

H.E. NO. 2024-4

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

In the Matter of

NEW BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-006

NEW BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the New Brunswick Board of Education (Board) violated 5.4a(3) and derivatively a(1) of the New Jersey Employer-Employee Relations Act (Act) when it disciplined New Brunswick Education Association (Association) representative Gerald Sherief for his behavior at liaison meetings during the 2021-2022 school year. During the meetings, which were held via teleconference, Sherief was acting as a union representative (not as an employee of A.C. Redshaw school) and addressing Principal Taylor about issues of concern for the Associations's membership. Due to the nature of the meeting, both Sherief and Principal Taylor were on equal footing-management to labor. Therefore, Sherief's behavior was insufficient to cause him to lose the protections of 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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Appearances:

For the Respondent,
Hendricks & Hendricks, attorneys
(George F. Hendricks, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

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

On July 8, 2022, New Brunswick Education Association (Association) filed an unfair practice charge against the New Brunswick Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically, section 5.4a(1), (3) and (5)^{1/}, by discriminating against unit employee and

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or (continued...)"

Association representative, Gerard Sherief (Sherief), in retaliation for his exercise of protected conduct. The charge more specifically alleges that Sherief was disciplined for his conduct during a meeting with management where he served as an Association representative.

On August 25, 2022, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the 5.4a(1) and (3) allegations but declined to issue a Complaint on the 5.4a(5) allegations (C-1).^{2/} On August 26, 2022, the Board filed an its previously submitted position statement dated August 8, 2022 in lieu of a formal Answer. (C-2).

On April 18, 2023, I conducted a Hearing at which the parties examined witnesses and presented exhibits. The parties submitted post-hearing briefs by July 19, 2023.

Upon the record, I make the following findings of fact:

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- 1/ (...continued)
condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by this act.
(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to press grievances presented by majority representative.
- 2/ "C" refers to Commission exhibits; "J" refers to joint exhibits; "CP" refers to Charging Party exhibits; and "R" refers to Respondent exhibits.

1. The Board is a public employer within the meaning of the Act. The Association is the exclusive majority representative of all personnel employed or on leave by the Board. (CP-1).

2. The Board and the Association are parties to a collective negotiations agreement (CNA) effective July 1, 2019 through June 30, 2022. (C-1).

3. Sherief has been employed by the Board for approximately 21 years. (T18). Sherief has also served as a building representative for the Association for the last 11 years. (T20).

4. From the start of his employment, until the Fall of 2022, Sherief was assigned to A.C. Redshaw School (A.C. Redshaw) teaching math and science. (T18-19). During his last year at A.C. Redshaw, the 2021-2022 school year, Kimberly Taylor (Principal Taylor) served as building principal.

5. Pursuant to Article XVII of the CNA:

A. 1. The Association shall form a Liaison Committee for each school building.

2. The School Building Liaison shall meet at regular intervals throughout the school year and as need arises with the building principal.

3. The School Building Liaison Committee shall review local school problems and practices, make known the views of the employees to the principal, and play an active role with the principal in the revision or development of building policies.

6. Sherief, as union building representative, attended liaison meetings. (T22).

7. The first liaison meeting for the 2021-2022 school year occurred in October 2021. (T22). All liaison meeting held during the 2021-2022 school year were done via teleconference. (T23). The liaison meetings normally took place after school, between 3:30pm and 4:00 pm. (T87).

8. On or about April 6, 2022, a liaison meeting occurred via teleconference. (T23, 25). The attendees of the meeting on behalf of the Association were Sherief, Leisha Ross-Hairston (Ross-Hairston) and Glenis Dupree. Principal Taylor and her secretary, Raqiba Abdul-Wahhab (Abdul-Wahhab), attended on behalf of the Board. (T24). The agenda for the April 6, 2022 liaison meeting indicated the subjects to be discussed included, building representative; dress code and building communications (CP-2). In order to make the agenda, the Association gathers information from their union members and compiles a list of issues that the Association would like to discuss. (T23). This agenda is then shared with Principal Taylor prior to the meeting. (Id.).

