H.E. NO. 2016-9

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HALEDON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2014-070

NORTH HALEDON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the North Haledon Board of Education did not violate N.J.S.A. 34:13A-5.4a(1) and (3) of the Act when it disciplined Association members who refused to cooperate during investigatory interviews. The Hearing Examiner found that the charging party failed to establish that Association members engaged in protected activity when they refused to answer questions during the investigatory interviews, but rather interfered with the Board's prerogative to investigate employee misconduct involving the unauthorized access to student records. The Hearing Examiner recommends that the complaint be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2016-9

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HALEDON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2014-070

NORTH HALEDON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Wilentz, Goldman & Spitzer
(Mary H. Smith, of counsel)

For the Charging Party,
Oxfeld Cohen
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 25, 2013, January 23, 2014, and February 18, 2014, the North Haledon Education Association("NHEA" or "Association") filed an unfair practice charge and amended unfair practice charges against the North Haledon Board of Education ("Board"). The charge, as amended, alleges that the Board violated section 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")[1/] when

1/ These provisions prohibit public employers, their agents or representative from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed
(continued...)

it disciplined certain members of the Association in retaliation for protected activity under the Act. The charge alleges that in April 2013, the Association sent a letter to parents of students in the school district, soliciting support for its ongoing negotiations with the Board. After members of the Board received a copy of the Association's letter, it conducted an investigation and ultimately imposed various disciplinary penalties upon certain Association members. Two Association members received written reprimands. The Board also allegedly withheld salary increments of five other Association members for the 2013-2014 school year. The Association alleges that the withholding was to penalize only union officers, negotiators, and those who "refused to name names" and therefore, the Board's actions violated the Act.

On February 18, 2014, the Director of Unfair Practices issued a Complaint and Notice of Hearing, which assigned the matter to me. On March 5, 2014, the Board filed an Answer. It admits that the Board disciplined certain Association members following the Superintendent's investigation into the Association's letter to parents, but denies all other allegations and that it violated the Act. It also submits that the Board's

---

1/ (...continued)
to them by this Act, and (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.

actions in connection with the instant matter were taken for legal and proper reasons.

On June 9, 2014, I conducted a hearing at which the parties examined witnesses and presented exhibits.[2/] Both parties filed post-hearing briefs on June 25, 2014. Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Board and the Association are, respectively, a public employer and public employee representative within the meaning of the Act (T8). The Association represents all teaching staff members, nurses, custodians, librarians, speech therapists, child study team members, and secretaries employed by the Board. (C-1, C-2).

2. Two schools comprise the North Haledon school district, an elementary school and a middle school (T14, T40). The elementary school is named Memorial School (T65), and the middle school is named High Mountain School(T113).

3. John J. Petrelli is the interim superintendent in the North Haledon school district and has been employed in that position since July 1, 2012 (T58; T102).

2/ "C" refers to the Commission's exhibits; R-1 through R-7 refer to the Board's exhibits; and CP-1 through CP-3 refer to the Association's exhibits. "T" represents the transcript, followed by the page number(s).

The Association's Letter

4. In or around January, 2013, the parties were negotiating a successor collective negotiations agreement to that which expired in 2012. (T15, T41, T48). The Association's executive committee called for a meeting of the entire Association that month (T16, T41). During the meeting, the Association decided to have a committee prepare a letter to the parents of the students in the district (T16, T41, T48). The purpose of the proposed letter was to inform the community of the status of negotiations (T16).

5. Jennifer Lally is an art teacher for the District's elementary and middle schools (T124-25). Lally was one of the Association's co-presidents at the time of the events that are the subject of the instant matter, although she was no longer a co-president at the time of the hearing (T40-41).

6. Roseanne Taormina is a teacher in the district's middle school, and has been employed by the Board for seventeen years (T14). Taormina served as the other Association co-president and was one of its lead negotiators for the successor collective negotiations agreement in January 2013 (T15, T41, T49).

7. Sasha Wolf is a field representative for the New Jersey Education Association and advises local unions, among other duties (T47). NHEA is one of the local unions that Wolf advises (T47). Wolf was involved in negotiations between the Board and

NHEA (T47-48). Although Wolf was not at the negotiations table, he had discussions with Taormina regarding strategy for the successor collective negotiations agreement (T48-49). In the early part of 2013, Wolf learned of the Association's plan to send a letter and of its intent; Wolf testified that the Association "was looking for ways to try to put some pressure on the school Board to move towards a resolution of the contract." (T48). Wolf had no role in the execution of the Association's plan to send the letter to students' homes (T49).

