

D.U.P. NO. 2021-9

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

In the Matter of

PINELANDS REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-161

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Pinelands Education Association (Association) against the Pinelands Regional Board of Education (Board). The charge alleges that the Board violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., when it responded to Association correspondence dated January 1, 2021 by sending correspondence dated January 3, 2021 to families within the school district rather than directly to the Association; and responded to an Association e-mail dated January 20, 2021 (which included confidential Association meeting minutes) that was inadvertently sent to a student, and subsequently directed to the Board based upon school district screening software, by sending correspondence dated January 22, 2021 to all school district staff including unit members. The charge also alleges that the Board violated the Act when it contacted the Association Secretary.

The Director dismissed the Association's 5.4a(1) claim, finding that the Board's January 3, 2021 correspondence did not tend to interfere with the Association's negotiating position regarding terms and conditions of employment affected by the COVID-19 pandemic; and that the Board's January 22, 2021 correspondence did not tend to interfere with the Association or its confidential information. The Director also dismissed the Association's 5.4a(5) claim, finding that the Board's contact with the Association Secretary did not evidence unlawful "direct dealing."

D.U.P. NO. 2021-9

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

In the Matter of

PINELANDS REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-161

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Cooper Levenson,
attorneys (William S. Donio, of counsel; Kasi
Marie Gifford, of counsel)

For the Charging Party, Mellk O'Neill,
attorneys (Arnold M. Mellk, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 26, 2021, Pinelands Education Association
(Association) filed an unfair practice charge against Pinelands
Regional Board of Education (Board). The charge alleges that in
January, 2021, the Board violated sections 5.4a(1) and (5)^{1/2/} of

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

2/ In its April 26, 2021 position statement, the Association
withdrew its 5.4a(2) allegation.

the New Jersey Employer-Employee Relations Act (Act), N.J.S.A.

34:13A-1 et seq., as follows:

-after receiving Association correspondence dated January 1, 2021 seeking negotiations regarding COVID-19 safety protocols, remote learning, and scheduling, the Board responded by sending correspondence dated January 3, 2021 to families within the school district rather than directly to the Association;

-after an Association e-mail dated January 20, 2021 (which included confidential Association meeting minutes) was inadvertently sent to a student and subsequently directed to the Board based upon school district screening software, the Board responded by sending correspondence dated January 22, 2021 to all school district staff including unit members; and

-contacting/discussing COVID-19 safety protocols, remote learning, and scheduling with the Association Secretary.

As a remedy, the charge requests that the Board and its representatives be enjoined from communicating with unit members regarding negotiations pertaining to terms and conditions of employment affected by the COVID-19 pandemic during their pendency; and be directed to negotiate exclusively with the Association's President regarding terms and conditions of employment affected by the COVID-19 pandemic.

On March 15, 2021, a staff agent held an exploratory conference.

On April 19, 2021, the Board served a position statement on the Association. With respect to the Association's correspondence dated January 1, 2021, the Board asserts that it did not receive same until January 2, 2021 and "had to

immediately make the decision whether to do what the Association was asking and delay the return to a hybrid model . . . which was to take place on January 4, 2021 . . . or to ignore the letter, return to hybrid in-person learning on January 4, 2021, and meet with the Association at a later date." The Board maintains that Superintendent Melissa McCooley, Ed.D. (McCooley) "decided to take into account the Association's concerns and . . . immediately had to notify District families that the planned return to hybrid learning . . . would not be occurring"; that she "was being honest in referencing the Association's concerns . . . and was being transparent in the letter to the families to let them know why the District's plan had so suddenly changed"; and that her "decision-making was within [the District's] rights" under N.J.S.A. 18A:40-12.^{3/} With respect to the Association's e-

3/ N.J.S.A. 18A:40-12, entitled "Closing schools during epidemic," provides:

