

D.U.P. NO. 2020-11

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

In the Matter of

HACKENSACK BOARD OF EDUCATION,

Charging Party,

-and-

Docket No. CE-2019-016

HACKENSACK CUSTODIAL AND
MAINTENANCE ASSOCIATION,

Respondent,

-and-

HACKENSACK ASSOCIATION OF OFFICE
PROFESSIONALS,

Respondent,

-and-

HACKENSACK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Hackensack Board of Education (Board) against three majority representatives (Unions) representing different units of Board employees. The Board alleged the Unions violated sections 5.4b(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by: (1) sending emails to Board administrators that imposed "unreasonable and impractical " demands on the Board; (2) threatening to file claims about workplace health and safety conditions that the Unions should have known were unfounded; (3) presenting grievances to the Board in a manner that was not compliant with the parties negotiated grievance procedure; and (4) filing an unfair practice charge in "an attempt to intimidate the Superintendent." The Director dismissed these claims, finding (1) the Unions emails were about working conditions and were protected activity under the Act; (2) union complaints that raise health and safety concerns are protected activity under the Act; (3) the failure to comply with a contractual grievance procedure, by itself, does not violate the Act, and (4) filing an unfair practice charge is a statutory right under the Act.

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Appearances:

For the Charging Party,
Scarinci and Hollenbeck, attorneys
(John G. Geppert, of counsel)

For the Respondents,
NJEA Uniserv Office 23
(Richard E. Loccke, Field Representative)

REFUSAL TO ISSUE COMPLAINT

On May 8, 2019, the Hackensack Board of Education (Board or Charging Party) filed an unfair practice charge against the Hackensack Custodial and Maintenance Association (HCMA), the

Hackensack Association of Office Professionals (HAOP), and the Hackensack Education Association (HEA) (hereinafter collectively referred to as "Respondents" or "Unions"). The charge alleges that the Respondents violated sections 5.4b(1), (2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by: (1) emailing Hackensack Public School District (District) administrators ". . . a series of unreasonable and impractical demands . . ." for information; (2) threatening to file a claim under the Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq. ("PEOSHA") and threatening other litigation against the District which Respondents ". . . knew or should have known was both unfounded and inappropriate . . . "; (3) failing to comply with contractual grievance procedures in the presentation of grievances; and (4) filing an unfair practice charge ". . . in an apparent attempt to intimidate the Superintendent . . ." of the District.

^{1/} These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the Commission."

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); 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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The HCMA is the exclusive majority representative for full-time custodians and maintenance personnel employed by the Board. HCMA is a party to a collective negotiations agreement (CNA) with the Board extending from July 1, 2018 through June 30, 2021. The CNA between the Board and HCMA sets forth a grievance procedure that requires a grievant to initiate a grievance within 20 school days, ". . . from the time of its occurrence." The grievance procedure also provides a five-step process for deciding and appealing grievance determinations, with steps one through five decision-makers being District's Principal, Director of Buildings and Grounds, Superintendent, the Board and an arbitrator, respectively.

HAOP is the exclusive majority representative for full-time secretaries and office staff employed by the Board. The Board

and HAOP are parties to a CNA extending from July 1, 2018 through June 30, 2021. The HAOP CNA also provides a grievance procedure with a five-step process for deciding and appealing grievance determinations, including the Principal, Board Secretary, Superintendent, Board and an arbitrator, respectively. Under the HAOP CNA, a grievant must initiate a grievance in writing within 20 school days, “. . . from the time of its occurrence.”

The HEA is the exclusive majority representative of certificated employees of the Board, including teachers. HEA and the Board are parties to a CNA extending from July 1, 2018 through June 30, 2021. The HEA CNA provides that a grievant must initiate a grievance in writing within 20 school days, “. . . from the time when the grievant would reasonably be expected to know of its occurrence.” The grievance procedure also sets forth several steps for processing and appealing grievance determination, which culminate in arbitration.

Richard E. Loccke is an NJEA UniServ Representative who represents the HCMA, HAOP and HEA. The Board alleges that on April 1, 2019, Loccke sent several emails to the District's Superintendent of Schools. According to the Board, Loccke's emails interfered with the administration of the District by “. . . making a series of unreasonable and impractical demands beyond his role as a union field representative” and that the demands violated the HCMA Agreement. It is unclear from the

charge what those demands were and what CNA provisions Loccke allegedly violated.

