

H.E. NO. 2021-9

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

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2018-021

WEST ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the West Orange Board of Education violated N.J.S.A. 34:13A-5.4a(1) when its superintendent emailed the West Orange Education Association (Association) president in response to a staff survey conducted by the Association and threatened to discipline the Association president for failing to obtain the superintendent's permission before the Association conducted the survey, and before the president met with a building principal regarding a grievance.

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.

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Appearances:

For the Respondent,
Cleary Giacobbe Alfieri Jacobs, LLC, attorneys
(Matthew J. Giacobbe, of counsel)

For the Charging Party,
Zazzali Fagella Novak Kleinbaum and Friedman, attorneys
(Richard A. Friedman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 20, 2017, West Orange Education Association (Association) filed an unfair practice charge against West Orange Board of Education (Board). That charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),^{1/} when

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...)

Superintendent Jeffrey Rutzky allegedly emailed Association President Mark Maniscalco in response to a staff survey conducted by the Association and threatened to discipline Maniscalco for failing to obtain Rutzky's permission before the Association conducted the survey, and before Maniscalco met with a building principal regarding a grievance. The Association further alleges that Rutzky's June 26, 2017 email was meant to intimidate and coerce Maniscalco from exercising his protected rights under the Act, and discriminate against Maniscalco for his exercise of his protected rights under the Act.

On July 9, 2018, a Complaint and Notice of Hearing was issued (C-1).^{2/} On July 17, 2018, the Board filed an Answer denying that it violated the Act in any way as a result of the June 26, 2017 email from Rutzky to Maniscalco (C-2). A hearing was held in this matter on December 6, 2018.^{3/} The parties submitted post-hearing briefs by February 26, 2019.

Based upon the record, I find the following facts:

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- 1/ (...continued)
act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."
- 2/ Commission exhibits are marked "C-", while Joint, Charging Party and Respondent exhibits are marked "J-", "CP-", and "R-", respectively.
- 3/ "T" represents the transcript, followed by the page number.

FINDINGS OF FACT

1. The Association is a public employee organization within the meaning of N.J.S.A. 34:13A-1 et seq. It is the duly authorized representative for certificated employees, including teachers, school nurses, guidance counselors, librarians, and social workers employed by the Board (J-1; T14).

2. The Board is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq., and the rules and regulations of the Public Employment Relations Commission promulgated in accordance therewith (T14).

3. Mark Maniscalco is a teacher employed by the Board for approximately the past twenty (20) years, who is currently serving as a dean of students at the district's high school (T21-T22).

4. Maniscalco is also currently serving as the Association's President, and has held that position for the past six to seven years (T22-T23).

5. Prior to serving as Association President, Maniscalco served as Association Vice President, and Negotiations and Grievance chair (T23).

6. As part of his duties as Association President, Maniscalco has been involved in issues involving Association members' working conditions and issues regarding the physical condition of West Orange school buildings as the need arises

(T24-T25).

7. As Association President, Maniscalco has been involved many times in conducting surveys of conditions in West Orange schools (T25).

8. Specifically, in February 2017, Maniscalco as Association President was involved in a survey of all schools in the district, including the Mt. Pleasant School (T25).

9. Through that survey, Maniscalco as Association President received feedback from Association members that members had serious concerns about the performance of the Mt. Pleasant principal, Julie DiGiacomo (T25). At the time, DiGiacomo was a first or second year non-tenured principal (T58-T59).

10. Maniscalco also received a few concerns about other schools as well through that survey, but the Association received an overwhelming response from members in the Mt. Pleasant school, including serious concerns regarding the safety of students and staff, and the revelation of private information of staff that was alarming for the Association to read (T26).

11. Once the Association received these responses from members, Maniscalco and other Association representatives compiled the results and tried to remove any identifying information (CP-1; T26-29). The Association prepared the survey and the compilation of results of the survey on its own, without the assistance of a professional surveyor (T82-T83). Maniscalco

and Association Vice President Stacie Varanelli then visited Mt. Pleasant School in person on June 21, 2017, the last day of school, after school had closed and asked for a meeting with DiGiacomo (CP-1; T26-T29).

