

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK STATE-OPERATED
SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2003-234

SEIU LOCAL 617,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Newark State-Operated School District. The Complaint was based on an unfair practice charge filed by SEIU Local 617 alleging that the District violated the New Jersey Employer-Employee Relations Act when it denied a Local 617 business agent access to its central office to represent unit members in disciplinary and grievance hearings. The Commission concludes that the District had a substantial and legitimate security concern to deny access to the central office and that the District made reasonable accommodations to ensure that employees are properly represented in grievance and discipline hearings.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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NEWARK STATE-OPERATED
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Docket No. CO-2003-234

SEIU LOCAL 617,

Charging Party.

Appearances:

For the Respondent, Newark Public Schools Office of the
General Counsel, attorneys (Adam S. Herman, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Arnold Shep Cohen, of counsel)

DECISION

On August 3, 2004, SEIU Local 671 filed exceptions to a
Hearing Examiner's report and recommendations. The Hearing
Examiner found that the Newark State-Operated School District did
not engage in unfair practices under the New Jersey Employer-
Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically
5.4a(1), (2), and (5),^{1/} when it denied an SEIU Local 617

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. (5) Refusing to negotiate in
good faith with a majority representative of employees in an
appropriate unit concerning terms and conditions of

(continued...)

business agent access to its central office to represent unit members in disciplinary and grievance hearings. The Hearing Examiner recommended that the Complaint be dismissed.

The unfair practice charge was filed by SEIU Local 617 on March 12, 2003. On July 31, a Complaint and Notice of Hearing issued. On March 12, 2004, the District filed an Answer admitting that it denied Debbie Walker access to the District's central office, but asserting that: Walker was denied access for security reasons related to her previous District employment; and asserting that the denial of access did not interfere with Local 617's ability to represent employees.

On March 23, 2004, Hearing Examiner Wendy L. Young conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On June 23, 2004, the Hearing Examiner issued her report and recommendations. H.E. No. 2004-18, 30 NJPER 284 (199 2004). On August 3, SEIU filed exceptions. On August 13, the District filed an answering brief urging adoption of the Hearing Examiner's recommendations.

1/ (...continued)
employment of employees in that unit, or refusing to process grievances presented by the majority representative."

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, including her credibility determinations (H.E. at 3-16).

Debbie Walker is employed by Local 617 as a business agent. Local 617 represents employees in various blue collar and clerical titles employed in the District's 82 schools and its central office. Local 617 also represents employees of the cities of Newark, Irvington, and Jersey City and the Newark Housing Authority.

Walker is a former employee of the District. She worked for the District as a data control clerk/typist in the Payroll Department at its central officer. Walker resigned from the District on October 7, 2002 as part of a settlement agreement arising out of disciplinary charges brought against her.^{2/} The District charged Walker with various offenses related to alleged theft of overtime pay through tampering with her own records. The charges were based on a District investigation that revealed unauthorized overtime payments totaling approximately \$6,000 since 1999.

^{2/} We specifically reject Local 617's argument that the settlement agreement precluded the District from presenting evidence of its reasons for denying Walker access. The agreement requires the parties to keep its terms confidential, but does not address whether or not Walker can reenter the premises as a union representative or require the District to ignore its security concerns.

Article 22 of the parties' contract permits union representatives to have access to all buildings and facilities during working hours to adjust grievances, settle disputes, investigate working conditions, and effectuate the provisions and aims of the contract. The facility office must be notified that the representative is present.

Most disciplinary and grievance hearings are held at the central office. Visitors to that office must sign in at the street level lobby. There are security guards on each floor. Upon arrival, Local 617 representatives acknowledge their presence to the guard and go about their union business unescorted. Hearings are held in one conference room, but Local 617 representatives often leave the hearing room to get documents or speak to witnesses.

Central office computers contain confidential employee and student information. The computer system has changed since Walker left. Passwords are changed every few weeks, but computers with password-protected programs running are sometimes left unattended. In the 82 schools, computers are located behind the counters in the principals' offices where union representatives need permission to go.

Shortly after Walker's resignation from the District, Local 617 hired her as a business agent. On January 21, 2003, Walker returned to the central office to represent unit members at

disciplinary proceedings. Upon being made aware of Walker's presence in the building, and after speaking to the District's general counsel, the District's Director of Labor Relations asked Walker to leave. He was concerned about the security of the computers because Local 617 representatives historically have had free access to employees and their workstations. He was concerned that Walker could sit down at a computer unchallenged, especially since employees were not aware of the facts surrounding her resignation. He did not consider telling employees the reason she had left because, among other reasons, he did not want "to kick her when she was down." The Director was also concerned that Walker's ill-will toward the District gave her reason to misuse computer information if given the opportunity to do so. He was also concerned that Walker's presence would disrupt operations because her alleged misconduct had resulted in an investigation of all employees in the payroll department.

