D.U.P. NO. 2022-1

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

In the Matter of

CLASSICAL ACADEMY CHARTER SCHOOL,

Respondent,

-and- Docket No. CO-2020-075

CLASSICAL ACADEMY CHARTER SCHOOL ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue complaint for several of the allegations in the unfair practice charge filed by the Charging Party. The Director will issue complaint under separate cover for Section 5.4a(1) regarding the allegations pertaining to the employer's decision to permit an alternative education association, the American Association of Educators, to provide free lunch and distribute its marketing materials on the employer's premises to unit employees, and for Section 5.4a(1) regarding the allegations pertaining to the employer's imposition of a three-day notice requirement for the Charging Party's representatives to informally meet with unit employees on its property. In disposing of the WDEA allegations, the Director explains that the WDEA does not expressly confer upon the Commission general jurisdiction to enforce all of the statutorily-created obligations imposed upon public employers.

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Appearances:

For the Respondent,
Riker Danzig Scherer Hyland & Perretti, attorneys
(Fiona Cousland, of counsel)

For the Charging Party,
Oxfeld Cohen, LLC, attorneys
(Gail Oxfeld Kanef, of counsel)

PARTIAL REFUSAL TO ISSUE COMPLAINT

On September 23, 2019, the Classical Academy Charter School Association (Charging Party or Association) filed an unfair practice charge against Classical Academy Charter School (Respondent or Charter School). The charge identifies three separate incidents as violating the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. and the Workplace Enhancement Democracy Act (WDEA)[1/] N.J.S.A. 34:13A-5.11 through

1/ Alleged violations of the WDEA do not necessarily implicate the Commission's unfair practice jurisdiction because this amendment identifies only certain conduct as an unfair
(continued...)

5.15 (WDEA). First, the Association claims that in May 2019, the Charter School permitted representative(s) of the American Association of Educators (AAE), an alternative association for teaching staff members, onto school property to provide a free lunch and distribute its marketing materials to unit employees, violating sections 5.4a(1) and (2) of the Act[2/] and the WDEA. Second, the Association claims that in August, 2019, an unnamed supervisor told a newly-hired unit employee who was reviewing her employment contract that she may choose not to join the New Jersey Education Association, also violating section 5.4a(1) and (2) of the Act and the WDEA. Third, the Association claims that on September 5, 2019, an NJEA representative was advised by the attorney for the Charter School that she must provide three days' notice before accessing the school property to meet with members informally, also violating section 5.4a(1) and (2) of the Act and the WDEA.

1/ (...continued)
practice under the Act. See N.J.S.A. 34:13A-5.14(c)

2/ 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization." The charge form also identified violations of sections 5.4a(3) and (7). However, the rider to the charge, does not specifically plead that those sections were violated. Accordingly, I do not separately analyze those claims. Considering that they were not specifically pled, and that no facts are alleged to support those claims, I dismiss them.

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).

I find the following facts.

The Charter School is a public employer within the meaning of the Act. The Association represents all non-supervisory certified employees of the Charter School. The Charter School and Association signed a collective negotiations agreement (CNA) extending from July 1, 2017 through June 30, 2020. The CNA was signed by the parties on November 29, 2018.

Article 5 of the CNA, entitled "Association Rights and Privileges," provides in Section C:

> The Association or its designees shall have the right to use a school building at all reasonable hours for meetings.... The Lead Person of the building will be notified at least three (3) school days in advance of the time and date of all meetings.

In May, 2019, the Charter School permitted AAE on its school grounds and offered unit members lunch. It also distributed its marketing materials to unit members in the teachers' lounge.

In August, 2019, a newly-hired unit member was informed that she may choose not to join the NJEA while she was reviewing and executing an employment contract.

Before September 5, 2019, the NJEA UniServ representatives were provided unfettered access to the school buildings to meet informally with members of the Association and conduct Association business. On September 5, 2019, counsel for the Charter School informed a NJEA Uniserv representative that the representative must now provide three-days' notice before entering school grounds to meet informally with members.