12. Maniscalco, Vice President Varanelli and DiGiacomo had a short, ten-minute meeting (CP-1; T26-T29). Maniscalco had not notified DiGiacomo or Marie DeMaio, President of the West Orange Administrators Association (WOAA), about going to Mt. Pleasant School with Varanelli to ask for a meeting with DiGiacomo, or about any of the Association's concerns with DiGiacomo, prior to their arrival on June 21, 2017 (T44).

13. Maniscalco brought a short cover letter dated June 21, 2017, with the survey results with him to the meeting with DiGiacomo, which broadly expressed the concerns received by the Association about DiGiacomo (CP-1; R-2; T27-28).

14. Maniscalco and Varanelli's purpose for the meeting was to make DiGiacomo aware of her staff's concerns so that DiGiacomo could take the opportunity to address the issues raised by the staff, but it was not a formal complaint (T29-T30).

15. Maniscalco advised DiGiacomo during the meeting about the Association's survey, that Mt. Pleasant was an outlier because the staff was expressing concerns that the Association did not see in any other building in the district, and that the Association thought it was only fair that it bring these issues

to DiGiacomo's attention so that she could take the time to change the staff's impression (T30).

16. Maniscalco credibly testified that the conversation with DiGiacomo was not pleasant, but it was professional, and he and Varanelli hoped that DiGiacomo would take the meeting to heart and make changes (T30).

17. Maniscalco told DiGiacomo that she should take home the cover letter and survey results, that it was going to be "tough reading," and commented to DiGiacomo that she was probably "going to need a glass of wine or two" while she was reading it (T31).

18. DiGiacomo thanked Maniscalco and Varanelli for bringing her the information, and the meeting ended (T31). DiGiacomo never indicated during the meeting that she felt intimidated or threatened by the meeting (T34).

19. The next day, June 22, 2017, Maniscalco sent a copy of the cover letter and materials that he brought to DiGiacomo on June 21, 2017, along with a separate cover letter, to Superintendent Rutzky via interoffice mail (CP-1; R-2; T53). This was the first time that Maniscalco and the Association notified Rutzky of the Association's concerns with DiGiacomo (T54-T55).

20. Maniscalco and the Association did not share any portion of the results of the survey with the Board or anyone else outside of the Association other than DiGiacomo and Rutzky

via the June 21 and June 22 communications detailed above, because the only "significant" concerns identified through the survey were with DiGiacomo (T56-T58, T86-T87). Maniscalco considers the results of the survey a "private, internal union document" (T87).

21. On June 26, 2017, Maniscalco received an email from Superintendent Rutzky threatening discipline (CP-2; T32-T33).

22. The email provides:

Mark - It has come to my attention that you and Stacie Varanelli went to Mt. Pleasant School after school dismissal on Wednesday, June 21, 2017. You asked to see Principal Julie DiGiacomo without an appointment, without introducing yourself and without stating the purpose of your visit.

You then proceeded to advise Mrs. DiGiacomo that you had the results of a "survey" that was allegedly done by her staff in March, 2017 and that she "should have a glass of wine" as she reviewed these comments. You also stated that she should not address any individual staff members if she could identify them based on a comment because they were allegedly afraid of retaliation. You told her there were "rocks to overturn" and these results were much worse than any other school. You also informed her that you would be sharing these results with me. To date, you have not shared the survey or the results with me.

First, you were not given permission, nor did you request permission to perform a staff survey. Accordingly, please provide a copy of the complete survey and all staff responses to same by no later than Friday, July 1, 2017. At this time, I will refrain from commenting on the survey or the contents of same until I have been provided a complete

copy and all staff responses and I have an opportunity to review it.

Second, you are not authorized to meet with a building principal without first advising me of the reason for such a meeting. I must be informed of the purpose of such a meeting and will determine if your request is appropriate and whether you will be given permission to have such a meeting.

Third, you are not authorized to evaluate a principal's performance. Your role as the Association President does not afford you the right to tell any administrator in this district what to do, how to approach staff and/or how to address concerns that have been brought to you about that principal. If you become aware of an issue with a principal, you are directed to bring it to my attention so that I can appropriately review the matter and address it if warranted.

I trust that you will abide by these directives. Failure to do so will result in appropriate discipline.

(CP-2).

23. After reading the email, Maniscalco was shocked that Rutzky would threaten Maniscalco's teaching job because of his "advocacy for the members" of the Association, and Maniscalco was scared for his position and for "that of all other people who work in the Association to represent members" (T34).

