

H.E. NO. 2024-9

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINELANDS REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-001

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Hearing Examiner grants the Pinelands Education Association's motion for summary judgment and denies the Pinelands Regional Board of Education's cross-motion for summary judgement. The Hearing Examiner concludes that the Board violated section 5.4a(1) of the Act when a supervisor criticized the Association President, who is an employee of the Board, for his conduct as an Association representative at his annual summative evaluation meeting. From the perspective of a reasonable employee under the circumstances, such activity by a supervisor has the tendency to interfere with the exercise of rights guaranteed by the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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PINELANDS EDUCATION ASSOCIATION,

Charging Party.

Appearances:

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

For the Charging Party,
Mellk Cridge, LLC, attorneys
(Edward Cridge, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On July 1, 2022, the Pinelands Education Association ("Association" or "Union") filed an unfair practice charge against the Pinelands Regional Board of Education ("Board"). The charge alleges that on June 17, 2022, the Board violated sections 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-a et seq. by criticizing and threatening the Association's President, Mel Reid (Reid), for protected activity during an annual summative evaluation, and for threatening the create a "communications team" that would circumvent the Union and impose unilateral changes to terms and conditions of employment for unit members.

On September 9, 2022, the Director of Unfair Practices ("Director") declined to issue a complaint on the Association's 5.4a (3) and (5) allegations.^{2/} On November 18, 2022, the Director issued a Complaint and Notice of Pre-Hearing with respect to the Association's 5.4a (1) allegation and assigned this matter to me as Hearing Examiner. On November 27, 2022, the Board filed an Answer denying that it violated the Act, and stating, in part:

. . . First, the referenced meeting in the Unfair Labor Practice charge was an end of the year summative meeting with Mr. Reid. Ms. Frasca did ask Mr. Reid if he received and reviewed his summative evaluation and had any questions. At the conclusion of that discussion, Ms. Frasca made it clear that she also wanted to speak to Mr. Reid regarding his role as a leader in the District. Ms.

1/ (...continued)
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."

2/ D.U.P. No. 2023-005, 49 NJPER 153 (¶134 2022).

Frasca explained that she wanted to make sure they were on the same page moving forward, and she wanted to ensure that next school year started more smoothly, both with him personally, and with the other staff members as a whole. In fact, Ms. Frasca prepared a statement to read to Mr. Reid regarding her concerns surrounding their relationship, her as an administrator, and him as a leader within the District. It is worth noting that Ms. Frasca felt she had to take the opportunity at the subject end of year meeting to have this discussion with Mr. Reid because he had ignored numerous prior request (sic) to meet with the Administration and discuss Association concerns, clear up any miscommunication, and work towards a collaborative path forward. Nevertheless, Ms. Frasca was within her rights to discuss Mr. Reid's unprofessionalism, especially with regards to the spreading of misinformation, unprofessional remarks towards students, and overall attitude towards District policies, colleagues, and Administration. Domain 4 of the District's evaluation is titled, "Collegiality and Professionalism." After, and while she was reading the statement Ms. Frasca on numerous occasions noted that none of these concerns, other than the ones regarding his unprofessional statements to students, were noted in Mr. Reid's evaluations, and were not going to be part of the evaluations. Ms. Frasca continually assured Mr. Reid that her sole purpose of raising these issues and having the conversation at the end of this school year was to ensure that the 2022-2023 school year got off to a better start. Ms. Frasca wanted to come up with a plan to foster an open line of communication for the 2022-2023 school year.

Board's Answer at ¶4 (Footnote omitted).

On January 11, 2023, the Association filed a motion for summary judgment, together with exhibits and a brief. On January

30, 2023, the Board filed an opposition to the Association's motion for summary judgment and a cross-motion for summary judgment, together with exhibits and a brief. On February 1, 2023, the Association filed a reply brief in opposition to the Board's motion. The motion and cross-motion were referred to me for a decision as the hearing examiner. See N.J.A.C. 19:14-4.8(a).

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The Association is the majority representative for certain employees of the Board, including teaching staff members. Unfair Practice Charge at ¶1; Board's Answer at ¶1.

