

D.U.P. NO. 2024-6

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

In the Matter of

CITY OF ASBURY PARK,

Respondent,

-and-

Docket No. CO-2022-232

CHAPTER 5, LOCAL 196,
INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS

Charging Party.

SYNOPSIS

The Director of Unfair Practices partially dismissed an unfair practice charge filed by Chapter 5, Local 196, International Federation of Professional and Technical Engineers (Local 196) against the City of Asbury Park (City). Local 196 alleged that the City violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act) when the Director of Public Works, Robert Bianchini (Bianchini), told multiple unit employees that Local 196 would not be able to do anything for them, and followed Local 196's President and Vice President around and took pictures of them while they were working. The Director held, based on Commission precedent, that Bianchini's statements to unit employees was protected speech and did not violate the Act. The Director further determined to issue a complaint as to unlawful surveillance allegation.

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Appearances:

For the Respondent,
Genova Burns, LLC, attorneys
(Jared J. Monaco, of counsel)

For the Charging Party,
Weissman & Mintz, attorneys
(Annmarie Pinarski, of counsel)

PARTIAL REFUSAL TO ISSUE COMPLAINT

On May 16, 2022, Chapter 5, Local 196, International Federation of Professional and Technical Engineers (Local 196) filed an unfair practice charge against the City of Asbury Park (City). The charge alleges that the City violated section 5.4a(1), (3), and (5)^{1/} of the New Jersey 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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees (continued...)"

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when the Director of Public Works, Robert Bianchini (Bianchini), told multiple unit employees that Local 196 would not be able to do anything for them. The charge further alleges that Bianchini harassed employees, including Local 196's President and Vice President, by following them around and photographing them while they were working, without any justification for doing so.

On May 19, 2022, the former Director of Unfair Practices sent counsel for Local 196 a letter advising that Local 196's a(3) claim did not satisfy the pleading requirements set forth in N.J.A.C. 19:14-1.3 and In re Bridgewater Tp., P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981), denying recon P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), aff'd NJPER Supp.2d 120 (¶100 App. Div. 1982), aff'd 95 N.J. 235 (1984). The letter further advised that absent a withdrawal or a formal amendment filed within seven days from the date of the letter, the Charging Party's a(3) claim will be dismissed. No amendment was filed and the a(3) claim was dismissed accordingly.

On June 24, 2022, the City filed a position statement arguing that the charge should be dismissed. The City asserts

1/ (...continued)
in the exercise of the rights guaranteed to them by this 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."

that it did not do anything to interfere with unit members' statutory rights, it made no unilateral changes to terms and conditions of employment, and that it has a managerial right to supervise and discipline employees.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶120 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

Local 196 is the exclusive majority representative of various non-supervisory employees of the City. The City and Local 196 are parties to a collective negotiations agreement (CNA) extending from January 1, 2021 through December 31, 2023.^{2/}

Daniel Virtgaym (Virtgaym) is Local 196's President and works as a Heavy Truck Driver for the City's Department of Public Works. Johnny Cerchia (Cerchia) is Local 196's Vice President

^{2/} The parties were in the middle of negotiations at the time the charge was filed and reached agreement after the filing of the charge.

and works as a Maintenance Repairer for the City's Department of Public Works.

In early March 2022, the parties held a labor management meeting at the office of the City Manager, Donna Viero (Viero). According to Local 196, approximately two weeks after the meeting, Bianchini told Virtgaym that he has the authority to run the Department as he sees fit, that employees are lazy, and that Local 196 is not going to be able to do anything for them. Local 196 further asserts that Bianchini made similar comments to multiple unit employees. Virtgaym also informed Viero that several employees have complained about Bianchini harassing them by "watching them closely," but that they were afraid of retaliation if they complained about him.

The following morning, Virtgaym and Cerchia arrived at a work location and exited their vehicle, when Bianchini pulled up and parked directly behind them. Bianchini then pulled out his phone and began taking pictures of Virtgaym and Cerchia. Bianchini and Greg Toro (Toro), Assistant Director of Public Works, then began circling the area where Virtgaym and Cerchia were working in two separate vehicles. At some point thereafter, Toro's supervisor, Anthony Thompson (Thompson), pulled up in his vehicle to watch Virtgaym and Cerchia as well. Thompson informed the two that he was instructed by Bianchini to watch them. That

afternoon, he told both of them that they were not working fast enough.

On May 9, 2023, Thompson drove by Lake Avenue where Virtgaym and Cerchia were working to watch them again. Thompson informed them that Bianchini called him that morning and instructed him to watch them again to make sure that they were working.

ANALYSIS

The 5.4(5) allegation

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over terms and conditions of employment. Employers are prohibited from unilaterally altering negotiable terms and conditions of employment because such changes circumvent the statutory duty to negotiate.

Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 1 (1978). Public employers are also prohibited 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" N.J.S.A. 34:13A-5.4a(5).

A charging party, in order to justify our issuance of a complaint, must set forth in its charge a "clear and concise statement of the facts" in support of its claims. N.J.A.C. 19:14-1.3(a); Edison Tp., D.U.P. No. 2012-9, 38 NJPER 269 (¶92 2012), aff'd P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013); Warren

Cty. College, P.E.R.C. No. 2018-25, 44 NJPER 287 (¶80 2017).