Although Walker's access to the central office was prohibited, she has been permitted to enter the 82 schools to service the membership. The District has no objection to Walker representing members at grievance or disciplinary hearings held outside of the central office and will hold hearings at other locations to accommodate Walker. Walker trained a chief shop steward to service employees at the central office. The District

hired a per diem employee to provide coverage when the steward is in hearings. Another union business agent also handled representation of employees at the central office.

Public employees have a constitutional right to present grievances through their chosen representative. N.J. Const. art. I, ¶19; see also Dover Tp., P.E.R.C. No. 77-43, 3 NJPER 81 (1977). Public employers must negotiate written grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations. N.J.S.A. 34:13A-5.3; see also Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978) (public employees have right to have grievances presented by majority representative). An employer action that tends to interfere with these statutory rights without a legitimate and substantial business justification violates 5.4a(1). See, e.g., New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Missouri Portland Co., 284 NLRB 432, 433 (1987) (employer violated a(1) by refusing to meet with union's grievance representatives).

The Hearing Examiner found that the District had substantial and legitimate business concerns that justified denying Walker access to the central office to attend grievance and discipline

hearings. Local 617 argues in its exceptions that the Hearing Examiner applied the wrong standard. It relies on a private sector case, King Soopers, Inc., 338 NLRB No. 30 (2002), which states that an employer can justifiably refuse to meet with a particular union representative if there is "persuasive evidence" that the presence of that individual would create ill-will and make good faith bargaining impossible." Local 617 contends that since there was no final determination that Walker actually engaged in the alleged misconduct, there is no persuasive evidence to justify the restriction on her access.

King Soopers is inapplicable. The District is not claiming that it will not meet with Walker or let her represent unit employees. It more narrowly maintains that because of its computer security concerns, it can reasonably refuse to meet with her in the central office. It is willing to allow her access to the District's 82 schools and will move hearings outside of the central office to accommodate her and Local 617.

More relevant private and public sector access cases permit an employer to enforce reasonable rules necessary to safeguard its property interests. See, e.g., Great Western Coca-Cola Bottling Co., 265 NLRB 766 (1982); Atlantic Cty., P.E.R.C. No. 98-8, 23 NJPER 466 (128217 1997). In Atlantic Cty., we held that an employer may not impose a total ban on a union representative's access to its premises without a substantial,

legitimate business justification. In that case, union president was terminated from employment by the County, which implemented a total ban on his access to the County's Justice Facility. The Hearing Examiner recommended finding that a ban extending beyond the portions of the jail that were off limits to non-employees was too broad and that the County should have to negotiate over reasonable access. We adopted that recommendation.

Here, the District's computer security concerns are substantial and legitimate and its ban is not total. Walker was charged with theft of overtime pay. She resigned pursuant to a settlement agreement under which she agreed that her accumulated vacation and personal leave would be used as restitution and that the employer would issue a Final Notice of Disciplinary Action. That Notice sustained the charges. No further adjudication on the charges was contemplated and none is needed to conclude that the District had a substantial and legitimate security concern. The District also made reasonable accommodations to ensure that employees are properly represented in grievance and discipline hearings, by other representatives at the central office or by Walker at an alternate location.^{3/} The employer's interest in

3/ The Hearing Examiner in Atlantic Cty. noted that the parties' contract did not guarantee the president access to the union office within the secure portion of the jail. Whether the access provision in this case guaranteed Walker access beyond that afforded by the District is an issue of contract interpretation not before us.

denying access outweighs any tendency of this denial to interfere with employee rights.

We also adopt the Hearing Examiner's recommendation to dismiss the remaining allegations in the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read 'L. Henderson', is written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Fuller, Mastriani and Watkins voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners DiNardo and Katz were not present.

DATED: January 27, 2005
Trenton, New Jersey
ISSUED: January 27, 2005

H.E. NO. 2004-18

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

In the Matter of

NEWARK STATE OPERATED
SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2003-234

SEIU LOCAL 617,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge filed by SEIU Local 617. The charge alleges that the Newark State Operated School District violated the New Jersey Employer-Employee Relations Act, specifically 5.4a(1), (2) and (5), when it denied Debbie Walker, a Local 617 business agent, access to the District's central office at 2 Cedar Street to represent its members. The Hearing Examiner found that the District's security concerns regarding Walker as a former District employee were substantial and legitimate. She found that these concerns outweighed Local 617's interest in having a representative of its own choosing. The Hearing Examiner also rejected the Charging Party's argument that since the settlement agreement resolving disciplinary charges against Walker was silent on her post-employment activities, it should be interpreted to permit Walker access to the District's central office.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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.