Whenever the board of health of any municipality shall declare any epidemic or cause of ill health to be so injurious or hazardous as to make it necessary to close any or all of the public schools in the municipality, the board shall immediately serve notice on the board of education of the school district situated in the municipality that it is desirable to close the school or schools. Upon receipt of the notice the board of education may close the schools under its control, or such of them as may be designated by the board of health. The schools so closed shall not be reopened until the board of education is satisfied that all

(continued...)

mail dated January 20, 2021, the Board asserts that the charge "represents a disingenuous response to the District's well-founded concern[s] regarding the possible release of public health misinformation, and the District's necessary response to such a dangerous occurrence." The Board maintains that it was "simply trying to assure staff members that all District nurses are following all protocols and procedures as per CDC and Ocean County Department of Health guidance, and to reiterate that teachers must play a role in maintaining the six feet of social distancing and be mindful of this requirement throughout the school day"; and was "actively trying to avoid the unnecessary incitement of panic by District staff." With respect to contacting the Association Secretary, the Board asserts that its Director of Student Services, Karen M. Kenny (Kenny), "was directed to [the Association's Secretary, Michael] Rua (Rua) [,] by an Association member" upon her inquiry regarding "who in the Association she should communicate with regarding setting up a meeting with the nurses, Association members, and the Administration to discuss COVID-19 safety protocols and concerns." The Board maintains that "Kenny was not attempting to negotiate with Rua or to cut [the Association's President, Mel] Reid (Reid) out of the process, she was simply attempting to

3/ (...continued)

danger from the epidemic or cause of ill health has been removed.

quell any concerns by setting up an informative meeting for the staff and Association members.”

On April 26, 2021, the Association served a position statement on the Board. With respect to the Board’s response to the Association’s correspondence dated January 1, 2021, the Association asserts that the Board communicated directly with unit members and the public about matters which were then the subject of negotiations between the parties and contends that this was a deliberate attempt to undermine the Association’s negotiating position. In particular, the Association argues that the Board’s communication sought to de-legitimize the Association’s safety concerns regarding in-person learning and was a calculated effort to castigate the Association in the eyes of the community. With respect to the Board’s response to the Association’s e-mail dated January 20, 2021, the Association asserts that the Board utilized confidential information about a closed Association meeting in order to directly communicate with unit members in an obvious attempt to undermine Association President Reid and his ability to represent the unit. In particular, the Association claims that the Board’s assertion that it was attempting to correct inaccurate information and quell the incitement of panic is disingenuous. With respect to the Board contacting the Association’s Secretary, the Association asserts that the Board engaged in direct dealing by attempting to

bargain around Association President Reid when it contacted Association Secretary Rua. The Association contends that the Board knew or should have known that arranging a meeting with the Association and/or setting an agenda for such a meeting required communicating directly with the Association President, not some other Association officer; and that the "ineluctable conclusion" is that the Board wanted to schedule a meeting to address terms and conditions of employment without the Association President.

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-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; 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). Based upon the following, I find that the complaint issuance standard has not been met and decline to issue a complaint.

The Association represents all regularly employed teaching staff members, special services staff, library/media specialists, school nurses, guidance counselors, secretaries, bookkeepers, accounting clerks, attendance officers, clerk typists, teacher aides, custodial staff, maintenance staff, sign-language

interpreters, and receiving personnel employed by the Board. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration.

On January 1, 2021, the Association sent a letter to Superintendent McCooley. It provides:

The Pinelands Education Association Executive Committee is respectfully writing to you, on behalf of the entire membership, to express our collective reservations regarding the return to school on Monday, January 4th due to the rising number of Covid cases locally. While the association understands and appreciates the importance of in-person instruction, we feel given the current Covid climate, that it would be prudent to consider the continuance of virtual instruction through January 18th, which is Martin Luther King Day.