2. Reid is a teaching staff member employed by the Board as well as the Association's President. Unfair Practice Charge at ¶2; Board's Answer at ¶2.

3. On June 17, 2022, Reid attended an annual summative evaluation meeting with the Board's Assistant Superintendent, Gina Frasca ("Frasca"). Unfair Practice Charge at ¶4; Board's Answer at ¶4.

4. The annual summative evaluation meeting is a mandatory component of New Jersey's statutory teacher evaluation process, as promulgated by the TEACH NJ Act and its regulations. N.J.S.A.

18A:6-117 et seq.; N.J.A.C. 6A:10-2.4(c). Under the TEACH NJ Act, a staff member receiving a rating of "ineffective" or "partially effective" on the annual summative evaluation will be placed on a corrective action plan. N.J.A.C. 6A:10-2.5.

5. At the meeting, Frasca asked Reid if he received and reviewed his summative evaluation and whether he had any questions. After that discussion, Frasca stated that she wished to speak to Reid regarding his role "as a leader in the District" and read a prepared statement. In the prepared statement, Frasca discussed allegations of unprofessionalism, ". . . especially with regards to the spreading of misinformation, unprofessional remarks towards students, and overall attitude towards District policies, colleagues, and Administration." Unfair Practice Charge at ¶4; Board's Answer at ¶4.

6. The prepared statement included the following:

- There is a lack of communication between Reid and the District's administration;
- Reid acted unprofessionally in the classroom, and provided specific examples of such conduct;
- Reid was spreading "misinformation," "fake news," and a "false narrative" among the staff that the Board was delaying contract negotiations with the Association.
- Stated plans for a new communications team, specifically:

"Moving forward, we would like to work with you as a team next year to promote positive interactions amongst staff. We will be setting up frequent meetings with you to be

sure we are addressing staff concerns and dispelling 'fake news' for the staff. If you do not feel it is your role to be part of this communications team, we will randomly select staff members to be key communicators- these staff will be able to come to admin and ask any and every question and get an answer to further relay information to staff."

- Advised that Frasca ". . . will continue to be [Reid's] direct supervisor next year, so [she] will be in communication with [Reid] frequently. Any and all concerns will go through [her] moving forward"

Association's Motion for Summary Judgment at Ex. C, pp. 5-7; Board's Opposition and Cross-Motion at 3, ¶4.

7. None of the concerns expressed in the prepared statement, besides the examples of alleged unprofessional comments made toward students, were included in Reid's written evaluation. Board's Opposition and Cross-Motion at 3, ¶5.

8. The Board maintains that Frasca was compelled to discuss the above concerns with Reid during the summative evaluation because Reid ". . . had ignored numerous prior request (sic) to meet with the Administration and discuss Association concerns, clear up any miscommunication, and work towards a collaborative path forward." Unfair Practice Charge at ¶4; Board's Answer at ¶4.

9. While the Board acknowledges that Frasca ". . . express[ed] some frustration regarding the poor relationship between the Association and the Board, and the slow pace with which negotiations moved this year", it insists Frasca was

speaking to Reid “. . . more in his role as a leader of the District, and not as a member of the Association’s Negotiation’s committee” Board’s Opposition and Cross-Motion at 9, Association’s Reply at 2^{3/}.

10. The rubric for Reid’s summative evaluation contained the following categories: Promoting Positive Interactions with Colleagues; Promoting Position Interactions about Students and Parents; Seeking Mentorship for Areas of Need of Interest; Mentoring Other Teachers and Sharing Ideas and Strategies; Adhering to District and School Rules and Procedures; and Participating in District and School Initiatives. Board’s Opposition and Cross-Motion at 4-6; Association’s Reply at 2.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{4/} In determining whether summary judgment

^{3/} The Association does not dispute that Frasca expressed frustration with the Union and the status of contract negotiations during the summative evaluation meeting. The Association does dispute that Frasca was speaking to Reid “as a leader in the District” when the comments critical of the Association were made. Association’s Motion for Summary Judgment at 7.

