

P.E.R.C. NO. 2016-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HALEDON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-070

NORTH HALEDON EDUCATION ASSOCIATION,

Charging Party,

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case and dismisses a complaint alleging that the Board withheld teachers' increments in retaliation for their having engaged in protected activity, specifically, mailing letters to students' parents regarding the status of ongoing negotiations. The Commission finds that the record evidence supports the Hearing Examiner's determination that the Board's motivation for investigating and disciplining the Association members was their having accessed and used confidential student information to mail the letters. The Commission concludes that the members' accessing and use of confidential information and the refusal of some to cooperate in the investigation was not protected activity.

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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Appearances:

For the Respondent, Wilentz, Goldman & Spitzer P.A.,
attorneys (Gordon J. Golum, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(William P. Hannan, of counsel)

DECISION

This matter comes to us for review from a report and recommended decision of Hearing Examiner Timothy Averell dated November 23, 2015. H.E. No. 2016-9, 42 NJPER 322 (¶94 2015). He recommended dismissal of a complaint issued in an unfair practice case filed by the North Haledon Education Association against the North Haledon Board of Education. The unfair practice charge alleges that the Board discriminated and retaliated against five Association members in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically section 5.4(a)(1) and (3), by withholding their increments.^{1/}

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

Following a hearing and the submission of briefs, the Hearing Examiner concluded that the Association failed to establish that the members whose increments were withheld engaged in activity protected by the Act.

On December 4, 2015, the Board filed a brief in support of the report and recommended decision. On December 9, the Association filed exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact are accurate. H.E. at 3-24. We incorporate them.

By way of background, the Association determined in or around January 2013 to have a committee prepare a letter to parents and guardians of district students to inform them of the status of ongoing successor contract negotiations between the Board and the Association. The Association used its own labels, paper, and envelopes to prepare the letters, and the envelopes were stuffed outside of contractual work hours. However, without the approval or knowledge of district administration, an Association member accessed the district's student information

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . . (3)
Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

database, "Realtime," to create address labels used for mailing the Association letter to students' parents and guardians.

The letter was mailed on April 19, 2013. Upon reviewing an envelope bearing the letter received by a parent, interim superintendent John Petrelli suspected that the address label had been generated through the use of Realtime. Petrelli understood student names and addresses to be confidential. He considered the unauthorized access to Realtime to obtain that information, and its use, to be a violation of law and Board policy that merited a full investigation.

Petrelli conducted a six-week investigation. On April 26, 2013, he met with middle school secretary Arlene Pezzuti. She had asked to speak with him without Association representation. Pezzuti told Petrelli that on the morning of April 19, two teachers asked her to take a bag of envelopes to the post office and to mail them during her lunch break. She was aware of the Association letter, having received one from the Association the night before via her personal email. The secretary disclosed the names of the two teachers to Petrelli but told him that she did not know who provided the labels or how they were printed.

On April 30, 2013, Petrelli interviewed, separately, several Association members who were able to access Realtime, so-called "Super Users," each in the presence of an Association representative. Four of these teachers told Petrelli that they

did not know anything about the letter or how its labels were acquired. Petrelli took no disciplinary action against them.

A fifth teacher, Donna Hastie, told Petrelli that she had volunteered to run the address labels because of her status as a Super User, that she received blank labels for that purpose from teacher/Association co-president Roseanne Taormina, and that she gave the printed address labels to teacher/Association member Linda Khoyan.

When Petrelli interviewed Taormina, she admitted that she provided the blank labels to Hastie and knew Hastie would print the labels using student address information obtained from Realtime. She also admitted in testimony before the Hearing Examiner that while she did not devise the plan to access the student information database, she knew of it.

On May 1, 2013, Petrelli met with Khoyan. She admitted receiving the printed labels from Hastie and delivering them to the elementary school, but she declined Petrelli's repeated requests that she identify the person to whom she delivered the labels at the school. During a second interview, on May 14, when again asked to whom she delivered the labels, Khoyan told Petrelli that she was not going to answer that question. When Petrelli responded that Khoyan could be considered insubordinate for her refusal, Khoyan replied that Sasha Wolf, an NJEA Field Representative, advised her, through the Association co-

presidents, that she did not have to answer any questions about the Association.

On May 13, 2013, Petrelli interviewed, separately, Mary Van Horn and Stephanie Macalle, the teachers Pezzuti identified as giving her the envelopes to deliver to the post office. Van Horn and Macalle admitted to being aware of the letter, but refused to answer questions about the logistics of getting them to the post office and how the Association obtained student addresses. By the Association's admissions,^{2/} Macalle brought the bag of letters to the elementary school for Pezzuti to mail.

