

D.U.P. NO. 2024-11

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

In the Matter of

PINELANDS REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-229

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 alleged the Board violated sections 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act (Act) by disclosing to a third party confidential communications about collective negotiations between Association officials and Board members in violation of the New Jersey Open Records Act (NJ OPRA). The Director dismissed the charge because (1) the Act did not confer unfair practice jurisdiction over NJ OPRA disputes and (2) the charge did not satisfy Commission pleading standards for pleading a refusal to negotiate claim. The Director also concluded that the charge was moot since the Board acknowledged the disclosure was a mistake and made concerted efforts to retrieve the disclosed information from the third party in question.

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Appearances:

For the Respondent,
Cooper Levenson, attorneys
(Kasi Marie Gifford, of counsel)

For the Charging Party,
Mellk Cridge, LLC, attorneys
(Arnold M. Mellk, of counsel)

REFUSAL TO ISSUE COMPLAINT

On April 27, 2021, the Pinelands Education Association (the Charging Party or Association) filed an unfair practice charge against Pinelands Regional School District Board of Education (Respondent or Board). The charge alleges that the Board wrongfully disclosed confidential collective negotiations information in its response to a records request pursuant to the New Jersey Open Public Records Act (NJ OPRA) by a third-party, which subsequently was published on OPRAmachine, a publically available website. The charge further alleges that the Board refused to take appropriate remedial action because it does not

control the website. The Association alleges that the wrongful disclosure and the refusal to rectify was undertaken to chill and restrain the Association from its right to engage in collective negotiations and to zealously advocate on behalf its employees. The Association also alleges the Board's conduct constitutes a refusal to negotiate in good faith. The Association asserts that the Board violated subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act.^{1/} Among other remedies, the Association is seeking the Commission to issue an order "[d]irecting and [c]ompelling the Board to take all legal and other action necessary to remove the wrongfully disclosed documents from the internet, and to claw back same from any recipient thereof, including but not limited to any person who viewed, downloaded, or copied 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

^{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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

standard has not been met, I will 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 Board is a public employer within the meaning of the Act. The Board and the Association are parties to a collective negotiations agreement (CNA) that extended from July 1, 2018 through June 30, 2021. The Association represents a broad-based negotiations unit comprised of non-supervisory employees, including teaching staff, counselors, aides and custodial staff.

On or around March 11, 2021, a member of the public submitted an OPRA request to the Board where he sought copies of "all emails between union president Mel Reid and all Board members and former Board member Sue Emst from January 2018" until the date of the request. The Board responded to the submitted OPRA request. The Association claims that the documents are publicly available at a website named "OPRAMachine" (www.opramachine.com).

The Association asserts that the Board provided emails that are exempt from disclosure. Under N.J.S.A. 47:1A-1.1-Definitions, NJ OPRA exempts from its disclosure requirement those records that include "information generated by or on behalf of public employers or public employees . . . in connection with

collective negotiations, including documents and statements of strategy or negotiating position.”

The Association attached as “Exhibit A” to its charge, a copy of the March 24, 2021 e-mail it sent to Board counsel regarding its disclosure. It asserted that the Board furnished exempted documents pertaining to collective negotiations and provided the OPRAmachine web address where it could find them. It quoted the NJ OPRA statute, and requested that “the District immediately remove from its OPRA portal all such documents, and that it take the steps necessary to claw back the wrongfully produced documents from their recipient(s).” It also demanded that the parties negotiate ground rules for the disclosure of information during the then-ongoing negotiations for a successor agreement.

The Board in its position statement provided the Certification of Business Administrator Nicholas Brown. After receiving the Association’s communication, Administrator Brown sent a message through the “contact us” capability on the OPRAmachine website on March 26, 2021. Brown requested that the documents be removed and returned to him. He explained that the documents were inadvertently released without redactions and that some contained information related to collective negotiations, which are exempted under the statute. He advised that once the documents were returned to him, he would make appropriate

redactions and return the documents eligible for disclosure under OPRA within two business days. Brown provided his email address and requested to know the "best way to coordinate this" Brown received a confirmation of his communication, which he attached to his certification as an exhibit. When Brown failed to receive a response, he followed up by email on April 12, 2021. He provided this email as an exhibit to his certification. Once again, Brown did not receive any response from the OPRAMachine website.

Board counsel also communicated with Association counsel, a copy of which is attached as Exhibit B to the charge. In this April 14, 2021 letter, Board counsel explains that although the District repeatedly asked that the OPRAMachine website remove the documents, the District cannot remove the documents since it does not control the website.

There is no dispute between the parties that OPRAMachine is a private website that is not controlled by the Board. It enables any individual to file an OPRA request through the website and publishes all requests online.

ANALYSIS

The charge must be dismissed because the Commission does not have unfair practice jurisdiction over NJ OPRA disputes. It has been long-established that courts do not permit the Commission to infer unfair practice jurisdiction where it has not

been expressly conferred by statute. Burlington Cty. Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970) (holding that the Commission did not have unfair practice jurisdiction before the enactment of N.J.S.A. 34:13A-5.4).