8. The Association used its own labels, paper, and envelopes to prepare its letter. The funds for these materials came from PRIDE, an organization the Association established through the NJEA to promote public education in the State (T17, T22, T42). Association member Donna Hastie works in the middle school. She used her personal printer and ink to create the address labels for the letter (T30, PHB Ex.A[3/] Q10). Hastie gave the printed address labels to fellow middle school teacher Linda Khoyan, who in turn, delivered them to the district's elementary school (T32-33, T112-113, PHB Ex. A Q11). Association members

---

3/ "PHB Ex. A" refers to an exhibit attached to the Board's post-hearing brief. The exhibit contains the Board's interrogatory questions, and the Association's admissions and answers, such as its answer that Hastie used her personal printer and ink to create address labels. At the hearing, counsel for the Board requested to include these documents in her summation, and I noted for the record that there was no objection to her doing so (T114-115).

stuffed envelopes at the district's elementary school outside of their contractual hours (T17-18).

9. The Association subsequently mailed its letter dated April 19, 2013, to the parents and guardians of the Districts' students (T16, PHB Ex. A Q.1).

The Investigation

10. On or around April 20, 2014, the President of the Board informed the district's interim superintendent, John J. Petrelli, that some board members with children in the district received a letter from the Association (T63; R5). At Petrelli's request, the Board president forwarded the letter and envelope to him (T63-64; R5).

11. Upon examination of the Association's letter, Petrelli decided to initiate an investigation because it appeared to him that information on the labels came from the database of student information system on the Board's computer systems (T64).

12. "Realtime" is the name for the student information database system covering all of the District's students (T24, T62). Regular classroom teachers in the district can access Realtime for a variety of purposes, such as recording student grades and tracking student attendance (T24, T80, T124-25). The term "Super User" refers to a Board employee who has access to all information stored in Realtime for all of the districts' students (T25, T113). Only certain employees have Super User

status (T25). While Super Users can record student grades and attendance in Realtime, Super Users access Realtime for purposes unrelated to regular classroom teachers' uses for Realtime (T79-80, T82-83).

13. The purpose of the Super User designation is to enable access to student information that is required for fulfilling various reporting and compliance requirements for the Board, Department of Education, or administration (T62).

14. The Association did not seek permission from the administration or the Board to access that student information system for the purpose of obtaining district students' addresses for its use in mailing the letter (T112, PHB Ex. A Q 6 & 7).

15. It is unclear from the record what information is available to those users who do not have Super User status. Petrelli did not know whether teachers who are not Super Users can access the addresses of their particular students through Realtime (T113). Lally did not know the type of student information to which regular classroom teachers who are not Super Users have access (T126). However, as an art teacher for most of the district's students, Lally claimed to have access to the home addresses of the students she teaches even though she is not a Super User (T124-25).

16. Petrelli viewed the unauthorized access of Realtime to obtain students' home addresses to be "one of the most egregious

violations of Board policy, federal, state law that [he] ever encountered" during his career as an administrator (T64). He understood students' home addresses to be confidential, stating that all information relating to a public school student in the State is confidential, absent parents' consent to disclosure (T95-98). Petrelli also testified that as Superintendent, he was responsible to ensure that the trust with students' parents is not violated (T65). For these reasons, Petrelli thought the unauthorized access of Realtime for students' home addresses merited a full investigation (T69). I credit Petrelli's testimony in this regard. He testified credibly that his motivation for investigating this matter was grounded in what he perceived to be a breach of student confidentiality.

17. The district maintains a list of all Super Users (R4). Petrelli interviewed all Association members on that list as part of his investigation (T68-69). The investigation took approximately six weeks (T70). At the conclusion of the investigation, Petrelli prepared a confidential report for the Board summarizing his investigation (T71, R5).

18. Taormina first learned of Petrelli's investigation when she was called in to represent a Super User whom Petrelli wanted to question (T17). Taormina served as the Association representative for all of Petrelli's interviews of Association members that were disciplined by the Board except Arlene Pezzuti

(T20). She compiled notes contemporaneously with Petrelli's investigation (T20; CP-1-A).

19. When Taormina learned of Petrelli's investigation, she telephoned Wolf to ask what rights Association members had in responding to the Superintendent's questions (T49-50).

20. Wolf told Taormina that, in his opinion, the Board had a right to conduct an investigation into what it believed to be disciplinary infractions, but that if the questions pertained to internal Association business, the interviewees had a right to refuse to respond. (T50) Wolf asked Taormina to communicate this information to her colleagues (T50). Taormina subsequently emailed Wolf's advice to the entire Association (T42-43).