Petrelli interviewed teacher/Association co-president Jennifer Lally. Petrelli asked Lally, "What is PRIDE," the name appearing at the top of the Association letter. Lally answered the question and informed Petrelli that the Association's PRIDE committee or organization had received student addresses from the District in the past to use in connection with the vote on the school budget and educational activities. By the Association's admissions, Lally "refused to refused to answer [Petrelli's] questions regarding the manner in which contact information for parents/guardians was obtained for the purpose of mailing the [Association] letter." At the end of that admission, the Association added, "as it was Association business."

2/ With the Hearing Examiner's and Association's consent, the Board put in evidence its admissions and the Association's responses to same by way of attaching them as Exhibit A to its post-hearing brief.

Each Association member except Pezzuti had an Association representative present when they met with Petrelli. For all interviews except Pezzuti's and Taormina's, the latter served as the employee's representative.

At the conclusion of the investigation, Petrelli provided the Board a detailed report setting forth a summary of each interview, his conclusions, and recommendations. He issued letters of reprimand to Pezzuti and Hastie and recommended that the Board withhold the increments of Taormina, Khoyan, Van Horn, Macalle, and Lally.

As more fully described in the Hearing Examiner's report, he reprimanded Pezzuti for engaging in "inappropriate staff conduct," as defined in Board Policy and Regulation 3281,^{3/} for her failure to check if the administration had approved the use of student record information to enable the mailing of the Association letters. He reprimanded Hastie for engaging in the same conduct as well as violating Board Policy and Regulation 3321^{4/} by reason of her unauthorized access to confidential

3/ Board policy 3281 prohibits inappropriate and unbecoming conduct toward students, whereas, regulation 3281 includes in the definition of "inappropriate staff conduct" conduct that case law, statute, or administrative code deems to be inappropriate or conduct unbecoming a school staff member.

4/ Board policy 3321 states that access to district computers and networks is for administrative and educational purposes only and prohibits their use for illegal or inappropriate activities or in manner that invades another's privacy. It

(continued...)

student information from the Board's database, and for violating a policy on "Discipline" by reason of her "complicity with regard to the unauthorized access." Petrelli testified he had not recommended the withholding of Hastie's increments because she was retiring at the end of the school year that June.

In the case of Taormina, Khoyan, and Lally, Petrelli's letter notifying each of them of the reasons for the withholding, consistent with his report to the Board, cited their use of confidential student information and insubordination. The notice also cited the federal statute and regulation and corresponding New Jersey regulation generally prohibiting disclosure of student educational records, including names and addresses, in the absence of parental consent or to persons or entities not specifically authorized by those laws to have access to that information.

In contrast, Petrelli's notice letter to Van Horn and Macalle cited insubordination as the reason for the withholding, specifically, the teacher's refusal to answer his questions about the preparation of the envelopes using confidential student information.

The Board accepted Petrelli's recommendations and withheld the increments of the five unit members. On June 27, 2013, the

4/ (...continued)
also states that violators of the policy are subject to discipline.

Association filed grievances on their behalf. It did not file grievances challenging the reprimand of Pezzuti or Hastie.^{5/}

In its initial brief, the Board urges the Commission to adopt the Hearing Examiner's report. It cites the federal and state laws and regulations mandating that the Board protect the confidentiality of student records, including home addresses unless previously categorized as directory information. The Board points out that Petrelli testified that the Board had not established a student directory and therefore that exception does not apply here. It asserts that although the Association had every right to inform the public of its collective negotiations positions with the Board, its employees had no right to violate laws and policies by accessing and using confidential student records in order to communicate that position. The Board argues that it was within its right to investigate the security breach and discipline employees for engaging in conduct prohibited by the student records laws and Board policies and for insubordination for not cooperating with Petrelli's investigation. It asserts that the Association members' refusal

5/ The grievances await arbitration as the parties agreed to stay that procedure pending the outcome of this case. Accordingly, we remind the parties that we have only been tasked in this matter with determining whether an unfair practice in violation of the Act was committed; not whether the Board had good cause for withholding the grievants' increments.

to answer questions regarding the access and use of confidential student information was not protected activity under the Act.

In its exceptions, the Association asserts that the Hearing Examiner erred in finding that its members did not engage in protected activity when they refused to answer questions concerning internal union matters. It contends that the conduct at issue should have been broken down into discrete parts - from composing a letter to parents, to an individual member accessing the database for the addresses, to mailing the letter, and then each employee's role in each activity analyzed. That approach, the Association contends, would have demonstrated that members' increments were withheld for refusing to answer questions about the protected activities such as drafting a letter to parents.

The Association also argues that once Hastie admitted accessing the addresses, the investigation should have ceased, its objective having been achieved. The Association claims that Petrelli's interviewing of Association members after he knew the individual who accessed the student database revealed that he "was seeking a reason to discipline [the] five Association members for not cooperating with his questions about internal union matters not related to accessing the Realtime system and for not naming names."

