

D.U.P. NO. 2023-3

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

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-094

EAST ORANGE ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the East Orange Administrators Association ("Association") against the East Orange Board of Education ("Board"). The charge alleged that the Board violated N.J.S.A. 34:13A-5.4a(1), (2), (3), and (7) when it transferred nineteen (19) Association members to new assignments following an internal union election that resulted in a change of the Association's leadership. The Director determined that, though the charge was timely filed under the Act, the Association failed to show that participation in the union election was a substantial or motivating factor in the Board's decision to transfer certain members. In the absence of facts in the charge indicating that the Board had knowledge of the election results, the Director found no connection between the election and the alleged retaliatory transfers.

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Appearances:

For the Respondent,
Scarinci Hollenbeck, LLC, attorneys
(Ramon E. Rivera, of counsel)

For the Charging Party,
Schwartz Law Group, LLC, attorneys
(Robert M. Schwartz, of counsel)

REFUSAL TO ISSUE COMPLAINT

On November 12, 2020, the East Orange Administrators Association ("Association" or "Union") filed an unfair practice charge against the East Orange Board of Education ("Board"). The charge alleges that the Board violated section 5.4a(1), (2), (3), (5), and (7)^{1/} of the New Jersey Public Employer-Employee

^{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; (2) Dominating or interfering with the formation, existence, or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the
(continued...)

Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., by transferring nineteen (19) members in retaliation for their participation in an internal (Union) election that resulted in a change of the Association's leadership. The charge alleges that ". . . [t]he 19 administrators who received the April 28 transfer notices all had voted against the then-existing officers of the Association" and that the existing officers, ". . . were supported by Respondent and/or its agents."

On February 5, 2021, the Association filed a position statement in support of its unfair practice charge. The Association wrote that during a grievance arbitration hearing contesting the validity of the transfers under the parties' collective negotiations agreement ("CNA"), Dr. Kevin West, the Board Superintendent at the time of the disputed transfers, ". . . basically testified that [the Board's stated reason for the transfers] was pre-textual, and that the real reason for the transfers was animus toward certain members of the Association." The Association also argues that the transfers violated various provisions of the CNA and state law.

1/ (...continued)
exercise of the rights guaranteed to them by the 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; and (7) Violating any of the rules and regulations established by the Commission." The (a)(1) claim was plead as a derivative violation.

On February 26, 2021, the Board filed a position statement opposing the charge. It argues that the charge is untimely under N.J.S.A. 34:13A-5.4c^{2/}, because "[t]he Association knew, or should have known, of the alleged misconduct on or about April 28, 2020, when its members received transfer notices." The Board also contends that no complaint should issue because the Association failed to allege facts showing that its transfer decision was "connected to" the union election, or that the Superintendent who recommended the transfers (subject to approval by the Board) knew how the individual members voted. Without such facts, the Board asserts, the Association has failed to show a violation of the Act.

On June 10, 2021, the Association filed a reply contending that the charge is timely filed. Conceding that members received transfer notices on April 28, 2020, it avers that the notices were only recommendations by the superintendent until they were approved by the Board at its May 12, 2020 meeting. Therefore, the Association argues, the November 12, 2020 charge, filed exactly six months after the May 12, 2020 Board meeting, is timely.

The Commission has authority to issue a complaint where it

2/ This Section provides, in part, that "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge"

appears that the 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.

I find the following facts:

The Association is an employee organization representing a collective negotiations unit of Board employees, including those in the titles of principal, assistant principal, director, assistant director, supervisor, and department head.

The Association and the Board signed a CNA that extended from July 1, 2017 through June 30, 2021. The CNA includes a provision on involuntary transfers (Article XI-C). Article XI-C requires the superintendent (or his/her designee) to meet with the impacted member and provide a reason or reasons for the transfer decision. The article also gives a member the right to appeal an involuntary transfer decision to the superintendent.

The CNA also sets forth an article regarding administrative assignments (Article XIII). Article XIII requires that the superintendent provide notice to members each April if there will be any change to the member's assignment for the upcoming year. If the member disagrees with a change in assignment, he, she or they may request a review of the decision with the

superintendent, and if the member chooses, a representative of the Association.

On or about April 15, 2020, the Association conducted an election among its members to elect union officers. The election resulted in a change of the Association's leadership.

On April 28, 2020, nineteen (19) members received separate notices from the superintendent recommending their transfer to new assignments for the following school year, effective July 1, 2020. The notices advised that the recommended transfers would be voted upon by the Board at its May 12, 2020 meeting.

On May 12, 2020, the Board met and voted to approve the recommended transfers.

On May 13, 2020, the Association filed a grievance asserting that the transfers violated the CNA. The grievance was submitted to arbitration. At the time of the filing to this unfair practice charge, an arbitration award had not issued.

