

D.U.P. NO. 2023-5

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

In the Matter of

PINELANDS REGIONAL BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-001

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices partially dismisses an unfair practice charge filed by the Pinelands Education Association, ("Association") against the Pinelands Regional School District Board of Education ("Board"). The charge alleged that the Board violated N.J.S.A. 34:13A-5.4a(1), (3), and (5) when it criticized and threatened the Association's President during a June 17, 2022 annual summative evaluation meeting. The charge further alleged that the Board violated the Act by threatening to create a communications team to circumvent the Association and impose unilateral changes to terms and conditions of employment.

The Director dismissed the section 5.4a(3) and (5) allegations. The Director determined that the Association did not allege the occurrence of an adverse employment action. The Director also determined that the threat to create a communications team does not constitute a unilateral change to terms and conditions of employment. The Director ordered a complaint to issue on the section 5.4a(1) allegation.

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Appearances:

For the Respondent,
Cooper Levenson, attorneys
(Kasi Marie Gifford, of counsel)

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

PARTIAL REFUSAL TO ISSUE COMPLAINT

On June 30, 2022, the Pinelands Education Association (Association or Union) filed an unfair practice charge against the Pinelands Regional School District Board of Education (Board). The charge alleges that on June 17, 2022, the Board violated section 5.4a (1), (3), and (5)^{1/} of the New Jersey

^{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; (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 (continued...)"

Public Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-a et seq., by criticizing and threatening the Association's President, Mel Reid (Reid), for protected activity during an annual summative evaluation, and for threatening to create a "communications team" that would circumvent the Union and impose unilateral changes to terms and conditions of employment for covered employees.

On August 12, 2022, the Board filed a position statement arguing that the charge should be dismissed. The Board asserts that Assistant Superintendent Gina Frasca (Frasca) appropriately discussed complaints of unprofessionalism with Reid in their meeting on June 17, 2022 because the Board's evaluation criteria (specifically, "Domain 4") requires consideration of aspects of professionalism.^{2/} During their meeting, Frasca said that she

1/ (...continued)
act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

2/ The Board's position statement avers that Frasca discussed with Reid complaints regarding ". . . the spreading of misinformation, unprofessional remarks towards students, and overall attitude toward District policies, colleagues, and Administration." The Board writes that these complaints touch on "Domain 4" of the Board's annual evaluation criteria. Under Domain 4, an employee is rated on the ability to: promote positive interactions with colleagues; promote positive interactions with students and parents; seek mentorship in areas of need or interest; mentor other teachers and share ideas and strategies; adhere to district
(continued...)

hoped Reid would communicate better and be a role model in the District," . . . something she expects from every senior teaching staff member."

The Board acknowledges that Frasca expressed frustration with the Union during Reid's evaluation meeting. She also expressed a desire for the Association and administration to communicate more frequently. The Board stresses, however, that this portion of their discussion was unrelated to Reid's evaluation, and that nothing concerning his Association-related functions was placed in his evaluation or file. The Board denies that Frasca threatened Reid regarding his role as Association President.

On August 17, 2022, the Association filed a position statement in support of the charge. The Association argues that the Board violated the Act when it mingled criticisms of Reid's Association activities with his annual evaluation. The Association asserts that under Commission precedent, an employer may not express its dissatisfaction with an employee's conduct as a union representative by exercising power over that individual's employment. The Association argues that the Board used Reid's annual evaluation meeting to threaten his employment based on his protected activities in the role of Union President.

2/ (...continued)
and school rules and procedures; and, participate in district and school initiatives.

The Commission has the authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts:

The Association is an employee organization representing a negotiations unit of Board employees. The Association and the Board are parties to a CNA that extended from July 1, 2018 through June 30, 2021.

On June 17, 2022, unit member and Association President Reid attended an annual summative evaluation meeting with the Board's Assistant Superintendent, Ms. Frasca.

During the meeting, Frasca asked Reid if he had received and reviewed his summative evaluation documents, and whether he had any questions.

After they discussed the evaluation, Frasca said that she wished to address Reid in his capacity as ". . . a leader in the District." The Association contends that Frasca was actually beginning to address Reid in his role as Association President.

Frasca began reading aloud from a prepared statement to Reid, expressing these criticisms and plans:

- There is a lack of communication between Reid and the District's administration;
- Reid acted unprofessionally in the classroom, and provided specific examples of such conduct;
- Reid was spreading "misinformation," "fake news," and a "false narrative" among the staff that the Board was delaying contract negotiations with the Association;
- Stated: "Moving forward, we would like to work with you as a team next year to promote positive interactions amongst staff. We will be setting up frequent meetings with you to be sure we are addressing staff concerns and dispelling 'fake news' for the staff. If you do not feel it is your role to be part of this communications team, we will randomly select staff members to be key communicators- these staff will be able to come to admin and ask any and every question and get an answer to further relay information to staff."^{3/}
- Advised that she " . . . will continue to be your direct supervisor next year, so I will be in communication with you frequently. Any and all concerns will go through me moving forward"

The Board asserts that none of the concerns discussed from the prepared statement, besides the examples of alleged unprofessional comments made to students, were included in Reid's evaluation.