21. Some of the Association members Petrelli interviewed answered his questions and cooperated (T69). Petrelli identified Daniel Onove, Karen Gabriele and Kristina Stipelkovich as "cooperative" employees with Super User status whom he interviewed (T70). Petrelli's report to the Board specifies that Onove claimed not to know how the address labels were generated for the letters or how the letters were distributed (R5). Neither Gabriele nor Stipelkovich participated in the letter's creation or its distribution (CP-1-A). Petrelli's report to the Board makes no reference to his interview with Gabriele and Stipelkovich, but Petrelli testified that Onove was unaware of the letter, and that the two others told him that they did not

know how the labels were made (T70). All three of these employees requested to have their Super User status removed during their interviews with Petrelli, as their job duties did not require such access (CP-1-A). Onove, Gabriele, and Stipelkovich were not disciplined as a result of information Petrelli learned in the interviews.

22. Certain Association members responded to Petrelli's questions by asserting that they couldn't respond to the questions because they had been advised not to do so and that it wasn't Petrelli's business to conduct an investigation that asked such questions. (T70). Petrelli informed the unit employees he interviewed, on multiple occasions during the interviews, that a failure to answer his questions could constitute insubordination (T33, T46, T71, T72, T113).

24. Petrelli first interviewed Pezzuti, a secretary at the middle school (T65). Before the investigation formally commenced, the district's middle school principal informed Petrelli that Pezzuti wanted to speak with him (T65). In the two meetings Petrelli conducted with Pezzuti on April 26, 2013, and May 16, 2013, Pezzuti declined union representation, and Petrelli granted her request to have the middle school principal present at those meetings (T65, CP-3, R5). Pezzuti told Petrelli that two teachers, Stephanie Macalle and Mary Van Horn, approached her on April 19, 2013, and requested that she take a bag of letters

to the local post office during her lunch period (T66-67, PHB Ex. A Q. 8). Pezzuti agreed, and delivered the letters to the post office during her lunch period that day after Macalle dropped the bag off at her desk (T67, R5, PHB Ex. A Q.8 & 13). Petrelli checked the middle school's video surveillance for April 19, 2013, which showed Macalle placing a bag of letters at Pezzuti's desk (T67). Pezzuti maintained that while she was aware of the Association's plan to send a letter to students' guardians, she did not know who provided the labels or how they were printed (R5 pg.6).

25. Petrelli interviewed Taormina on April 30, 2013 (CP-1-A). Petrelli asked Taormina to identify Association members who wrote the letter (T18). She declined to answer that question. She testified that she believed Petrelli did not have the right to ask that question based on the advice from Wolf (T18). She provided other information to Petrelli regarding the letter, including where the envelopes were stuffed, how the Association obtained the resources for the letter, and "a little bit about everything that had led up to the event." (T18). Taormina explained to Petrelli that the letters were photocopied outside of school; that the envelopes were stuffed at the elementary school before contractual hours; and that the letters were mailed out during a lunch break (CP-1-A). Taormina repeatedly declined to identify anyone was on the letter writing subcommittee, and

anyone who volunteered to stuff the envelopes because she believed that the questions pertained to Association matters (CP-1-A). Taormina did inform Petrelli that Donna Hastie printed the address labels (CP-1-A).

26. Taormina testified that she had "limited participation" in the letter's creation and distribution (T26, T30). Taormina provided blank labels to Donna Hastie, who in turn, accessed Realtime to generate the labels (T30, PHB Ex. A Q. 9a). Taormina was aware that Hastie would print the labels using information obtained from Realtime (T30). Taormina did not access Realtime to obtain students' addresses or devise the plan to do so (T26, T30).

27. Petrelli questioned Hastie on or around April 30, 2013 and May 16, 2013 (CP-1-A). Hastie's name appears on the District's list of employees with the Super User designation (R4). Hastie received the Super User designation because she was the testing coordinator for the District, and therefore, required complete access to Realtime to comply with state test requirements (T86-87). Hastie obtained blank labels from Taormina (T30, PHB Ex. A Q. 9a). She used her Super User status to access Realtime and print the addresses of all the parents and guardians of the Districts' students for the Association's mailing (T30, PHB Ex. A Q. 10). Hastie provided the printed address labels to another staff member, Linda Khoyan, for

delivery to the district's elementary school (T32, PHB Ex. A Q.12).

28. Petrelli also questioned Khoyan, who Hastie identified as the person to whom she gave the printed address labels (T32, PHB Ex. A Q. 11). Khoyan is a teacher in the District's middle school, High Mountain, and an Association member (T53). She was neither an officer for the Association nor was she a member of its negotiations team (T53, T113).

29. After receiving the printed address labels from Hastie, Khoyan delivered them to the district's elementary school (T32-33, T112-113, PHB Ex. A Q. 12, CP-1-A, R5). Petrelli repeatedly asked Khoyan to whom did she delivered the address labels, and Khoyan refused to answer that question, based on Wolf's advice that members did not have to answer questions about the Association (T113, PHB Ex. A Q. 12, CP-1-A, R5).