^{4/} N.J.A.C. 19:14-4.8(e) provides:

(continued...)

is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "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

4/ (...continued)

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). In evaluating violations of subsection 5.4a(1) of the Act, proof of actual interference or coercion is not required, and therefore, an employer's conduct or statement is evaluated from the perspective of a reasonable employee considering whether to exercise rights protected by the Act. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

ANALYSIS

The Commission has held that, while "[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 . . . ," it must be mindful of the difference ". . . between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer." Black Horse Pike, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); See Hamilton Tp., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977). The Commission explained that

“. . . where an employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment." Id. at 9.

In Black Horse Pike, the Commission considered whether the respondent violated sections 5.4a (1) and (3) of the Act by sending two letters to a union officer critical of comments that the officer made at a meeting while representing another teacher and unit member. The letters allegedly constituted a threat to take legal action and were placed in the representative's personnel file. Id. at 2. The Hearing Examiner concluded that the placement of the letters in the representative's personnel file, rather than in a file reserved for Union matters, “. . . indicated that the Board's agents intended that the letters would reflect upon [the union official] as a teacher and Board employee, not as an Association representative”and that the Board was “. . . confusing [the union officer's] roles as a teacher and as Association official.” Id. at 6-7. The Commission affirmed the Hearing Examiner's decision finding that the Board's conduct violated sections 5.4a(1) and (3) of the Act. Id. at 13.

Here, as in Black Horse Pike, the Board has confused Reid's roles as a teacher and as an Association representative by discussing the Board's frustration with the Association and Reid's conduct as an officer during his annual summative

evaluation. The summative evaluation is a statutorily required component of the TEACH NJ Act wherein teachers are to be evaluated based on their performance in the District. Reid attended his summative evaluation in his capacity as a teaching staff member - not as the Association's President. Yet Frasca dedicated time at the evaluation to commenting at length upon the ways in which she believed Reid was contributing to a strained labor relationship between administration and staff. Notably, Frasca's plan to create a "communications team" to facilitate the sharing of information with employees is a reaction to her dissatisfaction during the course of the previous year with Reid's ability to keep employees apprised regarding contract negotiation efforts and other labor relations issues.

Therefore, even when viewing the evidence in the light most favorable to the Board, I must conclude that the Board's comments during Reid's summative evaluation violated section 5.4a (1) of the Act because a reasonable employee might feel constrained in responding to an employer's criticism of an employee's protected conduct (or the conduct of the Association generally) when the employer's criticism is occurring during a meeting that was convened for the specific purpose of evaluating that employee's job performance. This is particularly true where, as here, criticisms regarding an employee's performance of his official duties, such as a teacher's interactions with students, are

intertwined with criticisms regarding the employee's performance of his union duties.

I am cognizant that the Commission in Black Horse Pike found that the placement of the letters in the union officer's personnel file was "determinative," because it indicated ". . . that the Board intended these letters to be reviewed when [the officer's] performance as a teacher was being evaluated." Id. at 10. In this case, while the comments critical of the Association were not placed in Reid's personnel file, they were nonetheless made during Reid's annual evaluation assessing his performance as a teaching staff member.^{5/} Their exclusion from Reid's personnel file does not negate the chilling effect that could reasonably be expected from Frasca's decision to merge criticisms of Reid's conduct as a teacher and an Association official. Thus, when viewing the evidence in the light most favorable to the Board, it is clear that criticism of the Association President's conduct as an officer made at his annual summative evaluation meeting could have the tendency to interfere with the exercise of rights guaranteed under the Act. And assuming the Board only intended to comment on Reid's role as a "leader" as opposed to an officer, the conclusion does not change because Section a(1) applies with

^{5/} As noted above, under the TEACH NJ Act and its regulations, an "ineffective" or "partially effective" rating in a summative evaluation will result in the teacher being placed on a corrective action plan. N.J.A.C. 6A:10-2.5.

equal force to any statutory employees considering whether to exercise their rights under the Act.

Moreover, an unlawful intent is not a necessary element of an a(1) violation. While the Commission further determined that the placement of the letters in the officer's personnel file in Black Horse Pike was evidence of a retaliatory motive, this case, which concerns only an alleged violation of section 5.4a (1), does not turn upon a finding that the Board acted with an anti-union^{6/} motivation. See Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986) ("Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient.").

