no other representational rights are implicated by its December 18, 2019 letter. However, the Hearing Examiner recognized that Mendenhall's right to representation under these facts is not dependent on the strictures of Weingarten rights. H.E. at 31-32. See, e.g., Union Cty. Vo.-Tech. Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135 (¶34 2021) (although Weingarten rights were not implicated in employee's ADA meeting, the Commission held that the employer's alleged restrictions on a union representative's full participation at the meeting were legally arbitrable).

Here, the record supports a finding that TESA had a right under the Act to represent Mendenhall during the DCF interview. Even as a potential witness in a child abuse investigation arising in the school setting, Mendenhall was subject to potential criminal liability and/or discipline by the Board depending on the results of the DCF investigation. As Board policies adopting the child abuse regulations in N.J.A.C. 6A:16-11.1 were applicable to Mendenhall as a Board employee, her

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2/ (...continued)
based upon an application of traditional Weingarten principles to the specific facts of the case. State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

failure to fully comply with the Board's directives concerning how to conduct herself in the interview (e.g., reminded of confidentiality and privacy standards, and to cooperate fully and provide accurate information), including its limitation on her right to union representation or legal counsel, reasonably could have subjected her to disciplinary action by the Board. The DCF investigatory interview was thus related to Mendenhall's employment with the Board and the interview had the potential to impact her terms and conditions of employment with the Board.

The Board's exceptions attempt to disclaim responsibility for the potential impact of its December 18 letter by focusing on the fact that the DCF is a third party. However, the Board acknowledges it was required by state law and Board policy to cooperate with the DCF and the record demonstrates the interconnectedness between the DCF and the Board in arranging interviews with employees who may have information relevant to an investigation. Pursuant to those rules, the Board's confidential secretary contacted Mendenhall to schedule the DCF interview. Nothing in the record suggests that the Board presented the interview as optional, rather than compulsory. Indeed, the Board was legally required to facilitate the interview between Mendenhall and the DCF. Under these circumstances, we find it objectively reasonable for Mendenhall and TESA to understand the Board's admonitions and guidelines contained in the December 18

letter as employer directives, despite the fact that the interview itself would be conducted by the DCF.

Contrary to the Board's contention, the Commission has found 5.4a(1) violations for an employer's communications that had an objective tendency to interfere with employees' rights to be represented by and freely communicate with their unions in situations outside of the negotiations table, grievances, or disciplinary disputes. In State of NJ (Trenton State College), P.E.R.C. No. 88-19, supra, we held that an employer's letter implying that employees should not discuss the college dean's reorganization plan with their union "could reasonably be found to interfere with the employees' ability to meet with their union leaders." 13 NJPER at 720. Regardless of whether the letter actually prevented employees from discussing the issue with their union, it violated the Act because it had the tendency to interfere with their right to communicate with their union concerning employment issues. In Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005), the Commission held that a principal's statement that a teacher had no right to discuss professional development committee issues with her union violated the Act because it had the tendency to interfere with her ability to consult with her union concerning employment issues. See also Irvington Bd. of Ed., H.E. No. 2001-11, 27 NJPER 105 (¶32041 2001), aff'd, 28

NJPER 157 (¶33055 App. Div. 2001) (principal's comment that two particular union representatives be present when discussing union complaints violated the Act because it tended to interfere with employees' right to representative of their choice).

Similarly, in the present case, the Board's December 18 letter restricting TESA's representation during the DCF interview objectively had the tendency to interfere with Mendenhall's rights under the Act, regardless of whether she agreed with or defied the attempted limitations. The fact that Mendenhall, after receiving the Board's letter limiting her to non-participatory representation, then elected not to bring a representative to the DCF interview, does not negate the 5.4a(1) violation that had already occurred. Accordingly, we find that the Board's letter purporting to curtail Mendenhall to only non-participatory representation in the DCF interview violated subsection 5.4a(1) of the Act because it tended to interfere with her right to be represented by and communicate with her union.