30. Petrelli questioned Van Horn on or around May 13, 2013 (T52). Van Horn is a teacher at the District's elementary school and was neither a member of the negotiations team nor a union officer at the time the Association distributed its letter to the school community (T52, T66, T106). Van Horn's name does not appear on the District's list of employees with the Super User designation (R4). The Association admits that during the investigatory interview, Van Horn informed Petrelli that she was aware that the letter existed but had nothing more to say (PHB

Ex. A Q. 14). Van Horn also refused to answer Petrelli's question of how the Association obtained the students' information for the mailing (PHB EX. A Q. 15). Van Horn also did not answer Petrelli's questions regarding how the letters were delivered to the post office; the logistics of the mailing; what PRIDE does; how the Association obtained the contact information for the guardians of the district's students; and whether PRIDE handles the Association's public relations (CP-1-A, R-5).

31. Petrelli questioned Macalle on or around May 13, 2013 (T52, T106, CP-1-A). Macalle served on the Association's negotiations team at the time its letter was mailed (T52). According to its admissions, Macalle asked Pezzuti to drop off the letters at the post office (PHB Q. 8). Macalle subsequently brought a bag filled with letters to Pezzuti for mailing (T67, R5, PHB Q. 13 Ex. A). The Association admitted that during her investigatory interview, Macalle refused to answer Petrelli's questions regarding the letter, other than to state it existed (PHB Ex. A Q. 17). Macalle refused to answer questions regarding the logistics of the mailing; her participation in the mailing; and how the Association obtained the district guardians' contact information (CP-1-A, R5).

32. Petrelli interviewed Lally, who also served as an Association co-president at the time the letter was mailed (T40-41, T124-25). Lally's name does not appear on the list of Super

Users for the district (R4). Petrelli asked Lally questions regarding PRIDE and the drafting of the letter (T42). Lally answered Petrelli's questions about PRIDE, but refused to answer his questions about the drafting of the letter (T42). She did not answer those questions because Taormina instructed her not to answer any questions that were asked about the writing of the letter (T42). Lally informed Petrelli how the information was obtained from Realtime and how the Association had accessed Realtime in the past (T44). Lally did not participate in the access of Realtime or the distribution of the contact information contained therein (T44-45).

Relevant District Policies

Governing District Computer Network and Email Systems

33. In November 2008,[4/] The Board issued "Policy 3321-Acceptable Use of Computer Network(s)/Computers and E-Mail by Teaching Staff Members" and its corresponding regulation of the same name, to govern the use of its computer and network system (R-2, R-5). The policy explains that "[t]he Board provides access to computer network(s)/computers and email for administrative and educational purposes only." (R-2).

34. Policy 3321 sets forth the use-standards governing the computer network and e-mail systems, and identifies prohibited

---

4/ All of the Board policies and regulations at issue in this matter were issued in November 2008.

uses of those systems. Among other prohibitions, the computer network, computers or email cannot be used in support of "illegal" or "inappropriate" activities (R-2). Illegal activities refer to those activities that violate laws and regulations, while inappropriate activities refer to "those that violate the intended use of the network(s)." (R-2). Prohibited uses also include privacy invasions and "other activities that do not advance the educational purposes for which the computer network(s)/computers and email are provided." (R-2).

35. Policy 3321 provides that violators of the policy "shall be subject to appropriate disciplinary actions. . ." (R-2). Such disciplinary actions can include dismissal, legal action, "and/or any appropriate action that may be deemed necessary as determined by the Superintendent and approved by the Board of Education." (R-2).

36. Under the caption "Real-time, Interactive, Communication Areas", Regulation 3321 to Policy 3321 provides that "the system administrators, at their sole discretion, reserve the right to monitor and immediately limit the use of the computer network(s)/computers or terminate the account of a member who misuses real-time conference features (talk/chat/Internet relay chat) etc." (R-5).

Governing the Disclosure of Student Information

Policy 8335 - Family Educational Rights and Privacy Act

37. Board Policy 8335 summarizes parents' and adult pupils' rights under the federal statute, Family Educational Rights and Privacy Act (FERPA)(R5). In pertinent part, the policy explains that FERPA generally requires the district to obtain the consent from parents and adult pupils before it discloses personally identifiable information contained in pupils' education records (R-5). The policy also explains that the New Jersey Administrative Code 6A:32-7 incorporates FERPA's requirements (R-5). Finally, it provides the name and address of the office overseeing FERPA compliance, and advises that parents and adult pupils have the right to file a complaint with the federal department of education for alleged violations of FERPA (R5).