The Board replies that the heart of the investigation and this matter was the unlawful accessing of confidential

information and that this undermines the Association's argument that the conduct of its members must be broken down in its constituent parts, some of which would have been protected but for the accessing of confidential information. It asserts that the Hearing Examiner properly considered the participation of the Association members whose increments were withheld in the scheme to use confidential student information in order to effectuate the mailing of the letter to parents. The Board contends that Petrelli's explanation of why two Association members only received reprimands - one because she had voluntarily come forward with information, and the other because she was retiring - dispels any argument of anti-union animus.

In analyzing the Association's exceptions, we cannot review the Hearing Examiner's findings of fact de novo. Our review is constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due to fact-finder's credibility determinations and "feel of the case" based

on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

The Hearing Examiner found that Petrelli "testified credibly that his motivation for investigating this matter was grounded in what he perceived to be a breach of student confidentiality." H.E. at 8. The Hearing Examiner also found Petrelli's testimony for the different penalties to be credible and that he was not targeting union officials or negotiations team members. H.E. at 23-24. The record evidence supports the Hearing Examiner's credibility determinations.

In Manalapan-Englishtown Bd. of Educ., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1979), we acknowledged that an employee organization's attempts to solicit public support for its positions was protected conduct, but we concluded that its use of students to distribute a letter setting forth its position in an ongoing dispute with a board of education was not protected conduct. We rejected the Hearing Examiner's conclusions that the board engaged in unfair practices by ordering the group's members to cease their distribution through students and by disciplining a member for disobeying that directive.

Similarly, in Jamesburg Bd. of Educ., P.E.R.C. No. 81-92, 7 NJPER 102 (¶12042 1981), Association members used students to distribute a leaflet to their parents regarding ongoing Association complaints. All teachers involved in the flyer

distribution were reprimanded, and the Association president was given a more formal letter of reprimand after the Board's investigation revealed her central role in the distribution plan. We found that the distribution of the flyers through the use of students was not protected activity and the resultant discipline for that conduct was not in violation of the Act. Id. at 103.

As in Manalapan-Englishtown Bd. of Educ. and Jamesburg Bd. of Educ., the method used by the Association to distribute its letter is not activity protected by the Act even if in furtherance of communicating its negotiations positions to parents. An employer has a right to investigate alleged misconduct and to discipline employees for refusing to answer questions about that misconduct. Given that student names and addresses are confidential by law, and given that the Board is duty-bound to safeguard that information, Petrelli had ample justification for investigating the matter, and disciplining Association members for being involved in a plan to access the Board's database and use confidential information from it does not violate the Act.

In State of New Jersey (Department of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001), we found that the State did not violate the Act when it disciplined a union shop steward who advised a unit member during an investigatory interview that he did not have to answer questions. The Commission held that

the shop steward's conduct became unprotected when he obstructed management's right to conduct an investigatory interview.

Similarly, in City of Bridgeton, P.E.R.C. No. 2011-4, 36 NJPER 299 (§113 2010), the City sought information from the union president whose grievance alleged improprieties in the internal affairs bureau. The City disciplined him for his refusal to reveal his sources, and civil service and unfair practice cases were filed and consolidated for hearing. An Administrative Law Judge found that the City's investigation ordering the union president to divulge the names of officers who made certain allegations was not an unfair practice. The Commission adopted the finding, reasoning:

The City complied with its obligations under the grievance procedure, but at the same time launched a separate investigation into the allegations of impropriety in internal affairs. It was [the union president's] refusal to comply with an order under that investigation, not retaliation for filing a grievance, that triggered the discipline.... We simply decide that under the facts of this case, [the employer] had the right to order [the union president] to provide information about the allegations involving the internal affairs bureau and that [the union president] did not have a privilege under the Act to refuse to provide that information. Under all these circumstances, the City did not violate the Act when it initiated discipline in response to [the union president's] refusal to provide the ordered information.

[36 NJPER at 300]

As in Bridgeton, while the present case could be viewed as involving some elements of protected activity, the object of the

investigation was unprotected activity, and the reason for discipline was the refusal to answer questions about that unprotected activity. We recognize that some Association members testified that Petrelli asked them during the investigation questions pertaining to protected union activity such as who authored the Association letter. However, those questions were incidental to the object of the investigation, and the evidence fails to support a finding that the Board took disciplinary action because employees declined to answer questions pertaining to Association business. Accordingly, while the Hearing Examiner found it unnecessary to reach the issue, we would also conclude that the claim of retaliation fails for lack of evidence.

In sum, we adopt the Hearing Examiners' analysis and conclusions. The Board had the right, if not the duty, to investigate the accessing and use of the confidential student information and to ascertain each member's involvement in that activity. Under these circumstances, the Board did not violate the Act when it disciplined Association members for refusing to answer questions about how student names and addresses were obtained and used.

ORDER

The Complaint is dismissed.

BY ORDER OF THIS COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: March 31, 2016

Trenton, New Jersey