H.E. NO. 2004-18

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

In the Matter of

NEWARK STATE OPERATED
SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2003-234

SEIU LOCAL 617,

Charging Party.

Appearances:

For the Respondent,
Perry Lattiboudere, General Counsel
(Adam Herman, of counsel)

For the Charging Party,
Oxford Cohen, LLC, attorneys
(Arnold Shep Cohen, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 12, 2003, SEIU Local 617 (Local 617) filed an unfair practice charge with the Public Employment Relations Commission alleging that the Newark State Operated School District (District) violated 5.4a(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,^{1/} when it denied Local 617's Business Agent Debbie Walker

^{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
(continued...)"

access to the District's central office (2 Cedar Street) to represent a unit member at a hearing. Local 617 also asserts that the District did not respond to its request that Walker be permitted to attend future hearings at the central office.

On July 31, 2003, a Complaint and Notice of Hearing issued (C-1).^{2/}

On March 12, 2004, Respondent filed its Answer admitting that it denied Walker access to the District's central office but denying that it committed an unfair practice (C-2). It contends that Walker was denied access for security reasons related to her former employment with the District. Its actions, it asserts, have not interfered with Local 617's ability to fully conduct its representational activities in the District.

A hearing was held on March 23, 2004. The parties submitted post-hearing briefs by May 7, 2004 and reply briefs by May 25, 2004. Based upon the entire record, I make the following:

1/ (...continued)
interfering with the formation, existence or administration of any employee organization. (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/ "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to charging party's and respondent's exhibits respectively. Transcript references to hearing dates are "T-".

FINDINGS OF FACT

1. The Newark State Operated School District is a public employer within the meaning of the Act (T8). The District is composed of eighty two (82) schools, but its headquarters are at 2 Cedar Street where most departmental disciplinary and grievance hearings are conducted (T22, T107). Occasionally, disciplinary hearings are conducted in the District schools upon request of the unions and/or for convenience. The District does not object to conducting either departmental or grievance hearings at other locations outside of 2 Cedar Street (T107-T108).

2. Local 617 represents employees in various blue collar and clerical titles employed by the District (CP-2). It represents approximately four hundred (400) custodians and security guards throughout the District with approximately one hundred fifty (150) of these employees assigned to 2 Cedar Street. The remaining employees represented by Local 617 are dispersed among the District's 82 schools (T23-T24, T79-T80). Although Local 617 represents certain District clerical employees, the majority of clerical employees working in the schools are represented by the Newark Teachers Union (NTU) (T134, T152).

Local 617 also represents approximately four thousand (4,000) employees of the City of Newark and Newark Housing

Authority as well as employees of Irvington and Jersey City (T20-T21, T55-T56).

3. Debbie Walker is currently employed by Local 617 as a business agent. She was hired on January 1, 2003 (T20). Prior to January 1, 2003, Walker was employed as a data control clerk/typist in the District's payroll department located at 2 Cedar Street. Her duties included processing the payroll and keeping time records. Her employment with the District began in October of 1994 (T21, T47).

While working for the District, Walker was also a chief shop steward and a member of the negotiations team for Local 617 (T21). When Walker was the Local 617 chief shop steward, there were no business agents specifically assigned to the District employees at 2 Cedar Street because Walker handled representation of Local 617 members. Only occasionally did a business agent assist her in hearings (T24-T25).

On October 7, 2002 Walker resigned her position with the District and entered into a settlement agreement dated October 18, 2002 resolving certain disciplinary charges against her. Walker was charged with various offenses related to her alleged manipulation of personal payroll records to reflect overtime which she had not worked. On October 23, 2002 the charges were sustained by a Final Notice of Disciplinary Action (CP-3, CP-4, R-1, R-3, T41-T44, T54-T55, T102, T104, T140).

4. Rahaman Muhammad is the president and business manager of Local 617. Although Muhammad knew of the District's charges against Walker which led to her resignation, he hired her to service the District's employees. He reasoned that as a former District employee, she was familiar with the contract, having been chief shop steward and on the negotiation team (T21, T74, T79).

At the time Local 617 hired Walker, Bernard Grayson was assigned to represent the Newark Housing Authority employees. Martha Rivera was assigned to represent employees in the District's pre-schools. Bruce Simpson was assigned to represent City of Newark and Irvington Housing Authority employees (T76-T77). These assignments changed after January 21, 2003. [See generally Facts 16 through 18].

On that date, Walker returned as a business agent, for the first time since her resignation, to 2 Cedar Street in order to represent Local 617 members at disciplinary hearings (T33). The District denied Walker access to its central office because it had security concerns growing out of her former employment with the District; namely, she would have access to employee computers while servicing Local 617 members. The District was also concerned with disruption in its operation (T103-T105, T151-T152).