Since the onset of the Pandemic, it is our belief that, despite the challenges that it presents, the faculty and staff have not only risen to the occasion to provide our students with support, both from an educational and emotional perspective, but we have gone above and beyond to do whatever it takes to meet those needs. We truly believe that we have demonstrated our dedication and commitment to the students of Pinelands Regional, and have done so with exemplary grace and professionalism.

The current trend of Covid cases increasing nationwide and more importantly locally, has caused much concern as to whether returning to school after a holiday break can be done safely. We have received many inquiries from staff members indicating that they do NOT feel safe returning. On a side note, the

week before the district went on break you conducted a survey asking staff what their preferences were regarding returning. Would you be kind enough to share those results with the staff.

The fears and concerns that we are hearing are consistent and seem to be for 2 outstanding reasons. Staff members are very concerned that returning to school after a 10 day break, whereas families have traveled out of state and/or participated in large group holiday gatherings, as evidenced in social media postings, the potential for an outbreak in-district could occur, much like it did after both breaks in November. The breaks in November, were only half as long or less in days, therefore it is our contention that the window of opportunity for potential spread to staff upon reopening does reach through January 18th and can be completely avoided by conducting a "pre-emptive mass quarantine."

The second prominent area of concern is the lack of mask wearing compliance by both students and staff. Emails documenting lack of compliance and absence of consequences to those who continually disregard the mask policy have been generated by several staff members to administration, however, the consensus is that they are not being followed up upon enforcing the ZERO TOLERANCE policy that, at the start of the school year, the staff was assured would occur. Flagrant disregard for this policy exists, especially with certain staff and administrators, most notably in the HS Main Office.

The mental health of the PEA membership, not surprisingly, is fragile at best, given the circumstances. They are not "okay". They are tired, they are stressed, and most importantly they are scared of potentially getting sick and/or transmitting the virus to a loved one that they are tasked with caring for. Because of this, we most respectfully request and hope that the administration will re-evaluate its position on returning to

school on Monday, January 4th, out of an abundance of caution and respect for the mental health and well-being of the dedicated teachers and support staff and continue virtual instruction through January 18th.

On January 3, 2021, Superintendent McCooley sent an email to all school district families. It provides:

Yesterday, January 2, 2021, I received a letter from the President of the Pinelands Education Association, written on behalf of the staff represented by this association, regarding concerns staff has with returning to any type of in-person instruction. In addition, several staff members have now informed us that they need to quarantine due to COVID exposure.

'The current trend of Covid cases increasing nationwide and more importantly locally, has caused much concern as to whether returning to school after a holiday break can be done safely. We have received many inquiries from staff members indicating that they do NOT feel safe returning. Staff members are very concerned that returning to school after a 10 day break, whereas families have traveled out of state and/or participated in large group holiday gatherings, as evidenced in social media postings, the potential for an outbreak in-district could occur, much like it did after both breaks in November' (Mr. Reid, PEA President).

Due to these recent concerns, as well as a lack in adequate staffing for both the Junior High and the High School, the Pinelands Regional School District will shift to an All Virtual Instruction Model from Monday, January 4, 2021 through Friday, January 8, 2021. Please note this includes all afterschool activities such as sports and clubs. VoTech will run as scheduled for the time being.

The administrative team, in concert with the Pinelands Education Association, will reassess COVID concerns and in-person staffing numbers at the end of the week in order to make a decision on the safest and most effective learning model for the following week, January 11, 2021 through January 15, 2021. The safety of our staff and students is paramount.

On January 22, 2021, Director of Student Services Kenny sent an email to school district staff. It provides:

Please be advised that a PEA member emailed the minutes from the PEA meeting on January 20, 2021 to a student. All student emails are screened with a Google filter for key words such as murder, suicide, death, etc. The minutes included the word death and therefore, the email was flagged and sent to myself, Karen Kenney, and Eric Pschorr.

I feel the need to clarify a situation that was stated in the minutes. According to the minutes, Mel Reid said the following:

I was exposed to Covid and sent home—for two weeks—after sitting through first period class. It is sad that I was in the building for 1 hour before I was sent home. The process of informing staff bothers me.

