

P.E.R.C. NO. 2024-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-054

WAYNE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Board's motion for summary judgment and the Association's cross-motion for summary judgment and remands the matter for a hearing. The Association's unfair practice charge alleges that the Board violated the Act when it declined to block third-party emails that encouraged teachers to revoke union dues. The Commission finds that the factual record does not sufficiently establish the purpose of the District's email system as it relates to third parties and the standard the District uses in determining which third-party emails are appropriate to gain access to its email system. Further, this matter involves novel legal issues and may involve constitutional issues that must be fully briefed by the parties.

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,
Scarinci Hollenbeck, LLC, attorneys
(John G. Geppert, Jr., of counsel, Sarah A. Gober, on
the brief)

For the Charging Party,
Zazzali, P.C., attorneys
(Raymond M. Baldino, of counsel)

DECISION

On October 6, 2022, the Wayne Education Association (Association) filed an unfair practice charge (UPC) against the Wayne Township Board of Education (Board or District). The Association's UPC alleges that the Board violated the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (5), and 5.14(a), (b), (c) (the Workplace Democracy Enhancement Act or WDEA),^{1/} when it declined

^{1/} N.J.S.A. 34:13A-5.4 prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

to block third-party emails that encouraged teachers to revoke union dues. On January 20, 2023, the Board filed its Answer to the Association's UPC. Thereafter, the parties engaged in settlement discussions and discovery. On May 4, the Board filed a motion for summary judgment on the UPC, and on May 5, the Association filed a cross-motion for summary judgment. The Association's motion was supported by briefs, exhibits, and the certifications of its counsel and its President. The Board's motion was supported by briefs, exhibits, and certifications of its counsel and Director of Technology. The parties' motions for summary judgment were referred to the Commission for a decision

1/ (...continued)

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. (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." The a(3) claim was subsequently withdraw by mutual consent.

N.J.S.A. 34:13A-5.14 provides that: "(a) A public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization. (b) A public employer shall not encourage or discourage an employee from joining, forming or assisting an employee organization. (c) A public employer that violates any provision of subsection a. or b. of this section shall be regarded as having engaged in an unfair practice in violation of subsection a. of section 1 of P.L.1974, c.123..."

pursuant to N.J.A.C. 19:14-4.8(a). Based upon the record submitted, we find the following facts.

SUMMARY OF FACTS

1. The Board and the Association are, respectively, public employer and public employee representative within the meaning of the Act.

2. The Association represents all contracted certificated personnel employed by the Board, but excluding certain positions such as assistant superintendents, directors, supervisors, department chairpersons, principals, assistant principals, among others.

3. The Board and Association are parties to a collective negotiations agreement (CNA) with a term of July 1, 2021 through June 30, 2024.

4. Article XXV (Association Rights and Privileges) of the parties' CNA provides, in pertinent part:

C. The WEA shall be allowed reasonable use of the school telephones and school mail facilities, provided, however, said use shall not include inflammatory or derogatory material. Disputes over this provision shall be resolved in expedited binding arbitration as provided by the rules of P.E.R.C.

5. The Board's Policy 2360.1 (Policy), "Use of Computers, the Internet, and Electronic Mail by Board/Staff Members", provides in pertinent part:

While the purpose of the school is to use

Internet resources for constructive educational goals, and legitimate Board/district business, individuals may be subjected to material some may find offensive. Be aware that the district employs a filter to limit the availability of inappropriate material, but it is not possible to filter every website or electronic communication.

* * *

Board and staff members are permitted to use the computer, E-mail and the Internet for educational and legitimate Board and district business purposes only. Use of the computer, electronic mail and/or Internet for commercial activity or posting of personal information is strictly forbidden.

* * *

Guidelines to Follow When Using the Network

1. Do not use the computer, electronic mail or Internet for anything other than education or legitimate Board or district business.

Guidelines to Follow When Using Electronic Mail

1. All messages shall pertain to constructive educational goals and/or legitimate Board/district business.

* * *

Any usage contrary to the above shall be reported immediately to the Superintendent. Users will be held accountable for their actions if the Rules of Appropriate Use are violated.