24. Maniscalco is not aware of any provision in the parties' collective negotiations agreement (CNA), or any board policies that prohibits him from surveying the staff, or that requires him to share the survey or staff comments with the Board (T35). Maniscalco does not believe there is any requirement that

he must request or obtain permission from the superintendent to communicate with members of the Association (T94).

25. Maniscalco is also unaware of any provision in the CNA or board policy that prohibits him from speaking directly to a principal without speaking with the superintendent first (T35-T36).

26. To the contrary, Maniscalco's understanding of the CNA and the grievance procedure is that the Association is not prohibited from speaking with a principal informally, and that the grievance process is that the Association should "attempt to resolve issues at the lowest level" (T36). Maniscalco never sought any discipline against DiGiacomo as a result of these events or communications (T95-T96).

27. Article III, Section B4 of the CNA regarding the grievance procedure provides:

Any employee who has a grievance shall discuss it first with his or her principal and/or supervisor in an attempt to resolve the matter informally at that level. The principal or supervisor shall give a decision within ten school days, which decision shall be in writing.

(J-1).

28. Maniscalco also testified that he did not evaluate the principal in any way by conducting the survey, as evaluations are done through a formal process with written evaluation documents and a post evaluation conference (T37-T38).

29. Maniscalco shared Rutzky's email with the other Association officers and representatives at a representative council meeting (T38).

30. Over the course of the following school year, the Association received feedback from its members that DiGiacomo had been addressing the members' concerns, and "had improved and had been doing a great job," so Maniscalco and Varanelli went back to DiGiacomo on the last day of the school year in June 2018 to "express [their] satisfaction and thanks to her for doing the hard work and getting better" (T41).

31. When Maniscalco and Varanelli went to the main office to speak with DiGiacomo, DiGiacomo indicated that Rutzky "had told her not to meet with" them, "but that she was going to meet with [them] anyway" (T41).

32. Maniscalco and Varanelli then entered DiGiacomo's office and "had a pleasant conversation" with her, "expressing [their] thanks for the amount of work she's done, telling her that she had won her staff back," and that the Association "had no complaints." The Association never filed a formal or informal grievance arising out of any of these issues, and Maniscalco and Varanelli thanked DiGiacomo "for taking seriously the concerns of her staff." The meeting ended with Maniscalco, Varanelli and DiGiacomo "hugging and going home for the summer" (T42, T61-T62).

33. On November 6, 2018, Maniscalco sent an email to Principal Estupinan regarding the Association's concerns about her discipline of various members of Gregory School staff for insubordination (R-1; T65). After sending the email, Maniscalco then met with Principal Estupinan about the Association's concerns (T65-T66).

34. Maniscalco's November 6, 2018 email to Estupinan provides in part:

As you know, we are at a moment where we are hopefully just starting to emerge from a situation in which our schools and community have gone through serious tumult having a great deal to do with disrespectful and somewhat dictatorial administrative treatment of staff. These problems have made the community at large suspicious of upper administration and concerned about the treatment of staff.

(R-1).

35. After outlining the Association's concerns regarding staff discipline at Gregory School, Maniscalco concluded his November 6, 2018 email to Estupinan:

If you disagree with our analysis and suggested outcome, we ask that you please accept this email as the initiation of the formal grievance process against your decision to issue formal written reprimands to these staff members accusing them of insubordination. We seek the rescission of these reprimands and their removal from the personnel records of these WOEA members.

(R-1).

36. Principal Estupinan is not tenured, and Maniscalco never contacted the superintendent or any of Estupinan's

supervisors regarding the Association's concerns (T88).

Maniscalco is not aware of any practice of contacting the administrator's union when there is a concern about what an administrator does (T89).

37. Besides the threat of discipline in Rutzky's June 26, 2017 email, Maniscalco was never disciplined in any way as a result of any of these events or communications (CP-2; T96-T97).

38. Maniscalco testified that the situation at Mt. Pleasant School was "worked out," as DiGiacomo "did the work on her own" and "her performance and her relationship with her staff improved dramatically" (T102-T103).

39. At no time during the June 21, 2017 meeting did DiGiacomo ever invoke any Weingarten rights (T104).

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees to all public employees the right to engage in union activities, including the right to form or join a union, negotiate collectively and make their concerns known to their employer. Specifically, it provides that:

[a] majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

[N.J.S.A. 34:13A-5.3.]