ANALYSIS

An overview of the pertinent provisions of the WDEA is appropriate because it impacts our disposition of the Association's various claims. Section 5.13 of the WDEA sets a minimum floor of certain access rights that public employers must provide to majority representatives. It also creates a framework in which those minimum access rights for majority representatives can be memorialized in collective negotiations agreements. Specifically, it provides in Section 5.13(g):

> Upon the request of an exclusive representative employee organization, a public employer shall negotiate in good faith over contractual provisions to memorialize the parties' agreement to implement the provisions of subsections a. through f. of this section....Agreements between a public employer and an exclusive representative employee organization implementing subsections a. through f. of this section

> shall be incorporated into the parties' collective negotiations agreement and shall be enforceable through the parties' grievance procedure, which shall include binding arbitration.

Subsection (h) sets forth a procedure by which either party may file a petition with the Commission seeking the appointment of an arbitrator if the parties are unable to reach an agreement after 30 calendar days. In short, the WDEA identifies certain minimum statutorily-created access rights for majority representatives, and creates a mechanism for enforcing those minimums through the grievance procedure of collective negotiations agreements. Section 5.13 of the WDEA does not provide that violations of any of the enumerated access provisions constitute an unfair practice within the meaning of the Act.

By contrast, Section 5.14 of the WDEA identifies certain employer conduct as an unfair practice within the meaning of the Act. Under sections (a) through (c), public employers that encourage negotiations unit members to relinquish membership in an exclusive representative employee organization, or that encourage unit members to revoke dues authorizations, or that encourage or discourage an employee from joining, forming or assisting an employee organization violate subsection 5.4a(1) of the Act. These provisions essentially codify existing, established case law. Particularly distinctive about Section 5.14 of the WDEA is its directive that the Commission provide

enhanced remedies for those specific a(1) violations, namely, a make-whole order. Thus, in this section of the WDEA and only in this section, the legislature expressly created an enforcement mechanism through the unfair practice jurisdiction of the Act and mandated greater remedies than typically available for a(1) violations. Accordingly, the WDEA does not expressly confer upon the Commission a general jurisdiction to enforce all of the statutorily-created obligations imposed upon public employers.[3/]

Providing Access to the AAE

Regarding the first incident, the Association's WDEA claim must be dismissed to the extent the charge alleges it as a separate cause of action. Nothing in the WDEA confers general jurisdiction over claims arising under its various provisions, and the Commission is tasked only with enforcing the Act.

However, the WDEA does proscribe public employers from encouraging unit employees to relinquish membership from the majority representative and encouraging or discouraging employees from joining or assisting an employee organization. As described above, such conduct under the WDEA constitutes a violation of Section 5.4a(1) of the Act. N.J.S.A. 34:13A-5.14(c). Therefore,

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3/ I believe that this reading is consistent with well-established principles of statutory construction. Moreover, courts do not permit the Commission to infer unfair practice jurisdiction where it has not been expressly conferred by statute. See e.g., Burlington Cty. Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970).

the Charter School's decision to permit the AAE to provide free lunch and distribute marketing materials may proceed to complaint under an a(1) theory as an implied endorsement of membership in the AAE instead of the Association.

The Association's a(2) claim does not meet the complaint issuance standard. Claims of domination arising under subsection 5.4a(2) must allege facts demonstrating "pervasive employer control or manipulation of the employee organization itself." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). No facts have been alleged demonstrating that the Charter School's decision to permit the AAE to provide a free lunch and distribute its marketing materials to unit employees somehow establish that the Charter School exercised such control or manipulation of the Association.

Unnamed Supervisor's Statement

The Association's second claim regarding an unnamed supervisor's statement to a newly hired unit employee must be dismissed. The Association asserts that by telling a newly hired unit employee that she may choose not to join the NJEA, the unnamed supervisor interfered with Association activities, coerced a potential member in exercising her union rights, dominated and interfered with the Association's formation and existence, and discouraged an employee from joining or assisting an employee organization.