6. The Board's Director of Technology certifies that the District utilizes Google Workspace as its email platform, which allows the District to mark a limited number of emails as spam;

however, the decision to block the domain is based only upon social engineering or phishing attempts that would prove harmful to the District's email system and not based upon the factual content of those emails or the sender. The decision to block the social engineering or phishing emails was not made by the District Superintendent or members of the administration, but rather by the Information Technology department. See also "Response to Interrogatories and Request for the Production of Documents" at 2:

The District does not filter any mail for staff members based on content or identity. Google however does mark certain mail as spam. The District has blocked certain domain emails that were sent to the District on very limited occasions. However, the only domain emails that have been blocked by the District were blocked based upon social engineering or phishing attempts that would prove harmful to the district.

7. Staff members' email address are publicly available through the District's website. Employees have the ability to individually filter emails that they do not wish to receive by deleting, blocking, unsubscribing or marking emails as spam.

8. The Association President certifies that Association members are aware that the school email is filtered by a "spam" filter to prevent improper content from being transmitted, and all email is subject to being monitored. When teachers use the internet in the instructional setting, certain domain names and types of content are restricted from use. Both in policy and

practice, the District's email system is used for school business and not for other purposes.

9. The District restricts employees from transmitting emails through its email system that advocate for political platforms or ideologies (e.g. fascism, communism, anarchism). See "Response to Interrogatories and Request for the Production of Documents" at 10:

In accordance with Board policy 2360.1, the District restricts the use of its email server by its employees to "educational and legitimate Board and district business purposes only." Because emails advocating for political platforms or ideologies are not related to "educational and legitimate Board and district business purposes" employees are restricted from sending such emails.

10. The District determines what content in emails is for "educational and legitimate Board and district business purposes" or otherwise violates its Policy. See "Response to Interrogatories and Request for the Production of Documents" at 10:

To the extent those emails discussed "educational and legitimate Board and district business purposes only" they would be permitted. To the extent the content of those communications strayed from such issues, they would be prohibited pursuant to the terms of Board Policy 2360.1, which permits employees to utilize the District's e-mail system for "educational and legitimate Board and district business purposes only."

11. The Association has monitored the transmission of

emails sent to District employees from the Sunlight Policy Center ("SPC") over District servers since 2020. The following is an excerpt from an SPC email:

New Jersey teachers must remember that their \$1,500 in dues pay for six-figure salaries for NJEA execs...you do not have to put up with this...You were essentially forced to join the NJEA and have your \$1,500 in dues withheld from your paycheck, but you can choose to stop paying dues and keep the \$1,500 for yourself - every year for the rest of your teaching career...CLICK HERE TO READ THE TERMINATION FORM, CLICK HERE TO READ THE OPT-OUT LETTER.

12. On July 13 and 19, 2022, the Association President notified the District Superintendent and the Director of Technology about the SPC emails, stating in pertinent part:

This is the second time within a week that I received an email from this group [SPC]. I'm guessing that it went district wide. It is not only inappropriate that this group continues to use the district email system but [sic] full of falsehoods and lies about our organization. This is union busting and disgraceful.

I am respectfully requesting this group be banned from sending further emails.

* * *

I was hoping we could discuss the Sunlight email blast educators received last week and a few weeks before that so we can figure out a way to avoid them in the future. My members should not have to continually get emails filled with false and distorted information.

13. On July 19, 2022, the District Superintendent replied to the Association President's emails, as follows:

This is a tricky one because we are a public entity, meaning the public and many organizations have the right to reach out to public employees and share ideas and concerns. Generally speaking, we have filters that block a host of inappropriate content that qualifies as vulgar, obscene, or otherwise inappropriate. This obviously made its way through the filter. As it stands, we do not have any specific organizations that we, as a school district have decided to block. I shared the issue with John Geppert, and he advised very clearly that it would be a legal issue for the district to block an organization from reaching out to public employees. He added that it would be especially difficult and problematic if the information being shared is mostly accurate. I understand your concern from a union position this is certainly not something you would want being shared with the membership, but we as a school district are not in a position to take on a dispute over the appropriateness of these emails by confronting the organization directly or indirectly. Perhaps this is something to share with the attorneys at the NJEA.

[Emphasis added].

14. The Association President certifies that not long after the July 2022 emails, she was approached by an Association member who wanted to know whether certain claims from the SPC emails were true. She further certifies that since the SPC email campaign began in 2020 she has noticed far fewer members have chosen to enroll in the Association, and the net result has been a decline in membership. The Association President certifies

that the SPC emails seem to be timed to correspond with teachers' typical hiring anniversary and some of the emails have specifically reminded teachers of their time window to drop their membership.