Section 5.4a(3) of the Act prohibits an employer from retaliating against an employee or majority representative for exercising these rights. The legal standards set forth in In re

Bridgewater Tp., 95 N.J. 235 (1984), determine whether an employer's actions violate N.J.S.A. 5.4a(3) of the Act. There, the Court determined that if the charging party proves by a preponderance of evidence on the record that protected conduct was a substantial or motivating factor in the adverse action, a violation will be found. Id. at 246. Such a violation can be proven by direct evidence or by circumstantial evidence establishing that the employee was engaged in protected activity, the employer knew of this activity and was hostile toward the exercise of protected rights. Id.

If the employer does not present any evidence of a motive not illegal under our Act or if its explanation is rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Id. at 242. 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 action would have taken place absent the protected the conduct. Id.

In Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission defined protected speech and conduct under the Act. There, the Commission determined that the employer violated 5.4a(1) and (3), when it

placed in the personnel file of a teaching staff member two letters critical of the teacher's comments while the teacher was serving as an Association representative in a meeting with the principal about another teacher's resignation from her job. The Commission explained:

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. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be initiated to halt or remedy the other's actions. [*Id.* at 503.]

The Commission continued:

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. [*Id.* at 504 (emphasis added).]

In Middletown Tp. Bd. of Ed. and Middletown Tp. Ed. Ass'n, P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den and notice of app. disp., 149 N.J. 35 (1997), a teacher/association grievance chair was reprimanded for, among other remarks, referring to a school administrator as a "lying scuzzball" during a public board meeting. The Commission determined that the employee's remarks

were protected speech since the teacher was speaking as a union representative during the meeting. Similarly, in Atlantic Cty. Judiciary and Derek Hall, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994), the Commission found that an employee's criticism during a staff meeting of a proposed evaluation plan was protected speech because the employee was a union representative and was advocating the union's collective concerns.

In City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979), the Commission determined that an employee may not be disciplined for engaging in protected activity, namely a shouting match between union president and city manager about employee complaints, but the union representative may not utilize his or her union position to undermine the employer's supervisory or managerial authority.

A union representative may raise issues not only covered by the collective agreement but, also, generally about working conditions impacting unit members. See generally, No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 (¶4205 1978) (Commission found that complaints, arguments, objections or other similar activities relating to enforcing a collective negotiations agreement or existing working conditions of employees, constitute protected activities under the Act).

Not all speech or conduct by an employee representative

acting on behalf of the union is speech entitled to the Act's protection. The courts have drawn a line between giving leeway for adversarial and/or impulsive behavior in the context of a negotiation or grievance meeting and conduct which indefensibly threatens workplace discipline, order, and respect. See generally, Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970); NLRB v. Thor Power Tool Co., 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965); Felix Industries Inc. v. NLRB No. 12, 164 LRRM 1137 (2000); Atlantic Steel Co., 245 NLRB No. 107, 102 LRRM 1247, 1249 (1979). See also Hamilton Twp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (1979) (employee offensive speech and conduct lawful in context of grievance meeting); City of Asbury Park, supra, 5 NJPER at 389.

More recently, in companion cases, the Commission located the line between protected conduct of an employee serving as a union representative, and unprotected conduct amounting to insubordination. In State of New Jersey, Dept. of Treasury (Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001), the Commission noted that consideration must be given to whether the employee is acting in the role of a shop steward or union representative, as well as the time and place of the speech. The latter includes whether the speech or conduct is on work time and on the shop floor or a closed-door meeting, whether other employees are present, whether the actions were threatening, and

whether the employee's actions were provoked by the employer's actions. Id. at 167.

In Glover, the Commission found that the employee/shop steward's actions and remarks, made during work time and on the work floor in front of several co-workers, went beyond protected speech when he interfered with the supervisor's attempts to interview another employee, and his actions were threatening to the supervisor. Id. This conduct was antithetical to maintaining discipline, order and respect in the work place. Id.

Similarly, in State of New Jersey, Dept. of Human Services (Garlinger), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001), the Commission also determined that an employee/shop steward's comments to a supervisor went beyond protected speech when he followed the supervisor down the hall during work hours and in front of co-workers and clients, shouting at her and threatening her. This conduct, the Commission determined, lost its statutory protection and constituted insubordination and misconduct. Id. at 177.