Background and the Parties Relationship Prior to January 21, 2003

5. The District and Local 617 are parties to a collective negotiations agreement effective from March 1, 2001 through February 28, 2004 (CP-2). They are in successor negotiations.

Article 22 is entitled Union Stewards. Section 2, entitled Visitation Rights, states:

Representatives of the Union shall have access during working hours of all facilities, buildings, grounds, and other places in which employees covered by this Agreement work, for the purpose of adjusting grievances, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this Agreement. The facility office must be notified that the representative is in the building. (CP-2)

6. District headquarters at 2 Cedar Street occupy the eighth, ninth and tenth floors of the building.^{3/} There are Local 617 members working on all three floors (T148-T149).

Visitors to the building sign in at the street level lobby before proceeding to their destination(s) within the building.

^{3/} The eighth floor consists of various departments including payroll, budget, accounts payable, technical support, benefits, food and nutrition, records, purchasing, human resources, transportation, design and construction and facilities. This floor also houses the departmental hearings (T148). Most hearings are held in conference room 804 (T139). The ninth floor consists of instructional departments such as special education and pre-school. The tenth floor houses, among other departments, information systems, community development, legal, security services and the superintendent's office (T148-T149).

There are security guards on each of the District's floors. Upon arrival, the Local 617 representative acknowledges her presence to the guard on each floor and then goes about her union business without escort (T27-T28). Each union representative carries an identification card/badge given to them by the District (T27). The Local 617 representatives have access, contractually and by practice, to all employees and are given freedom to move anywhere within the 2 Cedar Street facility to service their members (CP-2, T111, T140).

Ordinarily, the Local 617 representative and/or shop steward go to the employee's work station and either speak to the employee there or request permission from a supervisor to interview the employee away from the work area (T25-T26). Although hearings are usually held in one conference room (room 804), during hearings it is not unusual for Local 617 representatives to leave the hearing room to get documents or speak to witnesses (T139). Usually two, but sometimes more, Local 617 representatives attend departmental hearings to represent employees as well as shop stewards (T25, T77-T78, T109).

Walker's Employment with the District

7. Raphael Felli is the Director of Labor Relations for the District (T82). He has known Walker since he was first employed by the District and Walker was a shop steward for the union. He

had a good working relationship with her and considers her still a friend (T83).

8. Sometime in September of 2002 Felli was contacted by Director of Payroll Ms. White-Eutsey. She had been notified by Supervisor of Payroll Ms. Hatcher that there was an anomaly in Walker's time records for September 11, 2002. The original record reflected zero hours but was then changed to ten hours of overtime (T83, T116-T117). Felli was asked to conduct an investigation (R-4, T83, T86).

9. On September 19, 2002, after a preliminary investigation, Felli sent Walker a letter suspending her with pay beginning September 23, 2002 based on the allegations of overtime abuse (R-4, T84, T93-T94). Felli also began a more comprehensive investigation by conducting an audit of Walker's payroll records going back to 1999 which was as far back as computer records were kept (R-2, T86, T90).

Felli uncovered 26 incidents dating back to 1999 of unauthorized overtime charges totaling approximately \$6,000.00 as the result of Walker's tampering with her payroll records (R-2, R-3, T92). At the same time Felli was auditing Walker's account, he conducted an audit of other employees in the payroll department but found no irregularities in their accounts (T87).

10. After the full investigation, Felli brought disciplinary charges against Walker based on his findings. She

was charged with, among other matters, conduct unbecoming a public employee and misuse of public property. He served Walker with a Preliminary Notice of Disciplinary Action dated September 27, 2002 and a revised Preliminary Notice dated October 7, 2002 (CP-4, R-3).^{4/} Walker was represented by Local 617 throughout this period (T94-T96).

After reviewing the charges with the Local 617 representative, Walker tendered her resignation on October 7, 2002 and wrote that she would "not apply for any other position with the Newark Public Schools at any time" (CP-3). The letter of resignation was subsequently attached to a Memorandum of Agreement (MOA) between the District and Walker executed on October 18, 2002 (CP-4).

The MOA provides as follows:

1. Ms. Debbie M. Walker does not dispute nor affirm the charges set forth in the revised Preliminary Notice of Disciplinary action;
2. Ms. Debbie Walker shall voluntarily resign from her position with the Newark Public Schools;

^{4/} Felli contacted the Essex County Prosecutor's office to inform them of his investigation and tell them that he would forward the results to the Prosecutor (T95, T146). After the parties' entered into a settlement, Felli never followed through with or informed the Prosecutor's office of the settlement and no charges were filed against Walker by the Essex County Prosecutor's office (T146-T147).