I would like to outline the situation clearly since there are pertinent details missing:

-Mel Reid contacted the Nurse at 7:52 pm on Thursday (1/14/21) that a colleague informed him that they were positive for COVID.

-As of 5:34 am the following morning (1/15/21), the Nurse provided Mr. Reid the definition of close contact and described the contact tracing process.

-At 6:12 am, Mr. Reid said that he and the colleague tried to maintain 6 feet distance at all times.

-At 6:13 am, the Nurse advised Mr. Reid that if he and the colleague were able to maintain the 6 ft. distance that he would not be considered a close contact.

-The Nurse called the colleague at approximately 7:20 am to confirm they were positive and discussed possible close contacts, confirming that some measuring needed to occur to see if desks were 6 feet apart. Mr. Reid and an additional staff member were identified as close contacts of the staff member that tested positive. Mr. Reid and the other close contact were contacted to discuss the situation and to verify distance and time to the positive individual.

-Mr. Henderson went to Mr. Reid's classroom to measure the distance between the two Teacher desks and informed the Nurses that the desks were not six feet apart.

-Nurse called Mr. Reid again to confirm that he was indeed a close contact, needed to quarantine, and that she was arranging coverage via the Main Office. Mr. Reid informed Nurse that he only had 15 minutes left so he would finish out the period and head down since his next period 2 was a free period.

The purpose of this email is twofold. One, I would like to assure you that our Nurses are following all protocols and procedures as per the CDC and the O.C. Department of Health. Both Nurses are in constant communication regarding all positive COVID cases and close contacts for all staff and students. The

Nurses are on your team! Secondly, please be mindful of the six feet distance with Teacher desks in the classroom.

In full transparency, we will be posting the active positive COVID cases and quarantine numbers weekly on the school website. As of January 22, 2021, there are six staff members and seven students that are COVID positive (one of the students is completely virtual and has not been in the building). In addition, we have 70 students/staff quarantining due to travel, presenting as symptomatic, or being a close contact. For every positive case, we are required to contact the Ocean County Department of Health and the Ocean County Department of Education, providing all demographic information, as well as information for all close contacts.

As always, should you have any questions or concerns regarding any aspect of COVID, please do not hesitate to contact me or the Nurses.

ANALYSIS

5.4a(1) Claim

In New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978), the Commission articulated the standard for finding a violation of section 5.4a(1) of the Act:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

In Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983), the Commission explained that the tendency of an employer's conduct to interfere with employee rights is the critical element of a 5.4a(1) charge, holding that "proof of actual interference, restraint, or coercion is not necessary." 8 NJPER at 552. Moreover, the standard for determining a 5.4a(1) violation is objective: the "focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it." South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466, 467 (¶22222 1991); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp. 2d 58 (¶39 App. Div. 1979) (noting that it is the tendency to interfere and not motive or consequences of employer's conduct that is essential for finding an (a)(1) violation).

In deciding whether or not an employer statement violates section 5.4a(1), the Commission applies a balancing test acknowledging two important interests: the employer's right of free speech and the employee's right to be free from coercion, restraint or interference in the exercise of protected rights. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987). The Act permits employers to express opinions about labor relations provided such statements

are not coercive. Trenton State College; South Orange Village Tp. As the Commission stated in Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981),

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.

However, an employer may not make a statement to employees that has a tendency of discouraging them from engaging in protected activity and/or consulting with their majority representative. Trenton State College, 13 NJPER at 721 (employer communication that could have a tendency to discourage faculty from discussing college dean's reorganization plan with union violated 5.4a(1) of Act).