ANALYSIS

Public employees have the right to engage in "protected" conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a (1) and (3). The standards

^{3/} The prepared statement also specified that the Board would set up a meeting with Reid in August to set "norms' for the "communications team." No facts indicate that such a meeting ever took place, or whether the "communications team" was implemented.

for establishing whether an employer has violated section 5.4a(3) is set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) ("Bridgewater"). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. At 246.

An adverse employment action is an essential element of 5.4a(3) and (4) claims. State of New Jersey (Dept. of Comm. Affairs), D.U.P. No. 2015-8, 41 NJPER 102; Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp. 2d 150 (¶133 App. Div. 1985). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because ". . . there was no threat [or] change in any terms or conditions of employment." 10 NJPER at 438. Under PERC precedent, adverse employment actions normally require actual harm to a term and condition of employment. See, e.g., Rutgers University, H.E. No. 2003-2, 28 NJPER 466 (¶33171 2002) (finding no adverse personnel action resulted from staff reorganization where charging party's title, salary, and benefits remained the same); Seaside Heights,

P.E.R.C. No. 99-67, 125 NJPER 96 (¶30042 1999) (finding no violation where the charging party, a lifeguard, considered an assignment less desirable and prestigious, as well as a punishment and demotion, but suffered no loss in pay).

The Association has not alleged an occurrence of an adverse employment action. Even assuming that Reid engaged in protected activity of which the Board was aware, I glean nothing in the charge indicating that he suffered actual harm to a term and condition of employment. For example, no facts indicate that Reid was disciplined following his evaluation. The Board also has asserted, without contradiction, that nothing related to Reid's function as President of the Association was placed in his evaluation. Under these circumstances, the Association cannot meet the complaint issuance standard set forth in Bridgewater to establish a violation of section 5.4a(3).

The Association contends that the Commission's decision in Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) ("Black Horse Pike") requires the issuance of a complaint in this case. In Black Horse Pike, the Commission found that the Board of Education violated sections 5.4a (1) and (3) of the Act when it placed two letters in a teacher's personnel file that were critical of actions the teacher took while serving as a union representative in a meeting between another member and the Principal. In that case, the Commission

found it "determinative" that the Board placed the critical letters in the teacher's personnel file, rather than in a file reserved for union matters. Id. at 504 ("This action indicates that the Board intended these letters to be reviewed when [the Association representative's] performance as a teacher was being evaluated. It also constitutes evidence that the Board considered [the Association representative's] activities on behalf of the Association to be relevant to his conduct as a teacher.").

The Commission stressed in Black Horse Pike that writing letters critical of the teacher's Association-related functions is not *per se* improper, because "[a] public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations." Id. at 503. The employer may not, however, ". . . convert that criticism into discipline or other adverse employment action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee." Id. At 504.

The charge does not allege that Reid faced discipline or any other adverse employment action as a result of protected activity. Unlike the circumstances in Black Horse Pike, the portions of Frasca's prepared statement concerning Reid's Association-related activities were not included in Reid's

evaluation or personnel file. Nothing indicates that the Board intended to consider Union-related criticisms of Reid as part of his evaluation as a teacher. Black Horse Pike does not require the issuance of a complaint on the section 5.4a (3) violation, especially considering the Commission's explicit recognition that public employers are permitted to "comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations." Id. at 503.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over terms and conditions of employment. Employers are prohibited from unilaterally altering prevailing terms and conditions of employment because such changes circumvent the statutory duty to negotiate. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 1 (1978). The charge alleges that the Board's threat to create a "communications team" constitutes a violation of section 5.4a (5).

No facts indicate that the Board actually created the communications team, or that it actually altered any term and condition of employment without negotiation. The charge itself acknowledges only that the Board ". . . attempt[ed] to unilaterally change the terms and conditions of employment . . ." for unit members by threatening to create the communications team. Frasca's statement regarding the communications team does

not, by itself, constitute a unilateral change to any term and condition of employment for unit members. As such, I find that the complaint issuance standard has not been met and dismiss the section 5.4a(5) allegation.

An employer violates section 5.4a(1) if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 284 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary - the tendency to interfere is sufficient. Mine Hill Tp. P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). In this case, the Board admits that Frasca discussed the Board's frustration with the Union (including its frustration with negotiations) during Reid's annual evaluation meeting. As such, I find that the Association has sufficiently pled a violation of section 5.4a (1) and a complaint shall issue on that section.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: September 9, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 19, 2022.