Board Policy and Regulation 8330- Pupil Records

38. Board Policy 8330 explains that the Board authorizes the creation and maintenance of only those pupil records that are mandated by law and permitted by the Board (R-5). It charges the Superintendent or a designee with protecting the security of pupil records maintained by the district, and provides that the policy and corresponding regulation limit access to authorized persons (R-5). The policy identifies the organizations, agencies and persons that will have access to pupil records, and the process for requesting change in a record and a stay of disclosure (R-5). It describes how the district retains and disposes of pupil records (R-5).

39. Board Regulation 8330 begins by defining key terms. Of most relevance in the instant matter, the regulation defines "pupil record" as "information related to an individual pupil gathered within or outside the school system and maintained within the school system . . ." (R-5). It distinguishes between "mandated pupil records" and "permitted pupil records" (R-5). "Mandated pupil records" are defined as "those pupil records that the school districts have been directed to compile by State statute, regulation, or authorized administrative directive" and includes information such as "name, address, telephone number, date of birth, name of parent(s). . . ." (R-5). "Permitted pupil records" are defined as "records that the Board of Education has authorized, by resolution at a regular public meeting, to be collected in order to promote the educational welfare of the pupil. The regulation also contains provisions relating to the maintenance, security, and disposal of pupil records (R-5). Like the policy, Regulation 8330 identifies the persons and agencies who will have access to pupil records (R-5). This includes "certified school district personnel who have assigned educational responsibility for the pupil . . ." (R-5).

Disciplinary Actions

40. Upon the conclusion of his investigation, Petrelli took disciplinary action against seven Association members.

41. Petrelli issued a letter of reprimand to Pezzuti that was placed in her file (T73). By letter dated June 20, 2013, Petrelli summarized his interview with Pezzuti (CP-3). He also wrote that Pezzuti's failure to check with administration to see if approval had been provided for the use of the student information constituted inappropriate staff conduct under Board Policy and Regulation 3281 (CP-3).

42. Petrelli recommended that the Board withhold Taormina's increment for the 2013-2014 school year (T75). The Board voted to withhold her increment on June 19, 2013 (R-6). By letter dated June 20, 2013, Petrelli advised Taormina of the Board's decision and explained his basis for the increment withholding (CP-1-B). He explained that her increment was being withheld because she participated in the effort to access and use "confidential student records information" contained in Realtime and "[her] participation in subsequent activities involving the use and distribution" of such information without administrative approval (CP-1-B). He asserted that as a teacher, Taormina is "deemed to be aware that student records are confidential" under federal and state law, as well as Board Policy and Regulation 8330 (CP-1-B). Petrelli further wrote that Taormina's conduct violated Board policies governing staff conduct (Board Policy and Regulation 3281), discipline (Board policy 3150), and acceptable use of computer networks (Board Policy 3321)(CP-1-B).

43. Petrelli recommended that the Board withhold Khoyan's increment for the 2013-2014 school year (T75). The Board voted to withhold her increment on June 19, 2013 (R-6). By letter dated June 20, 2013, Petrelli advised Khoyan of the Board's decision and provided two reasons for the increment withholding (CP-1-L). He cited her participation in the use and distribution of confidential student information from Realtime and her insubordinate conduct (CP-1-L). He asserted that the use and distribution of students' information constituted inappropriate staff conduct under Board Policy and Regulation 8330 (CP-1-L). Petrelli further explained that, "...by refusing to answer my questions about the teacher to whom you delivered the completed address labels and about your role with respect to the enabling of the mailing of the letter to District parents/guardians utilizing confidential student records information, you engaged in insubordinate conduct." (CP-1-L).

44. Petrelli recommended that the Board withhold Van Horn's increment for the 2013-2014 school year (T75). The Board voted to withhold her increment on June 19, 2013 (R-6). By letter dated June 20, 2013, Petrelli advised Van Horn of the Board's decision and identified his basis for the increment withholding (CP-1-J). He explained that Van Horn engaged in insubordinate conduct "by refusing to answer my questions about your involvement in activities with respect to the processing and

preparation of envelopes used to mail a letter to District parents/guardians utilizing confidential student records information" from Realtime (CP-1-J).

45. Petrelli recommended that the Board withhold Macalle's increment for the 2013-2014 school year (T75). The Board voted to withhold her increment on June 19, 2013 (R-6). By letter dated June 20, 2013, Petrelli advised Macalle of the Board's decision and identified his basis for the increment withholding (CP-1-K). As with Van Horn, he explained that Macalle engaged in insubordinate conduct by refusing to answer questions regarding her role in the "processing and preparation of envelopes used" for the Association's mailing (CP-1-K).

