D.U.P. No. 2010-1

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-420

TRENTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refused to issue a complaint in a charge by the Trenton Education Association alleging that the Trenton Board of Education violated the Act by not allowing two union representatives to attend an investigatory interview with an employee. The TEA argued that the parties practice had allowed two representatives in the past. The Board argued that the Weingarten law and the parties contract did not require more than one representative. The Director held that Weingarten only required one representative, and any dispute over the parties contract language was more appropriate for the parties grievance procedure.

D.U.P. No. 2010-1

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2009-420

TRENTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Hill Wallack, attorneys
(Dana Lane, of counsel)

For the Charging Party,
Jim Loper, NJEA Field Representative

REFUSAL TO ISSUE COMPLAINT

On May 11 and May 18, 2009, the Trenton Education Association (TEA) filed an unfair practice charge and amended charge against the Trenton Board of Education (Board). The TEA alleges that on or about May 11, 2009, the Board violated sections 5.4a(1) and (2)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act) by not allowing one of its negotiations unit employees to be accompanied by two

1/ These provisions prohibit public employer, 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."

TEA representatives in a meeting with the principal of the school to which the employee was assigned and another school principal. The TEA alleges that by disallowing its two representatives to attend the meeting, the Board interfered with the employee's Weingarten[2/] rights; unilaterally changed a practice permitting more than one TEA representative to attend meetings which might have resulted in discipline of unit employees; interfered in the operation and administration of the TEA and engaged in anti-union animus.[3/]

The Board denies violating the Act. It contends that it met its Weingarten obligation by allowing one TEA official to represent the employee and that the parties' collective negotiations agreement does not provide for more than one TEA representative to be present at an investigatory meeting which might lead to discipline of an employee. The Board also argues that its restriction on the number of TEA representatives at such a meeting does not interfere with the operation or administration of the TEA and does not demonstrate anti-union animus.

2/ NLRB v. Weingarten, 420 U.S. 251 (1975).

3/ A charging party must specify the subsection(s) of the Act alleged to have been violated . . ." N.J.A.C. 19:14-1.3. An alleged unilateral change in a term and condition of employment requires a charging party to specify that 5.4a(5) of the Act has been violated. An allegation of anti-union animus requires an allegation that 5.4a(3) of the Act has been violated. Neither section has been cited on the charge form and these allegations are dismissed.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. On October 15, 2009, I wrote to the partes, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for that conclusion. The letter also provided the parties an opportunity to respond not later than October 26, 2009. On October 29, 2009, the TEA filed a reply. I decline to issue a complaint.

The TEA and the Board signed a collective negotiations agreement which expired on August 31, 2009. The agreement covers the Board's certificated employees.

On May 11, 2009, a TEA unit member was asked to attend a meeting with her school principal. For purposes of this decision, the unit member reasonably believed that the meeting might result in her discipline. She requested that the TEA president and first vice-president attend the meeting as her Weingarten representatives. Before the meeting began, another school principal who is also the president of the Trenton Administrators and Supervisors Association (TASA) told the TEA that only one of its representatives could attend the meeting.

The meeting convened with both principals, the unit member and one TEA representative.

The TEA asserts that in a previous meeting with the unit member and school principal, a second administrator had also attended, together with two TEA representatives. The TEA also asserts that in November and December, 2008, similar meetings were conducted with two administrators, two TEA representatives and a unit employee. The Board did not object to the number of TEA representatives attending those meetings. Finally, the TEA asserts that over the past six and one-half years, the Board has allowed more than one TEA representative to attend grievance and/or disciplinary investigations. The TEA contends that these facts establish a practice of permitting more than one TEA representative to attend meetings which implicate an employee's Weingarten right to representation. The TEA asserts that on May 11, 2009, the Board unilaterally changed that practice by allowing only one TEA representative to accompany a unit member to the meeting with her principal.

The Board does not dispute that two TEA representatives attended meetings with the unit employee and administrators. The Board contends however, that Weingarten does not require an employer to accommodate more than one union representative. The Board asserts that on May 11, 2009, it met its Weingarten

obligation by allowing one union representative to attend the meeting with the unit employee.