As an initial matter, the claim fails to meet the pleading requirements and must be dismissed. Under N.J.A.C. 19:14-1.3(a) 3, a charge "shall contain . . . [a] clear and concise statement of facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts . . . ." The charge fails to identify the persons alleged to have committed the unfair practice, as required. For liability to attach to the Charter School, one of its agents must have committed the unfair practice, and conclusory statements regarding an unnamed individuals supervisory status do not provide sufficient specificity to support the issuance of a complaint.

Also, no case law supports the proposition that a public employer representative violates the Act by making a factually accurate statement to an employee. Section 5.4a(1) of the Act prohibits a public employer from engaging in coercive speech. State of New Jersey, (Dept. of Law and Public Safety, Div. of Motor Vehicles),D.U.P. No. 92-25, 18 NJPER 327 (¶23142 1992) (citing Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 8-19, 7 NJPER 502 (¶12223 1981)). The standard adopted by the Commission in these cases mirrors the one developed in the private sector under the Labor Management Relations Act, 29 U.S.C. §141 et seq. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Secys.,

78 N.J. 1, 9 (1978); Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). While the charge alleges that the employee was reviewing and executing her employment contract when the supervisor made the comment, it does not contain any factual allegations that potentially suggest that the employee's decision to join or refrain from joining the NJEA may have had ramifications to the employee's terms and conditions of employment. Thus, a public employer's single factual comment to a unit employee regarding her option to become a member, without more, does not constitute coercive speech.[4/]

The Association's WDEA claim must be dismissed. While Section 5.14(c) of the WDEA expressly makes it an unfair practice to discourage membership in an employee organization, such conduct was already prohibited under a(1) of the Act. For the

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4/ Restricting noncoercive speech also raises constitutional considerations in both the private and public sectors. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-618 (1969)(interpreting Section 8(c) of the National Labor Relations act as "merely implementing" the First Amendment and explaining that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "'threat of reprisal or force or promise of benefit.'"); Black Horse Pike Reg. Bd. of Ed., supra ("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 . . .").

reasons discussed above, a public employer's single factual comment to a unit employee regarding her option to become a member, without more, does not violate a(1) of the Act. The unnamed supervisor's comment was free from any coercion that would potentially discourage an employee from becoming a member.

The Association's a(2) claim does not meet the complaint issuance standard and must be dismissed. As discussed above, claims of domination arising under subsection 5.4a(2) must allege facts demonstrating "pervasive employer control or manipulation." One factual statement from a supervisor does not establish such control or manipulation.

Notice Requirement Prior to Meeting with Unit Employees on School Property

The Association's WDEA claim must be dismissed. Alleged violations of the access rights afforded to majority representatives under the WDEA do not constitute an unfair practice for the reasons discussed above. Moreover, Section 5.13 of the WDEA does not create a general right for majority representatives of completely unfettered access to the property of the public employer.

The Association's a(2) claim does not meet the complaint issuance standard and must be dismissed. No facts indicate that the Charter School's effort to enforce the notice-requirement language of the CNA constitutes pervasive control or manipulation

of the Association.

The Association's remaining a(1) claim may proceed to complaint. While the Charter School correctly notes that the CNA requires prior notice, there may be some factual circumstances in which the failure to provide a union representative prompt access to the public employer's property would violate unit employees' rights under Section 5.4a(1).

ORDER

Accordingly, I will issue a Complaint under separate cover for 5.4a(1) regarding the claims pertaining to the Charter School's decision to permit the AAE to provide free lunch and distribute marketing materials on its premises to unit employees and for 5.4a(1) for the claims pertaining to the Charter School's imposition of the three-day notice requirement. All of the remaining allegations are dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: August 30, 2021

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

Any appeal is due by September 10, 2021.