

P.E.R.C. NO. 2024-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-006

NEW BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Board's exceptions and adopts a Hearing Examiner's decision on unfair practice charges alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by discriminating against a unit employee and Association representative in retaliation for his interactions with the school principal during a building representative liaison meeting to discuss issues of concern to the Association. The Commission finds that because the Association representative was engaging in protected conduct during the liaison meeting, he and the principal were on equal footing. The Commission further finds that, despite some disrespectful comments, the Association representative's conduct was not so offensive or disruptive as to lose the protection of the Act. Therefore, the Commission holds that the Board's memorandum reprimanding the Association representative for his conduct at the liaison meeting was retaliation for his protected activity in violation of the Act.

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, Hendricks & Hendricks, attorneys
(George F. Hendricks, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld Kanef, of counsel)

DECISION

This case comes before the Commission by way of exceptions filed by the New Brunswick Board of Education (Board) to a Hearing Examiner's decision on an unfair practice charge filed by the New Brunswick Education Association (Association). H.E. No. 2024-4, 50 NJPER 251 (¶56 2023). The Association's July 8, 2022 charge alleges that the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically, subsections 5.4a(1), (3) and (5)^{1/}, by

^{1/} These provisions prohibit public employer, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in (continued...)"

discriminating against unit employee and Association representative G.S., in retaliation for his exercise of protected conduct. The Board filed a position statement on August 8. On August 11, a Commission Staff Agent conducted an exploratory conference with the parties. On August 25, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the Association's 5.4a(1) and 5.4a(3) allegations. On August 26, the Board re-filed its position statement as its Answer.

On April 18, 2023, the Hearing Examiner conducted a hearing at which the parties examined witnesses and presented exhibits. The Board submitted its post-hearing brief on July 18 and the Association submitted its post-hearing brief on July 19.

On November 8, 2023, the Hearing Examiner issued a Report and Recommended Decision, H.E. No. 2024-4, finding that the Board violated subsection 5.4a(3) and, derivatively, 5.4a(1), of the Act when it disciplined Association representative G.S. for his behavior during liaison meetings during the 2021-22 school year which were held via teleconference. The Hearing Examiner found that G.S.'s conduct at the liaison meetings was protected conduct

1/ (...continued)
regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of 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 press grievances presented by majority representative.

under the Act because he was acting as an Association representative at union/management meetings wherein terms and conditions of employment were discussed and the record did not demonstrate that his behavior was threatening conduct. The Hearing Examiner therefore found that any discipline imposed on G.S. for his behavior at liaison meetings was in retaliation for his protected conduct in violation of subsection 5.4a(3) of the Act.

On November 30, 2023, the Board filed exceptions to the Hearing Examiner's report that the Commission Case Administrator found to be out of time and deficient per N.J.A.C. 19:14-7.3. With the Association's consent, the Case Administrator accepted the Board's exceptions and permitted it to cure its deficiencies by December 7. The Board filed amended exceptions on December 6.

SUMMARY OF FACTS

We have carefully reviewed the record, including the hearing transcript and the parties' exhibits. N.J.A.C. 19:14-7.2.^{2/} We adopt and incorporate the Hearing Examiner's findings of fact,

2/ "The record shall consist of the charge and any amendments; the complaint and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions."

which are supported by the record (H.E. at 3-11). We summarize the essential facts as follows.

The Association represents all personnel employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) with a duration of July 1, 2019 through June 30, 2022. G.S. has been employed by the Board for approximately 21 years and until the 2022-23 school year was assigned to the A.C. Redshaw School teaching math and science. G.S. has served as a building representative for the Association for the past 11 years. G.S. voluntarily transferred from A.C. Redshaw to Woodrow Wilson Elementary School for the 2022-23 school year. During G.S.'s last year at A.C. Redshaw (2021-22), the Principal was serving her first year as building principal of A.C. Redshaw.

As Association building representative, G.S. attended liaison meetings with the Principal and other Association and Board representatives. Article XVII of the CNA, entitled "Employee Administration Liaison," provides for such liaison meetings as follows:

- A.
 1. The Association shall form a Liaison Committee for each school building.
 2. The School Building Liaison shall meet at regular intervals throughout the school year and as need arises with the building principal.
 3. The School Building Liaison Committee shall review local school problems and

practices, make known the views of the employees to the principal, and play an active role with the principal in the revision or development of building policies.