This standard encompasses the “who, what, when and where” information about the commission of an unfair practice. Id., State of New Jersey (Judiciary), D.U.P. No. 2022-8, 48 NJPER 344 (¶77 2022).

Here, Local 196 fails to allege any facts suggesting that the City made unilateral changes to any terms or conditions of employment. The charge is also devoid of any facts suggesting that Local 196 demanded to negotiate impact issues that may be negotiable, and that the City refused to do so. See, e.g., Essex Cty. Sheriff, D.U.P. No. 2019-2, 45 NJPER 249 (¶67 2019) (the Director refused to issue a complaint, finding in part that “[a]lthough related severable impact issues may be negotiable, the [union] has not alleged that the [employer] refused to negotiate in response to a demand to negotiate”); Collingswood Bor., P.E.R.C. 2019-8, 45 NJPER 111 (¶29 2018) (the Commission granted a restraint of binding arbitration, finding in part that “there [was] no indication that [the union] sought, or was refused, the opportunity to engage in impact negotiations with the [employer]”). Accordingly, I dismiss Local 196's 5.4a(5) claim.

5.4a(1) claim

An employer independently violates section 5.4a(1) only if its action tends to interfere with an employee's rights under the

Act and lacks a legitimate and substantial business justification. New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶ 10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The objective tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶ 17197 1986).

Where, however, the action complained of implicates the employer's free speech rights, the Commission balances the rights of the majority representative and employer to determine whether the employer violated section 5.4a(1).

In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶ 12223 1981), a case involving employer free speech rights, the Commission held, in pertinent part:

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.

In deciding whether an employer's speech violates section 5.4a(1), the Commission has applied a balancing test acknowledging two important interests: the employer's right of free speech and the employees' right to be free from coercion, restraint or interference in the exercise of protected rights.

State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶ 18269 1987).

In Atlantic Cty. Utilities Authority, H.E. No. 94-15, 20 NJPER 119 (¶25064 1994), adopted P.E.R.C. No. 94-92, 20 NJPER 195 (¶25091 1994), a Hearing Examiner recommended dismissal of an unfair practice charge alleging the Respondent violated Section 5.4(a)(1) of the Act when its agents and representatives made speeches to employees during working hours regarding the possibility of privatization. Atlantic Cty. Utilities Authority. The Hearing Examiner found no facts to suggest that the Respondent threatened to dismiss employees in order to restrain their protected activities, nor did he find that any threats were made to shut down all or part of the Authority's operations. The Hearing Examiner found inapposite several cases cited by the charging party ; among them are Paterson Board of Education, P.E.R.C. No. 87-108, 13 NJPER 265-267 (¶18109 1987) (Principal threatened to get rid of Association delegates one by one), Township of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526, 527 (¶17197 1986) (Mayor threatened Union with reprisals if it attempted to proceed to interest arbitration), Parke Coal Company, 219 NLRB 546, 89 LRRM 1708 (1975)^{3/} (employer made a

^{3/} The New Jersey Supreme Court has held that adjudications under the federal Labor-Management Relations Act (LMRA) are "appropriate guides" in interpreting the Act's unfair practice provision. Galloway Tp. Bd. of Ed. v. Galloway Tp.
(continued...)

statement that if the union won the election it did not know how long it would operate), Benner Glass Co., 209 NLRB 111, 86 LRRM 1189 (1974) (supervisor stated that the President would close the plant “. . . before he would pay that kind of salary”)

Like the disputed remarks in Atlantic Cty. Utilities Authority, I find that Bianchini's comments to Virtgaym, specifically, that he has the authority to run the Department as he sees fit, that employees are lazy, and that Local 196 is not going to be able to do anything for them, falls within the type of speech and activity protected by Black Horse Pike. No facts suggest that Bianchini threatened, coerced, or promised benefits to any employees. While his words may be inaccurate, I do not believe that they warrant the issuance of a complaint because they fit within the ambit of the City's protected free speech rights under Black Horse Pike.

However, Local 196 does allege that Bianchini has been harassing Virtgaym and Cerchia by following them closely and taking photographs of them, while instructing others to do the same. An Employer's unjustified surveillance of employees independently violates section 5.4a(1). See, e.g., Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990) (placing employees under surveillance to build up information to

3/ (...continued)
Ass'n of Educ. Sec., 78 N.J. 1, 9 (1978).

justify illegal transfer violates 5.4a(1)); City of Linden, H.E. No. 2018-12, 44 NJPER 437 (¶123 2018) (even without adverse personnel action, harassing conduct without business justification in retaliation for successful grievance independently violated a(1)), adopted in pertinent part P.E.R.C. No. 2019-39, 45 NJPER 363 (¶95 2019). As such, I find that Local 196 has sufficiently pled a violation of section 5.4a(1), and a complaint shall issue on that section only with respect to the unlawful surveillance allegations.

ORDER

The unfair practice charge with respect to the section 5.4(a)(5) allegation and the section 5.4a(1) allegation concerning Bianchini's comments to Virtgym are dismissed. I will issue a complaint under separate cover only for the section 5.4a(1) allegation concerning the City's surveillance of Virtgym and Cerchia.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: August 23, 2023
Trenton, New Jersey

This decision may not be appealed pre-hearing except by special permission to appeal from the Chair pursuant to N.J.A.C. 19:14-4.6. See N.J.A.C. 19:14-2.3(c); N.J.A.C. 19:14-4.6(b).

Any appeal is due by September 5, 2023.