15. In an internal District email, dated August 30, 2022, the District's Systems Network Administrator states, in pertinent part:

Since 2019 info@sunlightpolicynj.org has tried to send approximately 30 different emails at different times to a total of 5279 staff. Of those 3181 went directly to our Admin quarantine and did not land in staff inboxes...The most recent email on 8/2 attempted to send to 459 staff but of that 429 was sent to quarantine. 30 emails went to staff and as you can see from column G staff mostly just deleted it and/or reported it as SPAM.

The next most recent 7/26 has similar stats with 462 emails attempted but only 66 staff members received the email.

The Systems Network Administrator responded to the District's Director of Human Resources' question as to why some of the emails were quarantined and not others, as follows:

To answer your question it is a catchall for emails that match a rule that can be set up by the user on the domain to mark certain senders as SPAM (so they don't get the emails in their INBOX) Google can also scan and detect emails that meet certain criteria and send it to quarantine.

16. On August 9, 2022, the Association's counsel wrote to the District requesting that it block the SPC emails. On

September 9, the District's counsel responded to the Association's letter, stating that it would not take any action regarding the SPC emails, that the number of SPC emails sent to faculty members was insignificant (i.e. only 30 employees actually received the emails), and that employees could block any emails they found objectionable, as directed by the Policy. On September 20, the Association's counsel responded to the District's refusal to remove the SPC emails for a final time, stating that the Association disagreed with the District's reasoning, but offered to sit down to resolve the issue. By email dated September 26, the Board's counsel declined the Association's request for a meeting to discuss the SPC email issue.

STANDARD OF REVIEW

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).

ARGUMENTS

The Board argues that its motion for summary judgment must be granted and the Association’s UPC should be dismissed because there are no material facts in dispute and the Association has failed to establish that the Board’s treatment of the SPC emails violated the Act or the WDEA. The Board claims that it is not possible to filter every website or electronic communication sent over its email system by third-parties that it has no control over. Rather, the Board’s Policy reminds employees of these limitations and that the employees have the ability to delete, block, filter, and report any emails they find objectionable. Further, the Board asserts there is no requirement, in law, the CNA, or in its Policy, to restrict third-parties from using the

District's email system, where faculty members' email addresses are publicly available, because the Association disagrees with the content of the third-party emails that may be critical of the Association. The Board asserts that the First Amendment prohibits it from restricting such emails based on a non-neutral viewpoint. The Board argues that its policy is not to impose any viewpoint based restrictions on third party emails. The Board posits that it is limited in its ability to restrict the rights of interested third-parties, such as parents and other citizens, from emailing Board employees in the same way it is limited in restricting the speech of the public at its Board meetings. The Board claims that, like its Board meetings, the faculty's publicly posted email addresses provide a means for citizens to directly voice their concerns about the District. The Board asserts that it did not violate 5.4a(1) because its treatment of the SPC emails was not motivated by anti-union animus, but rather, it complied with its legal obligation to not impose viewpoint based restrictions upon the use of its email system by third-parties. The Board argues the cases cited by the Association in support of its position are inapplicable here because those cases involved rival associations using a school's internal mail or email system to communicate, rather than, the use of the Board's publically accessible email system by a third-party political interest group, as in the instant case. Further,

the Board argues that it did not violate 5.4a(5) because it has no obligation to negotiate with the Association over a third-party's rights to email District employees whose email addresses are publicly available. Lastly, the Board asserts it did not violate the WDEA because it took no action to encourage Association members from withdrawing their membership, but instead, the Board's treatment of the SPC emails was viewpoint neutral and its Policy provides the employees with the ability to personally restrict any objectionable or undesirable emails.

The Association argues that its motion for summary judgment should be granted because the Board's failure to block, disavow, or take any other action regarding the SPC's anti-union emails violated the Act and the WDEA by undermining the Association and discouraging Association membership. The Association asserts that the Board has a duty to enforce its own email policy, which prohibits the dissemination of political and non-educational messages, has the ability to block such content, has done so in the past, including filtering many of the SPC emails, and thus, the Board's reluctance to block the SPC emails, once the Association notified the Board of its concerns, is tantamount to the Board's support of the SPC's anti-union campaign. The Association argues that the SPC's dissemination of its anti-union message through the Board's email system is the same as if the SPC posted these messages in the halls of the school or on other

school property, which would not be allowed. The Association asserts that the Board's email system is a non-public forum that the Board can control rather than a public space, such as a park or sidewalk, where First Amendment protections would apply. The Association cites several cases that found no First Amendment violations where schools restricted the speech of rival unions, critical of the incumbent union, utilizing the school's internal mail or email. Likewise, the Association maintains that the Board had the ability and the duty to restrict the SPC's anti-union emails, when notified by the Association of the campaign's detrimental effect upon Association members, and the Board's failure to do so violated the Act and the WDEA.