All liaison meetings held during the 2021-22 school year were done via video teleconference. Liaison meetings normally occurred after school between 3:30 and 4:00 pm. The first liaison meeting for the 2021-22 school year was in October 2021.

On April 6, 2022, a video teleconference liaison meeting took place in which G.S. was present along with two other Association representatives. The Principal was present on behalf of the Board along with her secretary. The agenda for the April 6 liaison meeting included the following topics: building representative; dress code; and building communications. The building representative discussion concerned the Association's desire to have G.S. or another Association representative sometimes attend disciplinary meetings instead of the Association representative who the Principal had been selecting to attend. The dress code topic involved the Association's concern that paraprofessionals would be disciplined for violations of the dress code policy. The Principal stated "next topic" and would not engage in discussion, to which G.S. may have responded with rolling his eyes. Regarding the topic of building communication, the Association expressed concern that student discipline was not

being communicated with classroom teachers. The Principal responded that communication is "fine."

During the April 6 liaison meeting, G.S. breathed heavily, sighed, and rolled his eyes. G.S. also admitted to moving his "head back and forth" during the meeting, testifying that he does that all the time. When the topic of student discipline (building communication) was being discussed, at one point G.S. stated "it's not all about you" to The Principal. Based on G.S.'s testimony and the testimony of two witnesses, including the Principal's secretary, G.S. appeared frustrated during the April 6 liaison meeting but did not interrupt, yell at, or threaten the Principal. At one point during the building representative discussion, G.S. told the Principal he would put a copy of the CNA in her mailbox "if you can read and understand it."

On April 8, 2022, the Principal summoned G.S. to meet with her regarding his conduct at the April 6 liaison meeting. It was a video teleconference meeting.^{3/} The Association President attended the meeting with G.S.. During the meeting, the Principal advised G.S. that she would write him up for his disrespectful conduct during the April 6 liaison meeting.

^{3/} The Principal testified that "we met virtually." (T124).

On May 2, 2022, the Principal issued a formal reprimand memorandum (Memorandum) to G.S. entitled "Demonstrating Unprofessionalism." The Memorandum states, in pertinent part:

On April 6, during a liaison meeting, Mr. G.S.'s conducts reached an apex of disrespect towards [the Principal] . . . Since the second liaison meeting of the school year, when [the Principal's] speaking, Mr. [G.S.] begins to roll his eyes, engages in heavy breathing, and moves his head, neck, and body back and forth. . . . Mr. [G.S.'s] comments and actions have been an inexcusable personalized attack on [the Principal], Mr. [G.S.'s] actions toward [the Principal] are aggressive and not conducive to a healthy workplace environment, as outlined in District Policy-3551-HEALTHY WORKPLACE ENVIRONMENT This document serves as formal notice that further violations of professionalism may result in additional disciplinary action.

The Memorandum also alleged that G.S. had interrupted her and made the "it's not all about you" and "if you can read and understand it" comments to her during the April 6 liaison meeting.

ARGUMENTS

The Board makes the following two exceptions to the Hearing Examiner's decision:

- "The Board takes exception to the Hearing Examiner's Recommended Decision that the Board's Disciplinary memo and any disciplinary penalties against Mr. G.S. for his behavior violate Section 5.4a(3) and, derivatively, 5.4a(1) of the Act."
- "The Board takes exception to the Hearing Examiner's Recommended Decision that Mr. G.S.'s behavior at a union/management meeting wherein terms and conditions of

employment were discussed, was insufficient to cause him to lose the protections of the Act.”

The Board concedes that the April 6, 2022 liaison meeting was a protected activity, but asserts that it was not the sole basis for the Memorandum because G.S.’s conduct towards the Principal was recurrent. The Board argues that during an April 8, 2022 meeting with G.S. and the Association representative, the Principal expressed her concerns about G.S.’s behavior towards her throughout the year and specifically the April 6 liaison meeting, but that G.S. “became more indignant” towards the Principal . The Board asserts the April 8 meeting was “non-Union activity” because the purpose “was to address concerns over the ongoing negative pattern of conduct exhibited by Mr. G.S. towards the Principal.” The Board contends that because G.S. was disciplined for his negative behavior towards the Principal, and not his union activity, there is no proof of anti-union motivation.