Again, the Association alleges that the Board violated section 5.4a(1), (3) and (5) of the Act when Rutzky emailed Maniscalco in response to the Association survey and threatened to discipline Maniscalco for failing to obtain Rutzky's permission before the Association conducted the survey, and before Maniscalco met with DiGiacomo regarding a grievance. The

Association further alleges that Rutzky's email was meant to intimidate and coerce Maniscalco from exercising his protected rights under the Act, and discriminate against Maniscalco for his exercise of his protected rights under the Act.

It is well settled that as union president, Maniscalco has the right to engage in Association activities, represent the interests of Association members, and make Association concerns known to the Board without discrimination pursuant to N.J.S.A. 34:13A-5.3. Maniscalco may also raise issues regarding working conditions impacting unit members, such as the working conditions at Mt. Pleasant School that the Association learned about through its survey. See No. Brunswick Tp. Bd. of Ed., supra, 4 NJPER at 454. Section 5.4a (3) of the Act also prohibits the Board from retaliating against Maniscalco for exercising these rights.

Again, this charge arises out of Rutzky's email to Maniscalco, which starts with Rutzky setting the scene regarding Maniscalco's meeting with DiGiacomo, but it is also clear from the beginning of his email that Rutzky was not pleased with Maniscalco's actions on June 21. (CP-2). However, as described in Black Horse Pike Reg. Bd. of Ed., supra, 7 NJPER at 503, because Maniscalco is engaged in protected activity on behalf of the Association, Rutzky and Maniscalco are equals, and Rutzky may criticize Maniscalco. However, Rutzky's email then departs from mere criticism:

First, you were not given permission, nor did you request permission to perform a staff survey. Accordingly, please provide a copy of the complete survey and all staff responses to same by no later than Friday, July 1, 2017. At this time, I will refrain from commenting on the survey or the contents of same until I have been provided a complete copy and all staff responses and I have an opportunity to review it.

(CP-2) (emphasis added). Despite Rutzky's request, Maniscalco has no duty to either request permission from Rutzky to perform a staff survey that does not interfere with the workday, or to provide Rutzky with a copy of the staff survey or any staff responses, and Rutzky's request for same interferes with Maniscalco's right to engage in protected activity as Association president on behalf of the Association. See Bridgewater, supra, 95 N.J. at 235; Black Horse Pike Reg. Bd. of Ed., supra, 7 NJPER at 502.

Rutzky's email continues:

Second, you are not authorized to meet with a building principal without first advising me of the reason for such a meeting. I must be informed of the purpose of such a meeting and will determine if your request is appropriate and whether you will be given permission to have such a meeting.

(CP-2). Rutzky's claim that he must be advised of, and then must grant permission for, any meeting between Maniscalco and DiGiacomo is unlawful for a number of reasons, as it again interferes with and attempts to restrain Maniscalco in the exercise of his duties as Association president. See

Bridgewater, supra; Black Horse Pike Reg. Bd. of Ed., supra; see also J-1, Art. III, Section B4 (“[a]ny employee who has a grievance shall discuss it first with his or her principal and/or supervisor in an attempt to resolve the matter informally at that level”).

As Rutzky’s email continues, it becomes even more problematic:

Third, you are not authorized to evaluate a principal’s performance. Your role as the Association President does not afford you the right to tell any administrator in this district what to do, how to approach staff and/or how to address concerns that have been brought to you about that principal. If you become aware of an issue with a principal, you are directed to bring it to my attention so that I can appropriately review the matter and address it if warranted.

I trust that you will abide by these directives. Failure to do so will result in appropriate discipline.

(CP-2) (emphasis added).

In the course of fulfilling his duties to the Association, Maniscalco cannot undermine the Board’s supervisory or managerial authority, nor can he threaten workplace discipline, order and respect. See City of Asbury Park, supra, 5 NJPER at 389; see also Crown Central Petroleum Corp., supra, 74 LRRM at 2860; NLRB v. Thor Power Tool Co., supra, 351 F. 2d at 584. The line separating protected conduct of an employee serving as a union representative from unprotected conduct amounting to

insubordination depends on whether the employee is acting in the role of a shop steward or union representative, as well as the time and place of the speech, such as whether the speech or conduct is on work time and on the shop floor or a closed-door meeting, whether other employees are present, whether the actions were threatening, and whether the employee's actions were provoked by the employer's actions. See Glover, supra, 27 NJPER at 167; Garlinger, supra, 27 NJPER at 177.