9. The first topic discussed was building representative. (T25). This issue involved what the Association felt was Principal Taylor continually selecting the same Association representative to attend investigatory disciplinary meetings. (T26-27). With respect to that same topic, the parties also discussed the appropriate role of union representatives during an investigatory disciplinary interview. (Id.) Sherief testified

that while the parties were discussing this issue, Principal Taylor "refused to hear anything more." (T27). Dress code was the second topic discussed. The Association was concerned that paraprofessional would be disciplined for violations of the dress code policy. Sherief testified that when this topic was brought up, Principal Taylor just said "next topic" and "wouldn't even engage in conversation after that." (T28). The next topic discussed was building communications. The Association was concerned that student discipline was not being communicated with classroom teachers. Sherief testified that when this topic was brought up, Principal Taylor responded with "communication is fine" and she "just kind of dismissed it." Lastly, not on the agenda, but discussed during the meeting, was the topic of announcements. The Association felt it was being denied access to the loud speaker as required by the CNA. (T30-31).

10. On April 8, 2022, Sherief was summoned to a meeting with Principal Taylor regarding his conduct at the April 6, 2022 liaison meeting. (T35). Lashaun Arrington, the union president, attended the meeting with Sherief. (T124). During the meeting, Principal Taylor advised Sherief that she was going to write him up for his conduct at the April 6, 2022 liaison meeting. Principal Taylor claimed Sherief's inappropriate behavior consisted of eye rolling, heavy breathing and making a remark about whether she could read. (T36).

11. On May 2, 2022, Principal Taylor issued a formal reprimand to Sherief regarding his conduct at the April 6, 2022 liaison meeting. (CP-3) The memo specifically states: "On April 6, during a liaison meeting, Mr. Sherief's conducts reached an apex of disrespect towards Ms. Taylor . . ." Sherief's inappropriate behavior as indicated in the memo as inappropriate included stating to Principal Taylor "[i]f you can read and understand it" with respect to "material being discussed"; when discussing the topic of "student discipline", Sherief stated "[i]t's not all about you"; and Sherief began moving his "neck back and forth" when interrupting and stating he would put a document in Principal Taylor's mailbox. The memo further indicates:

"[S]ince the second liaison meeting of the school year, when Ms. Taylor's speaking, Mr. Sherief begins to roll his eyes, engages in heavy breathing, and moves his head, neck, and body back and forth."

The memo concludes with:

"Mr. Sherief's comments and actions have been an inexcusable personalized attack on Ms. Taylor, Mr. Sherief's actions toward Ms. Taylor are aggressive and not conducive to a healthy workplace environment, as outlined in District Policy-3551-HEALTHY WORKPLACE ENVIRONMENT^{3/} This document serves as formal notice that further violations of professionalism may result in additional disciplinary action."

3/ I acknowledge that Policy-3551 (R-1) exists and that the Board alleged Sherief's behavior at the April 6, 2022 liaison meeting violated the policy. I make no further finding regarding the policy as it is unnecessary for me to make a decision in this matter.

12. Sherief testified that he was wearing a headset during the April 6, 2022 liaison meeting. (T29). Sherief admitted during his testimony that he "may have" rolled his eyes, breathed heavily and sighed during the April 6, 2022 liaison meeting. (T34). Sherief also admitted to stating "it's not all about you", although he denied he interrupted Principal Taylor. (T39). Sherief denied he stated "[i]f you can read and understand it", but rather testified that he advised Principal Taylor he would provide her with a copy of the contract so she could read it. (T38). Sherief also admitted that he moves his "head back and forth" all the time. Sherief explained that he was adjusting himself because the chair he was sitting in was not comfortable. (T36-40). Based on Sherief's testimony, I find that he did roll his eyes, breathe heavily, sigh and move his head back and forth during the April 6, 2022 liaison meeting. Sherief also stated "it's not all about you" as he further admitted in his testimony.