46. Petrelli issued a letter of reprimand to Hastie (T55-56, T74). In his letter dated June 20, 2013, Petrelli reprimanded Hastie for violating the Board's policies' governing computer use, staff conduct, and discipline (CP-1-I). He also warned Hastie that any additional misconduct may result in further disciplinary action (CP-1-I). At a meeting on May 29, 2013, the Board accepted Hastie's retirement, which became effective on July 1, 2013 (T75, R7).

47. Petrelli recommended that the Board withhold Lally's increment for the 2013-2014 school year (T75). The Board voted to withhold her increment on June 19, 2013 (R-6). By letter dated June 20, 2013, Petrelli advised Lally of the Board's

decision and identified his reasons for the increment withholding (CP-1-I). He cited her "participation in an effort to seek, and ultimately obtain and use" confidential student information from Realtime, her role in "the use and distribution" of that information, and her insubordinate conduct (CP-1-I). He claimed that these actions violated the Board's policies regarding acceptable computer use policy (#3321), discipline (#3150), and staff conduct (#3281). He further explained that Lally engaged in insubordinate conduct "by refusing to answer [his] questions about the manner in which contact information for District parents/guardians was obtained" from Realtime (CP-1-I).

48. On June 27, 2013, the Association filed grievances on behalf of Taormina, Lally, Khoyan, Macalle and Van Horn; all of whom had their increments withheld for the then-upcoming 2013-2014 school year (CP-1-C, CP-1-D, CP-1-E, CP-1-F, CP-1-G).

49. By letters dated July 10, 2013, Petrelli denied the grievances as the second step of the grievance procedure (CP-1-H). The grievances are currently pending arbitration as the Board and Association agreed to stay those proceedings until the resolution of the instant matter (T54). The Association did not file grievances regarding the letters of reprimand that Pezzuti and Hastie received (T55-56).

50. Petrelli and the Association have disagreed over the use of the Board's computer systems before, specifically when the

Association used school district email addresses in a group communication to Association members in January 2013 (T23-24, T59, T72, R-1). Taormina testified that the Association had usually been allowed to use the e-mail system for Association purposes in the past (T23-24; T118). In a meeting with Taormina and Lally, Petrelli explained that such use constituted a violation of the Board's computer network policy, and that future violations could result in discipline (T24, T60, T100, T121-122, R-3). Petrelli refrained from disciplining Association members on that occasion. (T60, T93, T101, T103, T105-108, T110).

51. Petrelli denied knowing the identity of the members of the Association's negotiations team (T79). I find his testimony credible. There was no evidence submitted that contradicted his claim.

52. Petrelli also testified regarding why he declined to recommend an increment withholding for the two other staff members involved in the Association's mailing, and issued letters of reprimand instead. Petrelli testified that he did not recommend an increment withholding for Hastie, the employee who accessed Realtime, because Hastie was retiring at the end of the school year, and therefore, an increment withholding would have no impact (T74). He also testified that if Hastie had not retired, he would have recommended her increment withholding. He explained that one of the reasons he did not recommend that the

Board withhold Pezzuti's increments was that she came forward before his investigation commenced (T73). I find his explanations for the different penalties to be credible and also find that Petrelli was not targeting Union officials and/or its negotiations team when discipline was meted out. Petrelli's testimony revealed that he was unaware of what members constituted the Association's negotiations team. This testimony was not refuted by the Association.

ANALYSIS

The charge alleges that the Board violated the Act when it imposed disciplinary penalties upon five Association members in retaliation for their refusal to cooperate with the Superintendent's investigation into the circumstances surrounding the Association's mailing. The Association further alleges that the Board imposed lesser penalties upon Association members who cooperated with the Board's investigation and that the Board's actions in this regard violated the Act.

The Association asserts that its mailing to district parents was an activity undertaken by the Association as a group and not individuals. Therefore, it claims that the Board had no business investigating an Association activity. In its post-hearing brief, the Association contends that correspondence issued by a majority representative is protected under the Act, and asserts that "[i]f a protected communication led directly to an internal

investigation, as is the case here, then discipline may not be imposed." The Association maintains that the only plausible basis to explain why some members involved in the same Association activity received increment withholdings while others received merely letters of reprimand is that the former group refused to cooperate with an investigation concerning an internal union matter while the latter group cooperated.

The Association also alleges that the Superintendent's proffered justifications for the letters of reprimand he issued to Pezzuti and Hastie are pretextual. It concedes that Pezzuti's decision to admit facts to Petrelli before he initiated his investigation may have been a relevant factor that would explain her relatively minor discipline. However, it asserts that Petrelli's decision not to recommend the withholding of Hastie's increment demonstrates that Petrelli rewarded members who cooperated with him.