3. The District accepts the terms of the attached October 7, 2002 resignation letter prepared by Ms. Walker;
 4. Ms. Debbie M. Walker voluntarily shall agree never to apply for any position within the Newark Public Schools as of the date of this agreement. Should she be erroneously hired [sic] this Memorandum of Agreement shall serve as the basis for her immediate termination without recourse to any grievance and/or court procedure;
 5. The Newark Public Schools will serve Ms. Debbie M. Walker with a Final Notice of Disciplinary Action along with one (1) original Memorandum of Agreement;
 6. Ms. Debbie Walker agrees that her accumulated vacation and personal leave time will be used by the District as restitution;
 7. This matter is dismissed as a [sic] settled and Ms. Walker waives and releases any and all individual or class claims of any kind or nature . . .
 8. The District waives and releases Ms. Walker from any action arising from charges contained in the Revised Notice of Disciplinary hearings.
 9. The parties agree that they shall keep the existence and terms and conditions of this Agreement, and any and all actions of the parties in accordance therewith, strictly confidential. (CP-4)
11. In constructing the settlement with Walker, Felli and the District were concerned with restitution for the unauthorized overtime and that Walker never be employed with the District again or have access to its computer systems (T99-T101). They

did not want to preclude her, as a non-employee, from all District property because she had a nephew in the school system and might have to visit a school or, as a former employee, she might have to go to District offices to inquire about her pension (T100-T102). In entering into the MOA, however, the District did not consider that Walker might, in the future, be employed by Local 617 and have access to 2 Cedar Street as a business agent. It was concerned with barring her future employment with the District (T101).

12. Felli did not tell Walker's co-workers the reason for her resignation or reveal the details of his investigation to them. However, the employees in the payroll department were aware that he was looking into all of their records because of allegations of misuse of overtime (T118-T119, T130).

January 21, 2003 - Walker denied access to 2 Cedar Street

13. On January 21, 2003 Walker returned to 2 Cedar Street for the first time since her resignation (T33). She was scheduled to handle departmental disciplinary hearings with another Local 617 business agent Patrice DeSmith (T31-T32).

Walker signed in at the lobby and went to the eighth floor where she was greeted by several Local 617 members who were happy to see her (T32). After Walker arrived at the hearing room,

Labor Relations Assistant Jodi Pitman informed her boss (Felli) that Walker was in the building (T123-T124, T126).

14. Felli had several concerns about Walker's presence at 2 Cedar Street. First, he was concerned with the security of the computer systems because Local 617 representatives historically have free access to employees and their work stations (T104, T139-T140). Walker was known to the employees. Felli was concerned that she could sit down at any computer and no one would question her presence, especially since the employees were not aware of the facts surrounding her resignation. Also, although the system had been changed since Walker left to prohibit employees from making changes to their own personnel records, Felli felt that Walker could still manipulate other employee records and gain access to private information (T103-T104, T123, T129-T130, T132, T139-T142). He never considered telling them the reason for her separation from employment because, among other reasons, he did not want "to kick her when she was down" (T130-T131). Absent this kind of knowledge, no employee would have had any reason to question Walker's activities in the building, including her possible computer use while there (T129).

The computers contain confidential employee and student information including, among other items, bank account information and court orders (T150-T151). Although employees

have passwords for their computers which are changed every few weeks, when they leave their work stations for a break or to go elsewhere in the building, the computers are not usually shut down nor are open programs otherwise password protected. Felli surmised that anyone sitting at a desk could gain access and manipulate information (T86, T104-T105, T128-T129, T140-T141). Felli was concerned that Walker harbored ill-will toward the District because of the circumstances of her resignation and, therefore, had reason to misuse computer information if given the opportunity to do so (T141).

Felli was also concerned that Walker's presence in 2 Cedar Street would cause a disruption in operations. Although the original investigation of Walker's activities was triggered by a non-bargaining unit co-worker and Walker was the primary target, her alleged misconduct resulted in an investigation of all employees in the payroll department (T106-T107, T119-T120).

As an example of his concern that Walker's presence would cause a disruption, Felli testified that he was approached by several employees on January 21, 2003 who informed him of Walker's presence. Although Felli's testimony was vague in this regard - he could not remember their names, job titles or what departments they worked in - , his testimony meshed with Walker's testimony that a lot of people approached her when she entered 2 Cedar Street to greet her and express their happiness to see her

(T32, T103-T104, T123-T125). The mere fact, however, that a few people came up to Felli to inform him that Walker was in the building does not establish that operations were actually disrupted. Nevertheless, Felli concluded that Walker's presence could disrupt operations.