The parties' collective negotiations agreement provides in a pertinent part:

> Article XIV - Teacher and Association Rights
>
> E.1. Whenever any teacher is required to appear before the Board or any committee, member, representative or agent thereof concerning any matter which could adversely affect the continuation of that teacher in his/her office, position or employment or the salary or any increments pertaining there to, then he/she shall be given prior written notice and shall be entitled to have a representative of the Association present to advise him/her and represent him/her during such meeting or interview.
>
> 2. Whenever a teacher is required to appear before the Board concerning discipline matters, he/she shall be given five (5) days prior written notice and reasons for the meeting or hearing. Said teacher may be represented by a person of their choosing.
>
> Article III - Grievance Procedure, Paragraph D, procedure:
>
> 2. Level Two
> 2 (b) The Superintendent and/or his/her designee shall represent the administration at this level of the grievance procedure. Within ten (10) school days after the grievance is filed with the Superintendent and his/her designee shall hold a hearing on the grievance unless the grievant states in writing that/he/she does not desire such a hearing. The grievant and a representative of the AGC shall be present at the hearing and may present such facts as are relevant to the grievance being considered.

> 3. Level Three
>
> (b) The Board shall appoint two or more of its members as hearing officers to hear grievances at this level. . . The hearing officers shall meet with the grievant and representatives of the AGC on the grievance and his/her (or their) first regular meeting after the AGC has notified the Superintendent of its intention to appeal, for the purpose of reviewing the relevant facts presented at Level Two. The grievant and no more than six (6) representatives of the AGC shall be present solely for the purpose of reviewing the accuracy of the facts presented below and to certify any documentary evidence that may have been presented below.
>
> Article III Grievance Procedure
>
> E. Right of Teachers to Representation
>
> 2. Any aggrieved person may be represented at all stages of this grievance procedure by a person of his/her own choosing, except that he/she may not be represented by a representative or by an officer of any teacher organization other than the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of this grievance procedure (emphases added).

The Board argues that these contractual provisions establish that "a" TEA representative may represent a unit member at an investigatory/disciplinary meeting. It asserts that it adhered to the terms of the agreement, notwithstanding the possibility of a differing practice. It also asserts that its conduct did not interfere with the TEA's right to operate and administer its organization and does not show anti-union animus.

ANALYSIS

An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, and is known as a Weingarten right. Weingarten was adopted by the New Jersey Supreme Court in UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335(¶32119 2001). The Court in Weingarten wrote: "[t]he union representative . . . is safeguarding not only the particular employee's interests, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not impose punishments unjustly." Id. at 420 U.S. 260.

Weingarten sets forth and reiterates a unit employee's right to "the union representative," "his union representative," "a union representative" or "union representative." Nothing in the

decision indicates that more than one union representative was needed to protect either the employee's right to union representation or the union's interest in protecting the rights of the entire unit through representation of specific employees.

The parties in this case do not dispute that the employee was accompanied and represented by a TEA official during the investigatory interview. Accordingly, I find that neither the employee's Weingarten protections nor the TEA's interest in protecting the entire negotiations unit were violated.

The TEA asserts that the parties have a practice of allowing more than one TEA representative to attend such investigatory interviews of unit employees. Such a practice would not prevail in the face of a contract provision clearly setting forth the disputed term and condition of employment. Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Several pertinent contract articles permit TEA unit employees to request "a representative of the Association," or "a person" of their choosing. Only at level three of the grievance procedure (before hearing officers) does the contract provide that "representatives" (plural) may participate, albeit for an expressly limited purpose. No facts suggest and the TEA does not assert that the May 11 meeting was conducted pursuant to level

three of the parties' grievance procedure. Nor do any facts suggest that the Board's action was in retaliation for any protected conduct.

The TEA also contends that the presence of the second principal (also, TASA's president) and his decision to allow only one TEA representative to attend the investigatory meeting, violates 5.4a(2) of the Act. I disagree.

N.J.S.A. 34:13A-5.4a(2) prohibits an employer from dominating or interfering with the administration of an employee organization. In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764, 765 (¶17291 1986), the Commission defined that provision's terms:

> Domination exists when the organization is directed by the employer, rather than the employees. . . . Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity.

Assuming that the second principal attended as an employer representative and not as a representative of the administrators' association, I am not persuaded that his alleged disallowance of a second TEA representative at the May 11 meeting interfered with the TEA's capability to "function independently." No facts suggest that the Board's action was "aimed at the employee organization as an entity." The 5.4a(2) allegation is dismissed.

To the extent that the TEA believes that the Board's action violated its contract, the TEA could pursue that concern through its grievance procedure. Any dispute over the interpretation of the parties contract terms regarding the above cited pertinent language is not complaintable. New Jersey Dept. Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The Commission's complaint issuance standard has not been met and I refuse to issue a complaint on the allegations of this charge.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Arnold H. Zudick, Director

DATED: December 8, 2009
Trenton, New Jersey

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

Any appeal is due by December 18, 2009.