Moreover, the revisions made to the Act with the passage of the Workplace Democracy Enhancement Act (WDEA) N.J.S.A. 34:13A-5.11 through 5.15,^{2/} support the conclusion that the Commission was not afforded unfair practice jurisdiction over potential violations of NJ OPRA. Although not cited or relied upon by the Charging Party, the WDEA as codified at N.J.S.A. 34:13A-5.13(d) revised the Act to include the following exemption to the type of government record subject to disclosure under NJ OPRA:

the home addresses, phone numbers, email addresses, dates of birth, and negotiation units and groupings of employees, and the emails or other communications between employee organizations and their members, prospective members, and non-members, are not government records and are exempt from any disclosure requirements of P.L.1963, c.73 (C.47:1A-1 et. seq.).

In notable contrast to other sections of the WDEA such as N.J.S.A. 34:13A-5.14, the legislature did not expressly provide that a violation of N.J.S.A. 34:13A-5.13(d) constitutes an unfair practice within the meaning of the Act. As explained in Classical Academy Charter School, D.U.P. No. 2022-1, 48 NJPER 113

^{2/} The "Workplace Democracy Enhancement Act," P.L.2018, c.15, enacted May 18, 2018, supplemented our Act with new sections at N.J.S.A. 34:13A-5.11 through 5.15.

(¶29 2021), the legislature in enacting the WDEA created a number of new obligations upon public employers, yet only specifically identified certain employer conduct as prohibited unfair practices within the meaning of the Act. Id. (contrasting the express grant of unfair practice jurisdiction in Section 5.14 with the absence of such language in Section 5.13 of the WDEA). Given the legislature's decision to only identify certain employer conduct under Section 5.14 as a prohibited unfair practice, the Director determined that the WDEA did not confer unfair practice jurisdiction for potential violations of all of the new statutory obligations that it imposed upon public employers. Id. The Director also noted that this conclusion was consistent with fundamental principles of statutory construction. Id.

This rationale applies in the instant matter. The WDEA contains its own NJ OPRA exemption under N.J.S.A. 34:13A-5.13(d). In contrast to other sections of the WDEA, the legislature did not expressly grant unfair practice jurisdiction for violations of this provision or any of the other provisions under Section 5.13. Therefore, without an express grant, we cannot infer unfair practice jurisdiction over potential violations of disclosure exemptions contained in either the WDEA or in NJ OPRA.

In its position statement, the Association contends that the disclosure of confidential negotiations documents was intentional

since it is litigating another case before the Commissioner of Education involving "statutorily confidential information" that was disclosed by the Board and that the Board's efforts to retrieve the information are insincere because it did not take "substantive legal action" to compel the return of the documents. However, even if I assume that the Association is correct in its legal conclusion that the Board on two occasions violated NJ OPRA when responding to records requests, the Association in its submission does not point to any statute that expressly grants the Commission unfair practice jurisdiction over NJ OPRA violations.

The Association maintains that the Board's disclosure was meant to "hamstring the Association in its ability to bargain aggressively and effectively on behalf of its members" and that such "intention[al] leaking" of confidential negotiations information violates subsection 5.4(a)(1) of the Act. But the Association's charge fails to provide specific factual allegations that suggest the disclosure was intentional beyond its mere assertion. It is undisputed that Board has a statutory duty to disclose certain records under NJ OPRA. It is undisputed that a third-party made the records request. There are no facts showing any sort of affiliation or coordination between the Board and the third-party who made the records request. Moreover, the Board did not ignore the Association's request for assistance in

obtaining the disclosed records, but instead promptly contacted the OPRAMachine website when the Association notified it of the issue. It is also unclear from the Association's position statement how a disclosure involving the communications of one of the Board's own members (who may or may not have been on the Board's negotiations team) would only hamper the Association's ability to bargain effectively when both sides would have their communications disclosed to the public.

The Association's failure to negotiate claim is also deficient and does not satisfy our pleading standards. N.J.A.C. 19:14-1.3(a); See also New Jersey State Judiciary, D.U.P. No. 2022-8, 48 NJPER 344 (¶77 2022) (explaining the complaint-issuance standard requires a charging party to set forth the "who, what, when and where" information about the commission of an alleged unfair practice.) The charge itself fails to identify any specific factual allegations to support the failure to negotiate claim. Even if I rely on the attachments to supplement the allegations in the charge, the only specific factual allegation provided in the attachment is that the Association requested negotiations regarding ground rules for any disclosure of negotiations-related information. No specifics are provided that would establish when or how the Board's agents refused to negotiate.

Lastly, even if the Association's charge presented a claim within our unfair practice jurisdiction and were sufficiently pled in accordance with Commission standards, I find the dispute arising from this charge is moot under Commission precedent.

A case will be found moot where "continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and, whether the offending conduct is likely to recur. See, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n, P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994).

Here, continued litigation over the Board's disclosure of communications to OPRAMachine would have little practical effect and would "unwisely focus the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills, 16

NJPER at 582. The Board acknowledges the disclosure was a mistake and made repeated, concerted efforts to retrieve the information in question from the owner of OPRAmachine's website. Despite these efforts, there does not appear to be any legal authority or other mechanism for the Board or the New Jersey Public Employment Relations Commission to compel the owner of a private website to remove or redact information on its site and retrieve the same information from website users with access to OPRAmachine. In short, continued litigation would only serve as a more expensive and time-consuming reminder of what this decision and the Board acknowledge: the information in question is exempt from disclosure under our Act and NJ OPRA. N.J.S.A. 34:13A-5.13(d).

Accordingly, 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/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: November 17, 2023
Trenton, New Jersey

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

Any appeal due by November 28, 2023.