The Board counters that the Association did not meet its burden of establishing a prima facie showing that the Association members' protected activity was a motivating or substantial factor in the decision to withhold their increments. It cites Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978) for the proposition that an employee organization's right to seek support from the public during collective negotiations is not unlimited. In that decision, the

Commission held that the union did not engage in protected activity when its members provided students with a letter detailing the union's position in a labor dispute to deliver to their parents. Id. at 264. The Board maintains that the Association in the instant matter similarly did not have a right to communicate its position regarding collective negotiations with the district by violating laws and Board policies that safeguard student information and to interfere with its investigation into such violations. It contends that the Act does not afford protection to union activity involving inappropriate workplace conduct.

The Board also asserts that the Association failed to present evidence establishing any anti-union animus. It notes that Petrelli did not discipline any Association members for the previous violation of the Board policy governing acceptable use of its computer network. Moreover, several Association members had been interviewed by Petrelli during his investigation of the Association's mailing, but did not receive any form of discipline.

The Board further contends that the record demonstrates that the members' increments would have been withheld anyway because they engaged in inappropriate and unlawful workplace conduct that was deserving of such discipline. The Board claims that it has a duty under federal and state law to safeguard student records.

The Board asserts that students' home addresses are student records protected by federal and state law. Pursuant to its legal duty, the Board developed policies to govern the access of student records and maintain their confidentiality. The Board claims that the Association's access of Realtime to obtain students' addresses violated its policies and necessitated the ensuing investigation. Therefore, the Board had a legitimate business reason when it disciplined the Association members.

Legal Standard for Violations of Section 5.4a(3)

The New Jersey Supreme Court, in Township of Bridgewater, 95 N.J. 235 (1984), set forth the standard for determining whether an employer's action violated §5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. Id. at 242, 246. This may be done by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, that the employer knew of the protected activity and was hostile toward it. Id.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under the Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further

analysis. Id. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Id. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record that the adverse personnel action would have taken place absent the protected conduct. Id. This affirmative defense need not be considered unless the charging party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the action. Id.

Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve. Id. The decision about whether the charging party proved hostility in such cases is based upon the consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

Legal Standard for Independent Violations of Section 5.4a(1)

An independent violation of subsection 5.4a(1) occurs when the public employer engages in conduct that "tend[s] to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Act, providing the actions taken lack a legitimate and substantial 'business' justification." New Jersey

College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978). The charging party need not produce evidence of anti-union animus. Id. In determining whether the challenged actions tend to interfere with protected activity, the Commission examines the "totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals." Id.

As a defense, the employer may produce evidence demonstrating a substantial business justification for interfering with, restraining or coercing employees in the exercise of their protected activity. Id. The substantial business justification must outweigh the impact its challenged conduct has on the exercise of the employees' statutory rights. Id.

Based on the above legal standards, I find that the Association members whose increments were withheld were not engaged in protected activity when they refused to answer Petrelli's questions during their investigatory interviews, based upon the Association's advice. While I agree with the Association that communications from majority representatives are often protected activity under our Act, I am not persuaded in this case that Association members are insulated from any disciplinary consequence of their actions (or omissions) simply

because they (arguably) followed advice in a "protected" communication. As the following analysis demonstrates, the Act did not protect the members' refusal to answer based on the evidence proffered at hearing. Moreover, it is clear to me that Association members violated Board policies when they orchestrated the mailing to students' parents by accessing student records through the Board's computer systems. Neither accessing such records nor refusing to cooperate with the Board's investigatory interview constitute protected activity under the Act.

In NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court of the United States ruled that the National Labor Relations Act affords a bargaining unit employee the right to request and receive a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This "Weingarten right" applies to public employees in the State of New Jersey. Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996). While employees cannot be disciplined for requesting union representation during an investigatory interview, there are important limits to Weingarten rights. Of most relevance in the instant matter, the right to representation under Weingarten may not interfere with legitimate employer prerogatives. Id.

The Commission explored Weingarten's prohibition against interference in State of New Jersey (Department of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). Under a predominant interest order, it ruled that a shop steward did not engage in protected activity when he obstructed management's right to conduct an investigatory interview by telling the subject of the interview that he did not have to listen to management, answer questions, or carry out orders. Id. at 176. It explained that a representative's role under Weingarten is not adversarial, and therefore "the latitude granted for perceived misconduct is thus narrower than in the negotiations and grievance settings." Id. at 174. The Commission recognized that a Weingarten representative's role is to assist the employee by objecting to harassing, confusing or misleading questions, helping clarify the employee's account, and suggesting additional witnesses. Id. at 174-75.

However, in reaching its conclusion, the Commission reviewed, at length, decisions involving alleged interference by union officials during investigatory interviews where employees invoked their Weingarten rights in an effort to distinguish protected representational activity and unprotected workplace misconduct. Based upon its review, the Commission concluded that "[t]heir representation cannot obstruct the employer's right to conduct such interviews." Id. at 175.