ANALYSIS

The central issue before us is whether the Board's refusal to block SPC emails violated the Act, specifically N.J.S.A. 34:13A-5.4a(1), (5) and 5.14. Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004). Additionally, 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. Trenton Bd. of Ed., P.E.R.C. No. 2022-20, 48 NJPER 245 (¶55 2021) (internal citations omitted). Public employers are also prohibited from “[r]efusing 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.” N.J.S.A. 34:13A-5.4a(5).

N.J.S.A. 34:13A-5.14a-c. provides as follows:

- a. A public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization.
- b. A public employer shall not encourage or discourage an employee from joining, forming or assisting an employee organization.
- c. A public employer that violates any provision of subsection a. or b. of this section shall be regarded as having engaged in an unfair practice in violation of subsection a. of section 1 of P.L.1974, c.123 (C.34:13A-5.4), and, upon a finding that the violation has occurred, the Public Employment Relations Commission, in addition to implementing any other remedies authorized by that section, shall order the public employer to make whole the exclusive representative employee organization for any losses suffered by the organization as a result of the public employer’s unlawful conduct and any other remedial relief deemed appropriate.
[Emphasis added].

Here, the Board's defense primarily provides two reasons for its decision not to block SPC emails - - first, the limitations of its own technology and second, its policy of not imposing viewpoint based restrictions on third-party emails. The District's second reason for not blocking SPC emails implicates constitutional issues which we will not decide in the absence of "a present, imperative and inescapable need to decide them. In Re Franklin Lakes Bd. of Educ., 1995 N.J. Super. Unpub. LEXIS 7 (App. Div. 1995), quoting, Hildebrandt v. Bailey, 65 N.J. Super. 274, 285 (App. Div. 1961) . The Supreme Court of New Jersey has held that "[a]dministrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." Christian Bros. Inst. of N.J. v. No. N.J. Interscholastic League, 86 N.J. 409, 416 (1981).

We find that on this record the limitations of the District's email system are unclear. This record does not sufficiently establish the purpose of the District's email system as it relates to third parties, and the standard the District uses in determining which third-party emails are appropriate to gain access to its email system.

The Policy makes clear that "Board and staff members are permitted to use the computer, E-Mail and the internet for educational and legitimate Board and district business purposes

only. Use of the computer, electronic mail and/or the internet for commercial activity or posting of personal information is strictly forbidden." (Emphasis added). Thus, the Board regulates use of the email system for Board and staff members for the purposes set out above. However, the Policy also states that "[b]e aware that the District employs a filter to limit the availability of inappropriate material, but it is not possible to filter every . . . electronic communication. Board and staff members are responsible for the material they access." This indicates that the District filters inappropriate content for Board and staff members, but that the District's filters have certain limitations.

With regard to third-party emails, there is no formal email policy reflected in the record. Board Interrogatory #2, which queried the Board's ability to filter third-party emails, states:

The District does not filter any mail for staff members based on content or identity. Google however does mark certain mail as spam. The District has blocked certain domain emails that were sent to the District on very limited occasions. However, the only domain emails that have been blocked by the District were blocked based upon social engineering or phishing attempts that would prove harmful to the district.

On July 19, 2022, the Superintendent sent the following response to the union's president's request for the District to block SPC emails:

This is a tricky one because we are a public entity, meaning the public and many organizations have the right to reach out to public employees and share ideas and concerns. Generally speaking, we have filters that block a host of inappropriate content that qualifies as vulgar, obscene or otherwise inappropriate. The [SPC] emails obviously made it through the filter. As it stands, we do not have any specific organizations that we, as a school district, have decided to block.

[Emphasis added].

The Association disagrees with the above and asserts that the District's email system is used for school business only and not for other purposes and also refutes any claims by the Board that it could not and should not block certain third-party emails.