13. Principal Taylor testified as to Sherief's conduct as laid out in her May 2, 2022 memo of discipline. She further testified that Sherief's conduct at the April 6, 2022 liaison meeting made her feel targeted, harassed and that Sherief was using intimidation tactics. (T122). Principal Taylor further testified that she felt harassed because Sherief's behavior was an "interruption" to her. However, Ross-Hairston, an Association representative, testified that when she would unmute herself to

speak during the liaison meeting, she would end up interrupting others. (T146). I do not credit Principal Taylor's testimony as all liaison meeting for the 2021-2022 school year were held via teleconference and Principal Taylor and Sherief were not in the same room during the meeting. I do credit Ross-Hairston's testimony regarding interruptions. (T24). Due to the nature of teleconference meetings (being able to unmute yourself in order to speak), interruptions were likely to happen and Sherief was not the only participant that caused interruptions during the meeting.

14. Two witness, Adbuk-Wahhab, Principal Taylor's secretary, and Ross-Hairston,, who were both present during the April 6, 2022 liaison meeting, testified that Sherief appeared "frustrated" during the meeting. (T95) (T147). Both witness also testified that Sherief did not yell or threaten Principal Taylor during the meeting. (T95) (T145). This testimony contradicts Principal Taylor's testimony that Sherief was "yelling" and "shouting" during the meeting (T119). I credit both Adbuk-Wahhab and Ross-Hairston's testimony that Sherief was frustrated during the April 6, 2022 liaison meeting as Sherief's own testimony described what he felt was Principal Taylor's dismissive behavior as to most of the agenda topics. I also credit Adbuk-Wahhab and Ross-Hairston's testimony that Sherief did not yell or threaten Principal Taylor during the April 6, 2022 liaison meeting. There

was conflicting testimony regarding whether Shereif was wearing a mask during the liaison meeting. While Sherief did admit that he did remove the mask at some point during the meeting, I find it irrelevant as Sherief admitted to both heavy breathing and sighing during the April 6, 2022 liaison meeting. No distinction was made by Sherief as to whether his heavy breathing and sighing occurred with or without the mask on. (T41).

15. Both Adbuk-Wahhab and Ross-Hairston testified that they did not recall Sherief stating "[i]f you can read and understand it" as indicated in the May 2, 2022 memo and as testified to by Principal Taylor. (T90, T152, CP-3, T116). Principal Taylor testified that this comment was made when the parties were discussing the topic of building representative. (T117). Sherief denied making the statement as described by Principal Taylor, but testified that he stated he would place a copy of the contract in her mailbox so she could read it. (T32, 38). Sherief testified that he stated he would provide Principal Taylor a copy of the contract as it related to the topic of announcements. However, in R-2 (Sherief's "letter of rebuttal to memo received on May 2, 2022") which was dated May 12, 2022, Sherief indicated that the comment about providing the contract was made in reference to the topic of "building representative." Due to the inconsistency between R-2 and Sherief's testimony, I credit Principal Taylor's testimony and I find that Sherief made the comment "[i]f you can

read and understand it" while the parties were discussing the topic of "building representative."

16. In the Fall of 2022, Sherief transferred from A.C. Redshaw to the Woodrow Wilson Elementary School. Sherief started looking for and applying for other positions prior to the April 6, 2022 liaison meeting because he just wanted a "different opportunity and a different position." (T65). Sherief testified that it wasn't until after he received the May 2, 2022 memo that he requested a lateral transfer because he was being disciplined for union activity. (Id.). Principal Taylor testified that Sherief had requested a transfer prior to the April 6, 2022 liaison meeting, specifically she became aware of his request to transfer in October/November of 2021. (T130). I find that while Sherief applied to different positions outside of A.C. Redshaw prior to receiving the May 2, 2022 memo of discipline, Sherief did not request a transfer until after the memo was issued. Principal Taylor did not have first hand knowledge of his request as she testified that she was notified by Human Resources as to the request. (T130-131). Therefore, I do not credit her testimony as to when Sherief requested the transfer.