The Association did not respond to the Board’s exceptions. We will therefore summarize the Association’s arguments from its July 19, 2023 post-hearing brief. The Association asserts that the Principal’s testimony indicates that she knew G.S. was serving as an Association representative at the April 6, 2022 liaison meeting. It notes that the meeting is required by the CNA for Board and Association representatives to discuss union-related issues. The Association argues that G.S.’s conduct did

not involve threats, name calling, or entering the Principal's personal space. It asserts that nothing about G.S.'s conduct threatened workplace order and there were no physical issues because it occurred after school and was conducted over Zoom. The Association argues that the Commission has found that more egregious conduct involving derogatory language, at a public meeting, was still protected under the Act.

STANDARD OF REVIEW

In analyzing the Board's exceptions, we are constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). We may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, and credible evidence. See New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due factfinder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004). Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Monroe Tp. Bd. of Fire Com'rs, P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54

2014), aff'd, 443 N.J. Super. 158 (App. Div. 2015), certif. den., 226 N.J. 213 (2016); and Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 32 NJPER 8 (¶2 App. Div. 2005), certif. den., 186 N.J. 609 (2006).

ANALYSIS

"[W]hen an Association representative interacts with a supervisor or other representative of management while pursuing protected activity, the two are considered to be on an equal footing." Paterson State Operated School Dist., P.E.R.C. No. 2013-74, 39 NJPER 483 (¶153 2013). In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission defined what is protected speech and conduct under the Act. Therein, we stated:

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. . . . The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.

[Black Horse Pike Reg. Bd. of Ed., 7 NJPER at 502.]

See also, Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd, 23 NJPER 53 (¶28036 App. Div. 1996), certif. den., 149 N.J. 35 (1997).

In exploring the line between what is protected speech and conduct of an employee and what is conduct amounting to insubordination and, thus, not protected, the Commission has given consideration to whether the employee is acting in the role of a union representative, as well as the time and place of the speech. The latter includes considering whether the interaction was during work time, whether it is in public or private, whether other employees in non-representative roles are present, and whether the employee's actions were provoked by the employer's actions. See State of New Jersey, Dept. of Treasury (Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001); and State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶132057 2001). "Despite the equality of participants in negotiations and grievance settings and despite the leeway allowed for impulsive and adversarial behavior, representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect." State (Glover), 27 NJPER at 173. To determine whether an employee's conduct is so disruptive or offensive in the context of the dispute so as to lose the protections of the Act, we must

balance the employees' protected right to representation against the employer's right to maintain workplace discipline. Id.

The Board excepts to the Hearing Examiner's conclusions that G.S.'s conduct during the April 6 liaison meeting did not cause him to lose the protections of the Act and that the Board's May 2 reprimand for his protected conduct at that meeting was therefore illegal retaliation under the Act. We find that the Hearing Examiner's determination that the Board's May 2, 2022 disciplinary reprimand memorandum issued to G.S. violated subsection 5.4a(3) of the Act and, derivatively, 5.4a(1), is supported by the record evidence and application of pertinent Commission precedent to the facts.

As conceded by the Board, G.S.'s participation in the April 6 liaison meeting for which he was disciplined was protected activity because he was acting in his capacity as the Association's building representative to discuss union issues. Furthermore, the meeting was conducted outside of regular work hours while G.S. was off-duty. The meeting was conducted virtually and was only attended by G.S., the Principal, union representatives, and the Principal's secretary. In this context, G.S. and the Principal were on equal footing and the meeting's timing and private "closed-door" setting did not implicate general workplace order and discipline concerns.

The record also includes evidence that some of G.S.'s responses or reactions to the Principal during the April 6 meeting conveyed his frustration with her and were disrespectful. The Hearing Examiner acknowledged these behaviors and analyzed them in the overall context of G.S.'s and the Principal's discussion. She relied on testimony to find that, during these video teleconference labor-management meetings, G.S.'s behavior included, at worst, eye rolling, heavy breathing, sighing, moving his head back and forth, and stating "its not all about you" and "if you can read and understand it" referring to the CNA. H.E. at 13. However, the record did not demonstrate that his behavior including yelling, threats, or interrupting and was not harassing or intimidating. H.E. at 16-17. The Hearing Examiner also recognized that the record supported that G.S.'s frustration was, in part, provoked by the Principal's "dismissive" behavior towards several of the Association's concerns he raised. H.E. at 8, 17. Applying the relevant legal standards for evaluating protected speech under the Act, the Hearing Examiner reasonably concluded that G.S.'s behavior as an Association building representative "was insufficient to cause him to lose the protections of the Act." H.E. at 17.