I find that the facts do not indicate that the Board's January 3, 2021 correspondence tended to interfere with the Association's negotiating position regarding terms and conditions of employment affected by the COVID-19 pandemic. The Board didn't misrepresent the Association's concerns; it provided an updated change in the mode of instruction for the week of January 4-8, 2021 and the reason for that change. The Board noted that it would continue assessing "COVID-19 concerns and in-person staffing numbers" in order to determine the mode of instruction

for the week of January 11-15, 2021. "No statements in the [Board's January 3, 2021 correspondence] declare an end to negotiations with the Association"; in fact, the Board acknowledged the Association's safety concerns regarding in-person instruction and accepted its suggestion to continue virtual instruction. South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466 (¶22222 1991).

The same is properly adduced from circumstances of the Board's January 22, 2021 correspondence; it too didn't tend to interfere with the Association or its confidential information. Rather, the Board specified how it came to possess an Association e-mail that was inadvertently sent to a student; pointed out a situation involving the school district's quarantine protocols that was circulated within the Association e-mail; attempted to clarify the timeline of events/circumstances as well as how the school district's actions in response were consistent with its quarantine protocols; and provided an update regarding posting of positive COVID-19 cases and quarantine numbers. "The [Board's response] [is] not disrespectful to the majority representative; [it is] not an invitation to unit employees to disavow their majority representative; nor do[es] [it] appear to be an attempt to improperly deal directly with employees or to avoid union representatives . . . [;] [r]ather, the [Board] attempted to

resolve a problem informally.” State of New Jersey, D.U.P. No. 92-25, 18 NJPER 327 (¶23142 1992).

Under these circumstances, I refuse to issue a complaint on the Association’s 5.4a(1) allegations. The Board’s correspondence does not indicate unlawful interference with protected rights. Black Horse Pike Reg. Bd. of Ed.

5.4a(5) Claim

The Commission has held that “public employers violate subsection 5.4a(5) by negotiating directly with individual employees or groups of employees rather than with their majority representative over negotiable terms or conditions of employment, even where individual negotiations resulted in greater benefits.” City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018) (citing Town of West New York, P.E.R.C. No. 99-110, 25 NJPER 332 (¶30143 1999) (unilateral placement of unit member at highest salary level to settle political discrimination lawsuit); Camden Cty., P.E.R.C. No. 94-121, 20 NJPER 282 (¶25143 1994) (unilateral salary increase); City of Union City, P.E.R.C. No. 90-37, 15 NJPER 626 (¶20262 1989) (unilateral salary range increase for two positions); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) (employer created incentive program through direct dealing with individual employees); Camden Cty., H.E. No. 95-4, 20 NJPER 344 (¶25177 1994) (employer dealt directly with employees about merit pay program); Cf. Buena Reg. School Dist.

Bd. of Ed., P.E.R.C. No. 93-97, 19 NJPER 246 (¶24121 1993)
(union's challenge to disciplinary settlement resulting in
employee's salary exceeding salary guide was arbitrable)).

In this case, the Board contacted the Association's Secretary to "discuss [a] subject matter the Association was attempting to negotiate with the District . . . notwithstanding the fact that [the] Association President . . . [was], and is, known to the District . . . to be the Association's negotiator." These facts don't indicate that any greater or lesser benefits were in fact negotiated or agreed upon for any individual and/or all unit members; it is also undisputed that the Board did not convene a meeting with the Association that excluded the Association President. Under these circumstances, I don't find that the Board's contact with the Association Secretary evidences unlawful "direct dealing." Contrast Matawan Aberdeen Reg. School Dist. Bd. of Ed., H.E. 89-41, 15 NJPER 356 (¶20159 1989), adopted P.E.R.C. 89-130, 15 NJPER 411 (¶20168 1989) (employer engaged in direct dealing by negotiating with individual employees and entering into agreements affecting their terms and conditions of employment despite knowing that the union president was the union's officially designate representative). I do not find that this section 5.4a(5) allegation warrants the issuance of a Complaint. Of course, the Board should maintain direct communication with the Association President in the future.

I find that the complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.1.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Director of Unfair Practices

DATED: June 8, 2021
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 June 21, 2021.