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees public employees the right to engage in union activities including organizing, making their concerns known to their employer, and negotiating collectively. Section 5.4(a)(3) prohibits an employer from retaliating against an employee for exercising his or her rights as guaranteed in the Section above. Under Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer does not present any evidence of a motive not illegal under our Act or if its explanation is rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record,

that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proven, on the record as a whole, that anti-union animus was a motivating factor or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Board asserts that the memo issued to Sherief on May 2, 2021 "was unrelated to Union activity and was issued in response to an ongoing pattern of disrespectful conduct and personal animosity" exhibited by Sherief towards Principal Taylor "each time she addressed the Committee, since the second Building Liaison Committee meeting earlier in the 2021-2022 School Year."

There is no dispute that Sherief was engaged in collective activity when he attended liaison meetings during the 2021-2022 school year. The purpose of his attendance at the liaison meetings was to raise Association concerns expressed to the Association by unit members. Accordingly, I find that Sherief's participation at the liaison meeting was a legitimate exercise of his rights protected under the Act.

There is also no question that the Board was aware of this protected conduct, as Principal Taylor also participated in the liaison meetings as required by the CNA.

An analysis of whether the employer demonstrated any independent hostility toward Sherief's behavior is unnecessary here. That is, this is not a case where an employer allegedly retaliates against an employee for protected activity by taking an adverse personnel action for a different reason. Rather, the Board brought disciplinary action against Sherief for his behavior at liaison meetings where he was acting as a union representative. In such cases, hostility can be inferred. Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. 149 N.J. 35 (1977); Jackson Tp., P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005). No evidence has been presented by the Board to show that the May 2, 2022 memo would have been issued to Sherief absent its hostility to his protected conduct. Thus, the issue here focuses on whether Sherief had a right protected by our Act to behave in the manner described in the May 2, 2022 memo and testified to by both Sherief and Principal Taylor. Sherief's behavior including, eye rolling, heavy breathing, sighing, moving his head back and forth and stating "its not all about you" and "if you can read and understand it." See finding no. 12 and 15. If I find that Sherief's behavior was protected under the Act, then the resulting discipline for his behavior at the liaison meetings directly violates section 5.4a(3) of the Act.

Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502, (¶12223 1981) is the Commission's seminal case on the issue of what is protected speech under our Act. In that matter, the Commission found that the employer unlawfully disciplined an employee concerning his comments at a meeting in which he served as union representative for another teacher. The Commission found that:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. Id. at 504.

Further, the Commission has held that when an employee acting in the capacity of a union representative interacts with a management representative while pursuing protected activity, "the two are considered to be on an equal footing." Paterson State Operated School Dist., P.E.R.C. No. 2013-74, 39 NJPER 483 (¶153 2013); Middletown Tp. Bd. of Ed.

The Association argues that Sherief's behavior was protected under the Act. The Association asserts that Sherief's conduct did not involve threats or name calling. Further, the liaison meetings took place after school with only a few people in

attendance, other staff were not privy to the contents of the meeting.

In Middletown Tp. Bd. of Ed., the Commission found, and the Court agreed, the employer violated the Act when it disciplined a teacher who criticized the school superintendent during a public board meeting. The Commission found that the teacher acting in the capacity of a union representative and addressing issues of collective concern to his membership, and including that all of his comments at the boarding meeting (specifically, characterizing the superintendent a "lying scuzzball") was protected by the Act.

Here, Sherief was acting as a union representative (not as an employee of A.C. Redshaw school) and addressing Principal Taylor about issues of concern for the Associations's membership. Due to the nature of the meeting, both Sherief and Principal Taylor were on equal footing-management to labor.