While we recognize that G.S.'s behavior was disrespectful, particularly his comments of "it's not all about you" and his questioning of the Principal's ability to read and understand the

CNA, we concur with the Hearing Examiner's analysis that G.S.'s conduct as an Association representative during that meeting was not so offensive or disruptive as to lose the protections of the Act. The Commission has established a high bar for losing the protection of the Act when union and management representatives are on equal footing in an adversarial context discussing workplace concerns. See, e.g., Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, supra (employer violated Act when it disciplined a teacher who called the superintendent a "lying scuzzball" at public board meeting); Carteret Bor., P.E.R.C. No. 2016-28, 42 NJPER 231 (¶66 2015) (employee and PBA delegate did not lose protection of the Act by calling the mayor "a joke" and asking him to "please shut up" during heated exchange about disciplinary procedures at council meeting); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (1979) (employer violated Act by disciplining union president for shouting match with city manager about employee complaints); Southern Jersey Transportation Authority, H.E. No. 2018-5, 44 NJPER 234 (¶67 2017) (union vice president lawfully disciplined for intimidating behavior including cursing and calling employee a "bitch"); State (Garlanger), P.E.R.C. No. 2001-52, supra, (union shop steward lost protection of the Act when he argued with and yelled at supervisor where patients and other employees could hear); and Berkeley Tp., P.E.R.C. No. 86-13, 11 NJPER 461 (¶16164 1985)

(union officer's conduct at council meeting lost protection of the Act because he yelled statements out of order, approached microphone with angry tone, verbally chastised members, and exhibited irrational behavior).

Accordingly, we find that the Hearing Examiner appropriately concluded that the Board's May 2 Memorandum reprimanding G.S. for his behavior at the April 6 liaison meeting was retaliation for his protected union activity in violation of subsection 5.4a(3) of the Act, and, derivatively, 5.4a(1). See, e.g., Middletown Tp. Bd. of Ed.; Black Horse Pike Reg. Bd. of Ed.; Carteret Bor.; and Jackson Tp., P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005).

The Board contends that G.S.'s behavior at the April 6 liaison meeting was not the sole basis for the May 2 Memorandum, and that the Principal expressed her concerns about G.S.'s interactions throughout the entire year at their April 8 meeting. However, despite that the fourth bullet point of the Memorandum states that the concerns about G.S.'s behavior started at the second liaison meeting of the year, the Memorandum was otherwise focused on G.S.'s behavior during the April 6 liaison meeting. Thus, we concur with the Hearing Examiner's finding that the reprimand was retaliation for protected conduct in violation of the Act and should therefore be removed from his record.

Based on the foregoing, the Hearing Examiner's Report and Recommended Decision finding that the Board violated subsection 5.4a(3) and, derivatively, 5.4a(1) of the Act is affirmed.

ORDER

The New Brunswick Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by imposing discipline against G.S. because of his behavior at the April 6, 2022 liaison meeting.

2. Discriminating in regard to the 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, particularly by imposing discipline against G.S. because of his behavior at the April 6, 2022 liaison meeting.

B. Take the following affirmative action:

1. Immediately rescind the disciplinary reprimand memorandum dated May 2, 2022 and any other discipline recommended or imposed against G.S. related to the April 6, 2022 liaison meeting and remove any copies thereof from G.S.'s personnel file.

2. Post in all places where notices to employee 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) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Bolandi, Eaton, Higgins, Kushnir and Papero voted in favor of this decision. None opposed. Commissioner Ford recused himself.

ISSUED: January 25, 2024

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 employees in the exercise of the rights guaranteed to them by the Act, particularly by imposing discipline against G.S. because of his behavior at the April 6, 2022 liaison meeting.

WE WILL cease and desist from discriminating in regard to the 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, particularly by imposing discipline against G.S. because of his behavior at the April 6, 2022 liaison meeting.

WE WILL take the following affirmative action of immediately rescinding the disciplinary reprimand memorandum dated May 2, 2022 and any other discipline recommended or imposed against G.S. related to the April 6, 2022 liaison meeting and remove any copies thereof from G.S.'s personnel file.

Docket No. CO-2023-006

New Brunswick 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