The Board also argues that Frasca was within her rights to discuss alleged instances of unprofessionalism during Reid's evaluation because the District's rating criteria involves consideration of a teacher's "Collegiality and Professionalism." However, criticisms of the Association itself, including an

^{6/} While unlawful intent is not a required element, I note that Frasca's prepared statement includes some language that has been recognized in both the public and private sectors to be evidence of animus. For example, labor law is replete with cases where employers admonish employees who engage in protected activity for exhibiting a lack of professionalism, cooperation or an improper attitude. See Tp. of Wayne, P.E.R.C. No. 95-20, 20 NJPER 383 (¶25194 1994) (explaining employer complaints about attitude often provide evidence of animus); Schaumburg Hyundai, 318 NLRB 449, 458 (1995) (owner's statements that employee did not work well with his team and exhibited a bad attitude were evidence of animus).

expression of frustration regarding negotiations, is unrelated to Reid's performance as a teacher, and therefore inappropriate for discussion during an annual summative evaluation. Once again, this reasoning applies even if Frasca was addressing Reid "as a leader in the District" (rather than as a teacher or the President of the Association) when the comments were made.

The Board also contends that it was necessary for Frasca to raise issues with the Association during Reid's evaluation because Reid had allegedly ignored numerous prior requests to meet with the Administration to discuss Association concerns. However, even assuming Reid had ignored requests to meet with the Board in his capacity as Association President, a teaching staff member's annual evaluation is an inappropriate forum to discuss criticisms of the member's conduct as an Association representative, or of the Association generally, for the reasons stated above. Furthermore, a potential unfair practice by an agent of a majority representative cannot be remedied by an employer committing an unfair practice, and the record does not indicate that the Board filed an unfair practice charge contesting Reid's alleged failure to bargain in good faith or otherwise discharge his Association-related duties.

In sum, based on the undisputed evidence in the record viewed in the light most favorable to the Board, I find that the Board's conduct violated section 5.4a (1) of the Act. The

summative evaluation exists to evaluate a teaching staff member's performance as a teacher - not as a union official. Criticism of the Association's employee representative during an evaluation "confuses" the employee's distinct roles and reasonably tends to coerce employees in the exercise of their rights protected by the Act.

CONCLUSION

For the reasons stated above, I grant the Association's Motion for Summary Judgment and deny the Board's Cross-Motion for Summary Judgment.

RECOMMENDED ORDER

I recommend that the Commission order the Board to:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by criticizing the conduct of the Association and its officers at the annual summative evaluation meetings of employees who are Association officers.

B. Take the following affirmative action:

1. Post at all places where notices to employees are customarily posted, copies of the attached notice marked Appendix "A". Copies of this notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and after being signed by the Board's authorized representative, shall be maintained by the Board for a period of at least sixty

(60) consecutive dates thereafter. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced, or covered by other material.

2. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Board customarily communicates with employees by such means and the notice posting period begins after the end of the 2023-2024 school year.

3. Notify the Chair of the Commission, in writing, twenty (20) days from receipt what steps the Board has taken to comply therewith.

/s/ Christina Gubitosa
Hearing Examiner

DATED: March 7, 2024
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 18, 2024.



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,
We hereby notify our employees that:**

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by criticizing the conduct of the Association or its officers at the annual summative evaluations meetings of employees who are Association officers.

WE WILL take the following affirmative action:

1. Post at all places where notices to employees are customarily posted, copies of the attached notice marked Appendix "A". Copies of this notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and after being signed by the Board's authorized representative, shall be maintained by the Board for a period of at least sixty (60) consecutive dates thereafter. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced, or covered by other material.
2. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Board customarily communicates with employees by such means and the notice posting period begins after the end of the 2023-2024 school year.
3. Notify the Chair of the Commission, in writing, twenty (20) days from receipt what steps the Board has taken to comply therewith.

Docket No. CO-2023-001

Pinelands Board of Education
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830