Based on his concerns, and after speaking with the District's general counsel, Felli asked Walker to leave 2 Cedar Street.

15. Muhammad was contacted when Walker was denied access to the building. He spoke to District representatives about the situation but was unable to persuade them to reverse their decision (T77).

Local 617's attorney subsequently wrote to the District protesting Walker's treatment and reiterating their position that as a Local 617 business agent she has the right to represent members at 2 Cedar Street hearings. He further stated that denying her access was tantamount to depriving Local 617 members of representation and argued that the Memorandum of Agreement between the District and Walker does not bar her from entering any District property. The letter continues that unless the District permitted Walker to enter District property to represent its members, it was recommended that Local 617 file an unfair labor practice charge (CP-1). The District did not respond to the letter (T38).

Representation of Local 617 members after January 21, 2003

16. Since January 21, 2003, although denied access to 2 Cedar Street, Walker has been permitted access to Local 617 members in the 82 schools because the District does not have the same security concerns at the schools where computers are located behind counters at the Principal's office. The clerical employees operating these computers are NTU members. Walker would need permission to go behind the counter and would have no reason to do so. Therefore, her access in all 82 schools is the same as for other business agents or Local 617 representatives (T56-T57, T79, T108, T137-T138).

Additionally, the District has no objection to Walker representing members at grievance or disciplinary hearings held outside 2 Cedar Street. Hearings are occasionally held at different schools to accommodate the union. Moreover, it has no objection to moving other hearings to locations outside of 2 Cedar Street to accommodate Walker and Local 617 (T107-T108).

17. Walker trained Lorenzo Hall, a District employee who works from 3:00 p.m. to 11:00 p.m., as chief shop steward to service employees at 2 Cedar Street (T36, T60, T62). The District hired a per diem employee to relieve Hall in the event he has to conduct any hearings which continue after 3:00 p.m. when he is scheduled to begin work. Another business agent,

Bruce Simpson, works with Hall to represent employees at 2 Cedar Street hearings (T62, T77, T109).

Both Simpson and Hall have freedom of movement throughout 2 Cedar Street to represent Local 617 members. In fact, except for Walker, there has been no change in access afforded to Local 617 representatives to service unit members (T109-T111). Walker has replaced Simpson in representing City of Newark employees and employees at the Irvington Housing Authority (T78-T79).

18. To date, no Local 617 members have complained to Felli that they have experienced difficulties with conducting disciplinary or grievance hearings because of Walker's inability to represent them at 2 Cedar Street (T109-T110).

ANALYSIS

Local 617 asserts the District violated the Act when it denied Walker, a Local 617 business agent, access to District offices at 2 Cedar Street to represent Local 617 members. If the District had security concerns, it contends, then it could have monitored Walker's movements while she was at 2 Cedar Street to prevent unauthorized activities.

The District counters that it had a substantial and legitimate business reason for denying Walker access growing out of her former employment with the District. Walker, it asserts, was separated from employment for manipulating the District's computer system over a three-year period to increase her overtime

payment. It contends that since Local 617 representatives historically have unlimited access to its members at 2 Cedar Street, Walker could potentially tamper with the computer system and gain access to confidential employee and student information. It does not want to take that risk by allowing Walker unfettered access to 2 Cedar Street. It asserts that the District simply exercised its right to protect itself from a former employee who abused her position of trust. The District also contends that Walker's presence at 2 Cedar Street would create ill-will among the employees and disrupt operations.

Article I, paragraph 19 of the New Jersey Constitution provides that public employees have the right to present proposals to their employers and make known their grievances "through representatives of their own choosing". The Commission affirmed this right in Dover Twp., P.E.R.C. No. 77-43, 3 NJPER 81 (1977). It held that the Act, at N.J.S.A. 34:13A-5.3, implements the constitutional provision through the selection of majority representatives chosen by employees in an appropriate unit who in turn negotiate and present grievances through representatives they themselves select.^{5/} This right, however, is not without restriction. When an employer places limits on the majority

^{5/} The Act also prohibits majority representatives from dictating or interfering with the employer's choice of representative(s) for collective negotiations and grievance processing. N.J.S.A. 34:13A-5.4(b).

representative's access to unit members, the interests of the employee organization in having representatives of its own choosing is balanced with the right of the employer to maintain order in its work place. New Jersey Office of Employee Relations, I.R. No. 2000-14, 26 NJPER 266 (¶31103 2000). Thus, each case turns on its own unique fact pattern.