Also on April 1, 2019, the Board alleges that Loccke "threatened the Superintendent with filing a complaint with PEOSHA which he knew or should have known was both unfounded and inappropriate" and violated the HEA CNA by presenting the complaint to the Board and issuing "directives to other District administrators and personnel" instead of responding to questions by administrators about the PEOSHA issue. (Paragraph 14 of Charge). On that same date, Loccke allegedly responded to an email from the Director of Buildings and Grounds demanding "specific dates when his directives would be followed and copied the Superintendent, Middle School Principal, an HEA Association member employee, the NJEA consultant, the HEA President, and the HCMA building representative in violation of the negotiated procedure set forth in Article 4, paragraph K." (Paragraph 15 of Charge).

On April 2, 2019, in response to Loccke's expressed PEOSHA-related concerns, the Director of Buildings and Grounds requested Loccke ". . . identify any specific part of the Middle School Building which had a concern." (Paragraph 16 of Charge). Loccke was not responsive to the request, but instead demanded the Director provide official health and safety reports for two of

the District's schools or generate the same if none existed. (Paragraph 16 of Charge).

On April 5, 2019, the Superintendent informed Loccke that by directing the Director of Buildings and Grounds to take specific action "not approved by District Administration", Loccke had failed to comply with provisions of the parties' CNAs. (Paragraph 17 of Charge). Loccke responded by threatening litigation ". . . which he knew or should have known was inappropriate and without foundation." (Paragraph 18 of Charge).

According to the Board, on several occasions in February, March and April 2019, NJEA representatives violated provisions in the parties' grievance procedures and Board policies by improperly attempting to "fast-track" grievances and presenting grievances to the Board that should have been presented to school administrators. (Paragraphs 19 and 22). The NJEA also allegedly violated provisions of the CNA by presenting untimely grievances that were not based on an "interpretation, application or violation" of the Unions' CNAs and were otherwise seeking relief prohibited by their CNAs. (Paragraph 20 and 21 of Charge).

The Board also alleges that the HEA, on April 10, 2019, filed an unfair practice charge (Docket CO-2019-259)^{2/} ". . . in an apparent attempt to intimidate the Superintendent from exercising her managerial right to train staff regarding the

2/ The HEA withdrew the charge on July 9, 2019.

impact of illness on the efficiency of the District and to demand attendance information" by removing information regarding purported sick leave abuse from unit employees personnel files. (Paragraph 23 of Charge).

ANALYSIS

The Board alleges the Unions violated sections 5.4b(1), (2), (3) and (5) of the Act. For the reasons that follow, I find that the facts alleged in the Board's charge do not satisfy the complaint issuance standard and dismiss the Board's claims.

5.4b(1) Claim

Section 5.4b(1) of the Act regulates the relationship between a union and the employees it represents. The Act provides, in pertinent part, that "employee organizations, their representatives or agents are prohibited from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4b(1). The Commission has recognized two types of claims a unit employee may bring against his or her majority representative under section 5.4b(1): (1) a claim that a majority representative violates its duty to represent its members fairly in contract negotiations and grievance processing; and (2) a claim that a majority representative arbitrarily, discriminatorily or invidiously excludes or expels a negotiations unit employee seeking to participate in majority representative affairs affecting his or

her employment conditions. State of New Jersey PBA (Rinaldo), P.E.R.C. No. 2011-83, 38 NJPER 56, 57 (¶8 2011).

Here, the Board's allegations do not present a claim under section 5.4b(1). The facts alleged in the Board's charge do not implicate the rights of unit employees vis a vis their majority representative, which section 5.4b(1) protects. Nor has any unit employee represented by the HEA, HAOP or HCMA claimed their rights under section 5.4b(1) were violated by their majority representatives. For these reasons, I dismiss the 5.4b(1) claim.

5.4b(2) Claim

Section 5.4b(2) of the Act prohibits majority representatives from "interfering with, restraining, or coercing a public employer in the selection of his representatives for the purposes of negotiations or the adjustment of grievances." To establish a violation of this section, an employer must prove ". . . a coercive pattern of union conduct designed to interfere with the employer's choice of representative for purposes of collective bargaining." Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 6 (¶17002 1985).

In Downe Tp. Bd. of Ed., the Commission interpreted and applied subsection 5.4b(2) for the first time. The Commission discussed several decisions by the National Labor Relations Board (NLRB) as examples of a "coercive pattern of conduct" under subsection 5.4b(2), including:

(1) Union obtained the discharge of an employer representative through picketing, threats of strike and violence, and by directing members not to fill out questionnaires the employer needed to obtain financing;

(2) Union threatened to make negotiations difficult unless employer discharged a foreman;

(3) Union organized a strike and refused to bargain with an employer until the employer left a multi-employer bargaining association;

(4) Union organized a work stoppage to force an employer to demote the employer's grievance representative; and

(5) Union repeatedly demanded the discharge of an employer's service manager; after manager is discharged, union lessens negotiations demands and agrees to negotiate past a strike deadline.