The Board's Exception 5 challenges the Hearing Examiner's determination that the Board's December 18 letter implied that Mendenhall's "continued employment" was conditioned on satisfactory compliance with the directives contained therein. H.E. at 30. We partially grant that exception because we do not find that the letter necessarily implied that Mendenhall's "continued employment" was in jeopardy depending on her conduct

at the DCF interview and compliance with the Board's directives. However, such a finding does not impact our above conclusion that the Board's letter reasonably implicated Mendenhall's conditions of employment, including the potential for discipline or even criminal liability, and therefore had the tendency to interfere with her right to representation during the DCF interview.

We next concur with the Hearing Examiner's determination that the Board failed to demonstrate a legitimate and substantial business justification for limiting union representation during Mendenhall's DCF interview to a non-participatory role. The Board's exceptions rely on its mistaken assertion that TESA had no rights under the Act to union representation at the DCF investigatory interview. As we have established that the Board's December 18 letter tended to interfere with Mendenhall in the exercise of rights guaranteed by the Act, the burden was on the Board to prove a legitimate, substantial business justification defense. However, the Board provided no legal authority or reasoning for its restriction of Mendenhall's representational rights. H.E. at 32-33. There is nothing in the record indicating any DCF law or regulation requiring only non-participatory representation during an investigatory interview. The Board was within its rights, given its obligations to cooperate with the DCF investigation, to reiterate any applicable DCF regulations and Board policies concerning the investigation

process. But when the Board unilaterally chose to go beyond those requirements and insert itself into the relationship between Mendenhall and TESA by limiting her to non-participatory representation, its actions were not justified and tended to interfere with Mendenhall's rights under the Act.[3/]

Finally, we consider the Board's exception to the Hearing Examiner's discussion of TESA's evidence that its counsel has previously represented school employee witnesses in DCF investigatory interviews in a participatory role without any restrictions by the employer. H.E. at 33-34. We find that, even if the Hearing Examiner had excluded this portion of the certification of TESA's counsel, it would not alter the outcome that a 5.4a(1) violation occurred in this case.

In conclusion, we find that Mendenhall had a right under the Act, independent of Weingarten rights which were not applicable under these circumstances, to have TESA represent her employment-related interests and to communicate with TESA concerning terms and conditions of employment without Board interference, which included a right to have TESA representation

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3/ Cf. Gloucester Cty., P.E.R.C. No. 2022-12, 48 NJPER 145 (¶38 2021) (while employer's first memo about withdrawing union dues deductions authorization was acceptable speech because it was in response to employee questions and conformed with language agreed to with union, the employer's second memo violated 5.4a(1) of the Act because it was not prompted by employee questions and was not limited to reiterating the agreed-upon procedures; thus, it had the tendency to interfere with their right to join or not join a union).

present during the DCF investigatory interview in a participatory role. As the Board's December 18, 2019 letter objectively had the tendency to interfere with Mendenhall's ability to freely exercise her right to communicate with her union and be fully represented by her union regarding the DCF investigatory interview that the Board required her to fully cooperate with, the Board's attempted curtailment of Mendenhall's representational rights violated subsection 5.4a(1) of the Act.

For all of the foregoing reasons, we deny the Board's exceptions to the Hearing Examiner's report and recommended decision, except for Exception 5 which we partially grant. With that non-material modification, we adopt the Hearing Examiner's decision granting summary judgment to TESA, denying the Board's motion for summary judgment, and finding that the Board committed an unfair practice in violation of subsection 5.4a(1) of the Act.

ORDER

The Trenton Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by specifying that unit members are limited to union representation or legal counsel present at a DCF-IAIU interview in a non-participatory role in conjunction with the admonition that unit members are expected to cooperate fully and

provide accurate information to the DCF-IAIU investigator, thereby reasonably implicating her employment-related interests and having the tendency to interfere with her right to be represented by and communicate freely with her union.

B. Take this affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Board has taken to comply herewith.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: April 27, 2023

Trenton, New Jersey

# NOTICE TO 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** cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by specifying that unit members are limited to union representation or legal counsel present at a DCF-IAIU interview in a non-participatory role in conjunction with the admonition that unit members are expected to cooperate fully and provide accurate information to the DCF-IAIU investigator, thereby reasonably implicating her employment-related interests and having the tendency to interfere with her right to be represented by and communicate freely with her union.

Docket No. CO-2020-186 Trenton Board of Education
(Public Employer)

Date: _____ By: _____

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, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830

APPENDIX "A"