In Salem County, I.R. No. 86-23, 12 NJPER 546 (¶17206 1986), a Commission Designee granted the union's request for interim relief and ordered the County to bargain with the union's chosen negotiator. The County had refused to negotiate with the union's team if its president was at the negotiations table, because he was under suspension for allegedly punching his foreman. Since the charges were disputed by CWA and appeared to grow out of an isolated incident which had not yet been proven, the Designee granted CWA's request. However, in rejecting CWA's contention that it had an absolute right to have a representative of its own choosing, the Hearing Examiner noted that "[o]pprobrious conduct on the part of an employee representative might strip an employee representative of this right". Id. at 547.

Similarly, in Atlantic County (Department of Corrections), H.E. No. 97-22, 23 NJPER 206 (¶28100 1997) aff'd at P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997), on a motion for summary judgment, the Hearing Examiner found a violation where the employer placed a total ban on the union president's access to

the County Justice Facility premises. The union represented correction officers. The parties' contract permitted the president and vice-president access to the Justice Facility when off duty to conduct union business. During a negotiations session the County served the president with a termination notice. The County refused to negotiate if the union president was on the team because he was fired and no longer an employee. The County asserted that the union office was located within the "secured perimeter" of the jail, an area accessible only to employees and inmates. Additionally, it contended that its policy was not to permit non-employees inside the jail's secured area without an escort and/or prior authorization. Citing Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983), the Hearing Examiner explained that absent a substantial, legitimate business reason, an employer may not impose a total ban on access to its premises. She found that in this particular instance, although complete denial of access to all County facilities might not be appropriate, some limitations on access could be appropriate because access for non-employees to the employer's property are determined by different standards than for employees. New Jersey Dept. of Transportation, P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990), mot. for recon. den. P.E.R.C. No. 91-28, 16 NJPER 535 (¶21237 1990). The Hearing Examiner determined that certain areas of the jail itself are off-limits to non-employees for

potentially valid security reasons. Id. at 208. Contrast Passaic Cty. Park Comm., P.E.R.C. 85-56, 11 NJPER 16 (¶16007 1984) (where past practice and contract permitted non-employee union representative access to employees without employer's permission to investigate and adjust grievance, employer violated 5.4a(1) and (5) of the Act by unilaterally terminating the term and condition of employment of non-employee visitation on employer's premises during working hours).

Federal precedent in the private sector supports the Commission's balanced approach to issues of access.^{6/} In Granite City Steel Co., 167 NLRB 310, 66 LRRM 1070 (1967), the employer violated the National Labor Relations Act (NLRA) when it failed to negotiate with the union before it restricted a business representative's access to the plant. However, the Board distinguished the conduct of one non-employee business agent who instigated a job action disrupting plant production and found the employer's actions in excluding that agent from its premises justified. The Board concluded, however, the misconduct was personal to the one business agent and did not justify the employer's "unilateral wholesale limitation of such right [of access] for all business agents". Id. at 316.

^{6/} The Commission has long been guided by federal precedent interpreting the Labor Management Relations Act in its application of our Act. Lullo v. International Association of Firefighters, 55. N.J. 409 (1970).

Similarly, in Great Western Coca-Cola Bottling Co., 265 NLRB 766, 112 LRRM 1286 (1982), while acknowledging that restrictions on a union representative's right to access the work site impairs a union's ability to police its agreement and diminishes employees' rights under the NLRA, the Board recognized the employer's right to enforce reasonable rules to safeguard its property interests.

In applying these cases to the facts of this particular matter, the District has established a substantial, business justification for denying Walker access to 2 Cedar Street. Unlike Atlantic County, the District has not placed a total ban on Walker's access. It has limited only Walker, a non-employee business agent, and her restriction is limited to 2 Cedar Street. She is still permitted access to members at the eighty two (82) District schools because the District's security concerns are not the same as at its headquarters. [See Fact No. 16.] The District has not changed its policies on access as to other Local 617 business agents.

Moreover, the District's security concerns regarding Walker's access to its computers are substantial and legitimate. Unlike Salem County where the charges against the employee union representative grew out of an isolated incident which had not yet been proven, here, charges against Walker were based on her conduct as a District employee which was pervasive over a period

of years, involved manipulation of the District's computer system to authorize unearned overtime and resulted in the issuance of a Final Notice of Disciplinary Action sustaining charges.

Charging Party asserts that the District could have addressed its security concerns by alerting 2 Cedar Street employees to guard against Walker's use of their computers or by monitoring the meetings between Walker and Local 617 members. Neither suggestion is tenable.