The Commission cited New Jersey Bell Telephone Co., 308 NLRB No. 32, 141 LRRM 1017 (1992) as illustrative. Id. There the NLRB held that a union official's Weingarten representation became unprotected when he advised a member during the course of the employer's investigatory interview to answer questions only once and prevented the employer from repeating its questions. Id. The Commission explained that the NLRB reasoned that such conduct would transform an investigatory interview into an adversarial forum and interfere with the employer's ability to investigate misconduct. Id.

The Commission also cited Climax Molybdenum Co. v. NLRB, 584 F.2d 360, 99 LRRM 2471 (10 Cir. 1978), where a union filed an unfair practice charge after the company refused its request to hold a conference on company time prior to an investigatory interview with two employees who had been involved in an altercation. The expressed purpose of the prior consultation was to inform the employees of the union's policy of non-cooperation for investigatory interviews, and during the investigatory interview the union representative advised the employees that they did not have to say anything. Id. at 364. In ruling that the employer had no duty to afford the employees subject to the investigatory interview a prior consultation with a union official on company time, the Court explained that the union's policy of non-cooperation "is directly contrary to the very

purpose of an investigative interview, i.e., to ascertain what the problem is, how it has developed and what, if any, solution or direction is dictated based upon the facts disclosed." Id.

While the precise boundaries of Weingarten's prohibition against interference with an employer's legitimate prerogatives may be unclear, the above cases demonstrate that refusals to answer questions during investigatory interviews generally falls well within its confines. Although the above decisions arose as challenges to disciplines imposed upon union officials for the representation they provided under Weingarten, they illustrate that refusals to cooperate or "answer" during investigatory interviews constitute interference with employers' legitimate prerogative to conduct such interviews. If a Weingarten representative's advice to not cooperate during an investigatory interview is not protected, then an employee's refusal to cooperate pursuant to that advice is similarly not protected. Employees are certainly entitled to refuse to answer management's questions during an investigatory interview. But the Act does not shield the employee from potential adverse action for that refusal, unless the reason of the employee's refusal is because the employer deprived them of a Weingarten representative.

Based on the record, once the Association members were provided with their Weingarten representative during Petrelli's investigatory interviews, there was no other basis for the

members to refuse to answer his questions under our Act. To be clear, this is not a case where a Weingarten representative or an employee acting pursuant to a representative's advice challenged an employer's harassing, confusing, misleading or otherwise objectionable questions during an investigatory interview and suffered adverse action as a result. Association witnesses, co-presidents Lally and Taormina, and NJEA representative Wolf, all testified that it was the Association's view that while management had a right to conduct its investigation, the members had a right to refuse to answer questions pertaining to "internal Association business" during Petrelli's investigatory interviews.

It is the Association's contention that these five members did not cooperate with the investigation, and that such noncooperation was lawful. The record confirms that the five Association members who received increment withholdings followed the Association's non-cooperation advice and, therefore, refused to answer either some or almost all of Petrelli's questions during his investigation into the Association's access of Realtime for its mailing. As set forth in the Association's admissions, Lally and Van Horn refused to answer Petrelli's question regarding how the members obtained the students' contact information for the mailing (Ex. A). Taormina testified that she refused to answer Petrelli's question regarding the identity of the members who composed the Association's letter (T18). Both

the Association's admissions and Petrelli's testimony establish that Khoyan refused to identify to whom she delivered the printed address labels at the elementary school. According to the Association's admissions, Macalle refused to answer questions regarding the letter other than to state that it existed.

Thus, the above facts demonstrate that the members refused to answer questions, and that refusal interfered with the Board's prerogative to investigate employee misconduct. The members' refusal to answer amounts to interference, and is not protected, under our Act. Moreover, the Association failed to show that accessing the information contained in the Board's computer systems constituted protected activity. Because the Association failed to establish that its members engaged in activity protected by the Act, I need not analyze whether the Board retaliated against Association members for engaging in protected activity.

As discussed above, both an independent violation of subsection 5.4a(1) and a violation of subsection 5.4a(3) require that the charging party establish that an employee engaged in protected activity. Because the record does not establish that the members who had their increments withheld engaged in protected activity, I conclude that the Association's complaint should be dismissed.

RECOMMENDATIONS

The North Haledon Board of Education did not violate N.J.S.A. 34:13A-5.4a(1) and a(3) when it withheld the increments of Association members and officers who refused to cooperate with its investigatory interviews. I recommend that the Complaint issued against it be dismissed.

/s/Timothy Averell
Hearing Examiner

DATED: November 23, 2015
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 4, 2015.