It is clear from the Policy that Board and staff members have the ability and responsibility to mark certain emails that are outside of "educational and legitimate Board and District business purposes" as spam. However, it is unclear on this record what standard the District employs in determining which third-party emails are inappropriate, and/or on what basis the District's Google email platform itself marks emails as spam. An August 8, 2022 email from the District's Director of Technology sent to the District's Director of Human Resources states as follows:

Since 2019 info@sunlightpolicynj.org has

tried to send approximately 30 different emails at different times to a total of 5279 staff. Of those 3181 went directly to our Admin quarantine and did not land in staff inboxes. . . .

The most recent email on 8/2 attempted to send to 459 staff but of that 429 was sent to quarantine. 30 emails went to staff and as you can see . . . [were] mostly just deleted and/or reported as SPAM.

The next most recent 7/26 has similar stats with 462 emails attempted but only 66 staff members received the email.

In response to the above email, the Director of Human Resources asked "What is admin quarantine? Why was that done in some cases and not others?" The Director of Technology responded as follows:

[I]t is a catchall for emails that match a rule that can be set up by the user or the domain to mark certain senders as SPAM (so they don't get the emails in their inbox). Google can also scan and detect emails that meet certain criteria and send it to quarantine.

In this case, I would guess the first explanation is most likely- staff marked it as spam.

After considering all of the above, we find that this record does not provide a sufficient basis to determine the purpose of the District's email system as it relates to third-party emails and that the parties are in dispute as to whether the email system is a public or private forum; the limitations of the Board's control in regulating third-party emails that are sent to

teachers' publicly listed email addresses; and what standard is used by the Board to decide which third-party emails are "inappropriate" as distinguished from the more objectively defined categories of vulgar or obscene third-party emails. The record is also devoid of context as to how many third-party emails staff members actually receive on the District's email system, which should include examples of other third-party emails, aside from SPC emails, that have been considered appropriate, as well as examples of non-vulgar, non-obscene third-party emails that have nonetheless been deemed to be inappropriate. These factual issues require an evidentiary hearing so that a Hearing Examiner can determine the purpose of the District's email system for third-parties and the extent of the Board's control over the email system as it relates to third-party emails. The Board should also directly address whether SPC emails would qualify as "inappropriate" based upon its responsibility under the Act to not "interfere with, restrain or otherwise coerce employees in the exercise of rights guaranteed to them by the Act", and to not "encourage employees to resign or relinquish membership in an employee organization, or revoke authorization of the deduction of fees to an employee organization." N.J.S.A. 34:13A-5.4a(1); 34:13A-5.14a-c.

Additionally, this case presents a novel legal issue as to whether the Board's maintenance of the email system as a vehicle

for the dissemination of information may support a violation of the Board's obligations under N.J.S.A. 34:13A-5.4a(1) and N.J.S.A. 34:13A-5.14a-c. This element also weighs against deciding this dispute as a matter of summary judgment.

As discussed above, constitutional issues are more appropriately resolved by the courts. See Christian Bros. Institute, 86 N.J. at 416; see also In Re Franklin Lakes Bd. of Educ., supra. However, to the extent that the Board and/or the Association believe that these facts trigger "a present, imperative and inescapable need"^{2/} for PERC to determine constitutional issues, the parties must directly state so and also directly brief to the Hearing Examiner any constitutional issues that may be implicated by these facts. Those issues include, but are not limited to, the parties' positions on the nature of the forum (i.e. the District's email system) for First Amendment purposes. These are also more novel legal issues that have not been directly addressed by the parties in their summary judgment briefs. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) is the seminal case that sets out the contours of public forum doctrine. The varying sub-categories of public forums discussed in Perry have different constitutional legal standards/tests attached to each forum. To the extent the

^{2/} In Re Franklin Lakes Bd. of Ed., supra, 1995 N.J. Super. Unpub. LEXIS 7 at 4-5.

parties believe constitutional issues are implicated by these facts, they must directly brief those legal standards/tests for the Hearing Examiner to make any necessary constitutional determinations.

For the foregoing reasons, we deny the parties' cross motions for summary judgment as this matter presents numerous issues of disputed material facts that cannot be resolved through summary judgment motions. Moreover, novel issues of law may also be implicated by these facts. The parties are left to their proofs and affirmative defenses at a hearing.

ORDER

The Wayne Township Board of Education's and the Wayne Education Association's cross-motions for summary judgment are denied. The case shall be set for hearing.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Higgins and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: September 28, 2023

Trenton, New Jersey