First, alerting District employees would have placed the District in the untenable position of having to reveal to its employees the reasons for their increased vigilance in contravention of the strict confidentiality terms of its settlement agreement with Walker. Additionally, the unlimited access allowed Local 617 representatives to the three floors occupied by the District at 2 Cedar Street makes this solution cumbersome at best and in all probability unworkable.^{2/} Finally, monitoring Walker's meeting with Local 617 member presents other concerns because employees are entitled to meet in private with their representatives without interference from employers or their agents. Moreover, it would necessitate assigning either a

^{2/} Charging Party argues that since disciplinary hearings and arbitrations are held in set locations at 2 Cedar Street, attendance at such meeting could not lead to Walker's accessing computers. The record demonstrates, however, that Local 617 representatives freely access members throughout the 3 floors at 2 Cedar Street both before, during and after hearings and arbitrations.

security guard who is in the Local 617 unit or another District employee to follow Walker around in the event she leaves the meeting and goes to another location to consult with other members.

Local 617 hired Walker as its business agent because of her knowledge of contract negotiations and grievance processing which grew out of her experience as a District employee and a Local 617 shop steward. However, Local 617 knew or should have known when it hired Walker as its representative several months after she resigned her District post that her employment history with the District might raise concerns about her access to 2 Cedar Street. The settlement agreement Walker entered into with the District, allowing her to voluntarily resign in exchange for her promise never to work for the District in the future and payment of restitution was brokered by Local 617.

Nevertheless, Charging Party asserts that the settlement agreement on its face allows Walker access to 2 Cedar Street. It reasons that since the agreement addresses Walker's future employment with the District but is silent as to any other restrictions on her post-employment activities or access to District premises - e.g. Walker's access as a Local 617 employee, the agreement should be read to allow Walker access.^{8/}

^{8/} Charging Party characterizes the silence on the issue of Walker's access to District property as a Local 617 employee
(continued...)

The District counters that the settlement agreement was intended to resolve disciplinary charges stemming from Walker's employment with the District not possible future employment with Local 617.

Based on the foregoing, an inference cannot be drawn from the agreement's silence on Walker's post-employment activities and access to District property that Walker was intended to be granted unfettered access as a Local 617 representative to 2 Cedar Street. Neither party envisioned that scenario when the agreement was executed. Certainly, there is no evidence in the record to suggest her employment with Local 617 was even being contemplated at the time the settlement agreement was crafted. Therefore, the District could not have reasonably foreseen issues arising out of her potential employment with Local 617.

Additionally, Felli, who negotiated the agreement on behalf of the District, explained why it did not bar all access to 2 Cedar Street. The settlement was narrowly tailored to allow Walker, who had relatives who were students in the schools, access to District headquarters on their behalf. He also observed that Walker, as a former employee, might need to speak

8/ (...continued)
as a contract ambiguity. It cites cases addressing contract interpretation where ambiguities are found. These cases are inapposite since there was no ambiguity in the meaning of the contract language, only silence on an issue.

to District personnel about her pension benefits. These limited exceptions seem reasonable under the circumstances.

Charging Party asserts that the District's actions in denying Walker access to 2 Cedar Street violated 5.4a(2) of the Act. Commission cases dealing with 5.4a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by membership in a union and her position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976). While motive is not an element of this offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980); Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986). The facts of this record do not support this violation.

The District has not prevented Local 617 from representing its members. The record demonstrates that the District accommodated Local 617 by hiring a per diem employee to relieve Lorenzo Hall, a District employee and Local 617 representative, when hearings at 2 Cedar Street extend into his work hours. The District also offered to move hearings out of 2 Cedar Street so that Walker could attend. It has not prevented any other Local 617 from representing its members nor has it changed its policies

giving Local 617 representatives free access to its members at 2 Cedar Street. The only restriction it has placed on Local 617 representation is as to one agent, Walker, and as to one facility, 2 Cedar Street. Even though that facility houses the most Local 617 members in one location (approximately one-hundred fifty), the District has provided reasonable accommodation to permit Local 617 to continue to conduct business as usual, and it has done so.

Local 617 is not prevented from utilizing Walker's expertise and experience in representing any of its other units outside the District. It represents approximately 4,000 employees throughout the Newark area. Also, Walker has trained the Local 617 representatives currently acting on behalf of the members in the District and has the ability to train other business agents based on her generalized knowledge of negotiations and contract administration.

Based on the foregoing, I do not find that the District violated 5.4a(1), (2) and (5) of the Act.^{2/}

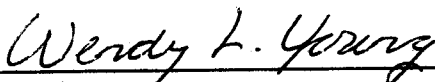
9/ To the extent the charge alleges that the District did not respond to a February 26, 2003 letter from Local 617 General Counsel, this allegation was not addressed in the parties' briefs. Standing alone it does not articulate a violation of the Act. The letter itself is not request requiring a response, but represents a statement of position and communicates an intended course of action. [See generally Fact No. 15.]

CONCLUSIONS OF LAW

The District did not violate 5.4a(1), (2) and (5) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.



Wendy L. Young
Hearing Examiner

Dated: June 23, 2004
Trenton, New Jersey