ANALYSIS

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in a pertinent part:

No complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so provided.

The Commission has held that “[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed” and “[i]n determining whether a party was ‘prevented’ from filing an earlier charge, the Commission must consider the circumstances of each case and assess the Legislature’s objectives in prescribing the time limits as to a particular claim.” State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff’d 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). “Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge.” Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), aff’d P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

The Association’s unfair practice charge is timely filed. Although members received transfer notices on April 28, 2020, the notices provide that the transfers will be voted upon by the Board at its May 12, 2020 meeting. Before the Board’s vote, the transfer notices were only recommendations by the superintendent.

The procedure followed by the Board is consistent with N.J.S.A. 18A:27-4.1a, which provides, in part, “[a] board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board” Since the transfers were not approved until the Board voted on May 12, 2020, I find that the November 12, 2020 charge is timely under N.J.S.A. 34:13A-5.4c.

Public employees have a right to engage in “protected” conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set forth in Bridgewater Tp v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) (“Bridgewater”). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

The facts alleged in the charge do not indicate a prima facie circumstantial case under Bridgewater that protected

conduct was a substantial or motivating factor in the Board's decision to transfer the 19 members. The Association has pleaded no facts suggesting that the Board (or its superintendent) knew how any individual member voted in the union-conducted election, or that the 19 selected for transfer were the only members transferred. Without a factual allegation of such knowledge, it is unclear how the Board could have retaliated against those members who voted for new Association leadership. Unless the Board knew how each individual member voted (and implicitly, how such or substantially similar facts were learned), such results could not have been a substantial or motivating factor in an alleged retaliatory decision to transfer certain personnel.

The Association's February 5, 2021 position statement avers that the Board's former superintendent, Dr. West, testified at an arbitration hearing about the transfers stating that the Board was motivated by animus towards union members, and that he cooperated with the Board to ensure that he was not deprived of benefits when he left the Board's employ. Even assuming that the Association's characterization of testimony and hearsay statement (omitted from the charge) is accepted as true, I find that it does not provide adequate factual support for a necessary allegation that the Board knew or how it came to know the Union officer choice of individual members. Without such an allegation, I glean no causal nexus between participation in the

Union election and the alleged retaliatory transfers. As such, the charge fails to meet the standard set forth in Bridgewater, requiring that the 5.4a(1) and (3) allegations be dismissed.

The Association also contends that the Board dominated or interfered^{3/} with the Association in violation of section 5.4a(2) by transferring those members who voted for new leadership. Although motive is not an element in a 5.4a(2) claim, the charging party must show that the acts complained of actually interfered with or dominated the formation, existence, or administration of the employee organization. See Borough of Middlesex, H.E. No. 86-58, 12 NJPER 471 (¶17177 1986) aff'd P.E.R.C. No. 87-27, 12 NJPER 757, (¶17285 1986).

The charge alleges that "[t]he retaliatory transfers were intended to interfere with the management and control of the Association," but no facts suggest that the transfers resulted in actual interference with or domination of the employee organization. The Association does not allege, for example, that the transfers interfered in the ability of a union member to vote

3/ In Atlantic Comm. College., P.E.R.C. No. 87-33, 12 NJPER 764-65 (¶17291 1986), the Commission wrote: "Domination exists when the organization is directed by the employer, rather than the employees. See, e.g., Han-Dee Spring & Mfg. Co., 132 NLRB No. 122, 48 LRRM 1556 (1961). Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity."

in the election, or that the transfers impacted the Association's ability to represent its members. In the absence of facts alleging actual domination or interference, I dismiss the allegation that the Board violated section 5.4a(2) of the Act.^{4/}

The charge also alleges violations of section 5.4a(5) and (7). The alleged facts do not indicate that the Board failed to negotiate in good faith with the Union, or that it refused to process grievances. To the contrary, as the Association acknowledges in its position statement, the Board and the Union proceeded to arbitration on that issue (i.e., whether the May 12, 2020 decision to transfer Association members violates the CNA), suggesting that the Board is indeed processing grievances and participating in grievance arbitration with the Union. The charge also fails to cite a rule or regulation of the Commission that the Board allegedly violated. I dismiss the 5.4a(5) and (7) allegations.

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.

N.J.A.C. 19:14-2.3.

^{4/} The charge alleges that ". . . [t]he 19 administrators who received transfer notices all had voted against the then-existing officers of the Association." It does not allege that all union members who voted against the then-current officers of the Association received transfer notices. Whether the latter allegation would satisfy the section 5.4a(2) complaint issuance standard is not before me.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: August 24, 2022
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 September 6, 2022.