The Commission has found that labor relations is sometimes a contentious and emotional business that prompts feeling to run deep. It can hardly be expected that advocates will always be respectful or even civil to one another. Reasonable latitude must be accorded to labor and management advocates to express their opinions, including criticism of one another or impulsive behavior. Borough of Carteret, P.E.R.C. No. 2016-28, 42 NJPER 231 (¶66 2015) (Commission found that Board violated the Act when

it disciplined a union representative for statements he made to the Mayor (specifically, stating "you're a joke" and "please shut up" at a public meeting).

The Commission has also explored the line between what is protected conduct of an employee serving as a union representative and what is not protected. In State of New Jersey, Dept. of Treasury (Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001) and State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C. No. 2001-52, 27 NJPER 167 (¶132057 2001), the Commission noted that consideration must be given to whether the employee is acting in the role of a shop steward or union representative, as well as the time and place of the speech. The latter includes whether the speech or conduct is on work time and on the shop floor or a closed-door meeting, whether other employees are present, whether the actions were threatening, and whether the employee's actions were provoked by the employer's actions.

Here, Sherief was acting as an Association representative at liaison meetings held after school in which participation was limited to only Association representatives and Principal Taylor. Although Principal Taylor viewed Sherief's behavior as "harassing", "threatening" and "intimidating", I do not credit her testimony regarding same. See finding No. 13. (Compare Southern Jersey Transportation Authority, H.E. No. 2018-5, 44

NJPER 234 (§67 2017), where the Commission found Gates, a union vice president, was lawfully disciplined, when during the work day, he had engaged the fellow employees, in a heated verbal altercation in which he intimidated them, cursed and referred to a female co-worker as a "bitch".) Here, as testified to by Ross-Hairston and Adbuk-Wahhab, Sherief did not threaten or yell at Principal Taylor during the April 6, 2022 liaison meeting. See finding no. 14. Sherief was frustrated by Principal Taylor's dismissive behavior during the April 6, 2022 liaison meeting. Id. Further, all liaison meetings during the 2021-2022 school year were held via teleconference and Principal Taylor and Sherief were not in the same room during the meetings. See Id. Because the liaison meeting was held via teleconference, Sherief did not enter into Principal Taylor's personal space. Further, interruptions happened during the liaison meetings as participants would have to unmute themselves in order to speak. See finding no. 13. Therefore, Sherief's behavior at a union/management meeting wherein terms and conditions of employment were discussed, was insufficient to cause him to lose the protections of the Act.

Given the totality of the circumstances here, I find that the Board's disciplinary memo and any discipline penalties against Sherief for his behavior violate section 5.4a(3) and, derivatively, 5.4a(1) of the Act.

RECOMMENDATIONS

I recommend that the Commission **ORDER:**

A. That the New Brunswick Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by bringing and/or sustaining disciplinary charges against Sherief because of his behavior at the April 6, 2022 liaison meeting.

2. Discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act, particularly by bringing and/or sustaining disciplinary charges against Sherief because of his behavior at the April 6, 2022 liaison meeting.

B. That the Board take the following affirmative action:

1. Immediately rescind the disciplinary memo dated May 2, 2022 and any disciplinary penalty recommended or imposed against Sherief and remove any copies thereof from Sherief's personnel file.

2. Post in all places where notices to employee are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately

and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, the Borough notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

/s/ Stephanie D'Amico
Stephanie D'Amico
Hearing Examiner

DATED: November 8, 2023
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 November 20, 2023.



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 employees in the exercise of the rights guaranteed to them by the Act, particularly by bringing and/or sustaining disciplinary charges against Sherief because of his behavior at the April 6, 2022 liaison meeting.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act, particularly by bringing and/or sustaining disciplinary charges against Sherief because of his behavior at the April 6, 2022 liaison meeting.

WE WILL immediately rescind the disciplinary memo dated May 2, 2022 and any disciplinary penalty recommended or imposed against Sherief and remove any copies thereof from Sherief's personnel file.

Docket No. CO-2023-006

New Brunswick 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