[Downe Tp. Bd. of Ed., 12 NJPER at 6]

Based on its analysis of NLRB precedent, the Commission found in Downe that the union's conduct during negotiations in sending a letter to the board of education's president demanding the board member's presence at negotiations was not a violation of subsection 5.4b(2), even though the board president was not the employer's negotiations representative. 12 NJPER at 7.

Consistent with Downe, the Commission has repeatedly held that a written communication about terms and conditions of employment by a majority representative or public employee to a government official, by itself, is not a violation of subsection

5.4b(2) even when that communication is directed to an official who is not the employer's designated negotiations or grievance representative. City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190, 191 (¶4096 1978), aff'd NJPER Supp.2d 58 (¶39 App. Div. 1979); East Windsor Bd. of Ed., D.U.P. No. 81-7, 6 NJPER 521 (¶11265 1980); Wayne Tp., D.U.P. No. 2017-3, 43 NJPER 167 (¶50 2016). Absent factual allegations that the majority representative attempted to prevent the employer's representative from fulfilling his or her responsibilities, we have found no violation of subsection 5.4b(2) under these circumstances since the official who receives a letter concerning negotiations or a grievance may simply turn it over to the appropriate government official and decline to respond. Id. The burden on the employer to re-direct a communication about terms and conditions of employment to the appropriate administrator or official is minimal when compared to the public employee's protected constitutional right to present a position to a government official about his or her terms and conditions of employment. City of Hackensack; see also City of Englewood, 29 NJPER at 43 (Director finds union's letters to the city's council instead of negotiations representative requesting dialogue with the council over staffing issues were not a violation of Act since the union was not demanding negotiations with the council but was merely asking for a discussion which the council could decline to have).

Here, the Unions' emails to District administrators do not rise to the level of a "coercive pattern of conduct" in violation of section 5.4b(2). Downe Tp. Bd. of Ed. The emails are written communications about unit employees' working conditions and are protected activity under the Act. City of Hackensack; Wayne Tp. And while the Board alleges that the Unions violated the Act by raising workplace health and safety concerns and threatening litigation under PEOSHA, the Commission has held that complaints over workplace health and safety, under PEOSHA or any other law, is protected activity under the Act. West Deptford Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30042 1999).

Although the Board alleges that the Unions improperly presented grievances to the board and directed administrators to take certain actions, the Board responded to the Unions demands by declining to provide the information requested and directing the Union to communicate its demands to the "appropriate" administrators. No allegations suggest that the Board's designated grievance or negotiations representatives or District administrators were prevented from fulfilling their responsibilities by the Unions' conduct. To the extent the Unions' presentation of grievances did not comply with grievance procedures, the Board was free to deny the grievance and raise procedural defenses to a grievance. N.J. Transit, P.E.R.C. No. 89-29; 14 NJPER 638, 639 (¶19267 1988). But the failure to comply

with grievance procedures, by itself, is not an unfair practice. Id.

The Board also alleges that the Unions threatened to file frivolous claims against the District and filed an unfair practice charge ". . . in an apparent attempt to intimidate the Superintendent . . ." This conduct is not an unfair practice within the meaning of the Act. The Commission has adopted the principle that union representatives are ". . . afforded wide latitude in terms of offensive speech and conduct. . ." in the presentation of grievances on behalf of unit employees. Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979). And a union has a statutory right to file an unfair practice charge under the Act, even if the charge lacks merit or, in the employer's view, is "frivolous." N.J.S.A. 34:13A-5.4a.

For these reasons, I dismiss the Board's 5.4b(2) claim.

5.4b(3) Claim

Section 5.4b(3) of the Act requires a majority representative to negotiate in good faith with a public employer concerning terms and conditions of employment. N.J.S.A. 34:13A-5.4b(3); Glen Rock Bd. of Ed., P.E.R.C. No. 82-11 7 NJPER 454 (¶12201 1981). To prove a violation of this section, an employer must establish that the majority representative, by its conduct, adversely impacted negotiations or was an impediment to reaching an agreement. Rutgers University, P.E.R.C. No. 2017-4, 43 NJPER

17 (¶18 2016). Since there are no allegations in the Board's charge alleging that the Unions adversely impacted collective negotiations, I dismiss this claim.

5.4b(5) Claim

Section 5.4b(5) prohibits employee organizations or their representatives from violating Commission rules or regulations. N.J.S.A. 34:13A-5.4b(5); Newark. The Board does not cite any rule or regulation that the Unions violated. I therefore dismiss this claim.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: April 30, 2020
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 May 11, 2020.