I find that Maniscalco never crossed that Glover/Garlinger line from protected conduct into insubordination, nor did he threaten workplace discipline, order and respect. Maniscalco was acting as Association president, in response to a staff survey, and went to see DiGiacomo after the end of the school day on the last day of school. (T26-T29). The only employees present were Maniscalco, Varanelli, and DiGiacomo, and Maniscalco testified that although the ten-minute conversation was not pleasant, it was professional. (T30). Maniscalco advised DiGiacomo about the survey, and about the Association's concerns so that she could make changes. (T30). Maniscalco told DiGiacomo that the survey results were going to be "tough reading," and she was probably "going to need a glass of wine or two." (T31). DiGiacomo thanked Maniscalco for the information and never indicated that she felt intimidated or threatened. (T34).

Furthermore, not all issues of concern need be addressed by

the filing of a formal grievance or in closed door management/labor meetings. It promotes the purposes of the Act to encourage majority representatives and employers to resolve their differences informally, if possible. Thus, the Board violated section 5.4a(1) when Rutzky threatened to discipline Maniscalco for representing the interests of Association members and making Association concerns known on June 21 because that would impermissibly convert "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," and "condone conduct by an employer which would discourage employees from engaging in organizational activity." See Black Horse Pike Reg. Bd. of Ed., supra, 7 NJPER at 504.

With regard to whether the Board violated section 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 an adverse action. 95 N.J. at 246; see also Passaic Cty. Prosecutor's Office, P.E.R.C. No. 2013-15, 39 NJPER 173 (¶52 2012). Here, besides the threat of discipline in Rutzky's email, Maniscalco was never subject to any adverse personnel action, as he was never disciplined in any way as a result of any of these events or communications (CP-2; T96-T97). Thus, I do not find that the Board violated section 5.4a(3) of

the Act.

The Association also alleges that the Board violated section 5.4a(5) of the Act, which prohibits the Board from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative." However, Maniscalco testified that over the course of the following school year, the Association received feedback from its members that DiGiacomo had been addressing the members' concerns, and "had improved and had been doing a great job," so Maniscalco and Varanelli went back to DiGiacomo on the last day of the school year in June 2018 to "express [their] satisfaction and thanks to her for doing the hard work and getting better" (T41). The Association never filed a formal or informal grievance arising out of any of these issues, and Maniscalco and Varanelli thanked DiGiacomo "for taking seriously the concerns of her staff." (T42, TT61-T62). Thus, I do not find that the Board refused to process Maniscalco's grievances with regard to DiGiacomo, and thus I do not find that the Board violated section 5.4a(5) of the Act.

CONCLUSIONS OF LAW

Based upon the above findings of fact and legal analysis, I make the following conclusions of law:

The West Orange Board of Education violated section 5.4a(1) of the Act when Superintendent Jeffrey Rutzky emailed Association President Mark Maniscalco in response to a staff survey conducted by the Association and threatened to discipline Maniscalco for failing to obtain Rutzky's permission before the Association conducted the survey, and before Maniscalco met with a building principal regarding a grievance.

RECOMMENDED ORDER

I recommend that the Commission order that the West Orange Board of Education:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with Maniscalco's right to exercise the rights guaranteed to him by the Act and by threatening to discipline Maniscalco for failing to obtain Rutzky's permission before the Association conducted a staff survey, and before Maniscalco met with DiGiacomo regarding a grievance.

B. Take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent'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.

2. Notify the Chair of the Commission within twenty (20) days of receipt of what steps the Respondent has taken to comply with this order.

/s/ Lisa Ruch
Lisa Ruch
Hearing Examiner

DATED: May 18, 2021
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 May 28, 2021.



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 New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with Maniscalco's right to exercise the rights guaranteed to him by the Act and by threatening to discipline Maniscalco for failing to obtain Rutzky's permission before the Association conducted a staff survey, and before Maniscalco met with DiGiacomo regarding a grievance.

WE WILL take the following affirmative action:

Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent'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.

Notify the Chair of the Commission within twenty (20) days of receipt of what steps the Respondent has taken to comply with this order.

Docket No. CO-2018-021

WEST ORANGE 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