P.E.R.C. NO. 2017-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OPERATED SCHOOL DISTRICT,
CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2014-098

NEWARK TEACHER'S UNION LOCAL 481,
AFT, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts in part, and modifies in part, the Hearing Examiner's recommended decision granting the NTU's motion for summary judgment as to its unfair practice charges. The charges allege that the District violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5), by: (1) unilaterally requiring teachers desiring to attend the 2013 NJEA convention to submit information that they had not previously been required to provide; (2) refusing to disclose to the NTU the names and addresses of unit members receiving "ineffective" performance evaluations for the 2012-2013 school year; (3) blocking email sent from the NTU's Director of Operations to District employees other than the District's Director of Labor/Employee Relations. With respect to the first charge, the Commission finds that the District violated sections 5.4a(1) and (5) of the Act when it failed to rescind a unilaterally-imposed requirement that unit members complete "Travel Authorization Request" and "Justification of Need" forms, or not be considered to have applied for convention leave under N.J.S.A. 18A:31-2, until two days before the 2013 NJEA convention. With respect to the second charge, the Commission finds that the District did not violate the Act by refusing to provide a list of unit members who received "ineffective" performance evaluations for the 2012-2013 school year given that teacher evaluation ratings are confidential under N.J.S.A. 18A:6-120(d). With respect to the third charge, the Commission finds that the District violated section 5.4a(1) of the Act when it restricted the NTU's Director of Operations email access with unit members.

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, Scarinci Hollenbeck, LLC, attorneys (Ramon E. Rivera, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Colin Lynch, of counsel)

DECISION

On October 22, 2013, the Newark Teacher's Union Local 481, AFT, AFL-CIO (NTU) filed an unfair practice charge against the State Operated School District, City of Newark (District), alleging that the District violated sections 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq. (Act).[1/] Specifically, the NTU alleges that the District:

> (1) unilaterally changed terms and conditions of employment in advance of the 2013 New Jersey Education Association (NJEA) convention by requiring teachers desiring to attend the convention to submit information that they had not previously been required to provide;
>
> (2) refused to disclose to the NTU the names and addresses of unit employees receiving "ineffective" performance evaluations at the end of the 2012-2013 school year; and
>
> (3) blocked email sent from the NTU's Director of Operations to District employees other than the District's Director of Labor/Employee Relations.

On August 27, 2014, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to the NTU's 5.4a(1) and (5) allegations. On September 17, 2014, the District filed an answer denying the NTU's allegations.

On January 12, 2015, the NTU filed a motion for summary judgment, the certification of John Abeigon (Abeigon), the NTU's

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the 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 process grievances presented by the majority representative."

Director of Organization, and exhibits. On January 13, the District filed a cross-motion for summary judgment, the certification of Laurette Asante (Asante), the District's Director of Labor/Employee Relations, and a "certification of exhibits" by the District's counsel.[2/] On March 4, we referred the motions to a Hearing Examiner for a decision. See N.J.A.C. 19:14-4.8.

On October 20, 2015, the Hearing Examiner issued a Decision and Recommended Order [H.E. No. 2016-7, 42 NJPER 274 (¶80 2015)]. He concluded that the District violated section 5.4a(5) and, derivatively, 5.4a(1) of the Act by unilaterally imposing conditions on unit employee attendance at the 2013 NJEA convention and by refusing to provide the names and addresses of unit employees receiving "ineffective" performance evaluations for the 2012-2013 school year. The Hearing Examiner also concluded that the District independently violated section 5.4a(1) of the Act by revoking NTU representative Abeigon's email access to unit employees, but that the District did not violate the Act by revoking his email access to non-unit District administrators other the labor relations director.

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2/ Affidavits or certifications submitted in support of or in opposition to a motion for summary judgment must be based on personal knowledge, and therefore, an attorney's certification will not normally be a proper vehicle to authenticate the party's exhibits. See PBA Local 187, P.E.R.C. No. 2005-61, 31 NJPER 60 (¶29 2005) and cases cited therein.

This matter now comes before the Commission on exceptions filed by the District on November 4, 2015 to the Hearing Officer's Decision and Recommended Order. The NTU filed opposition to the exceptions on November 12, 2015.

The District asserts the following exceptions:

> 1. The District did not unilaterally change the terms and conditions of employment in requesting notification of teachers' attendance at the 2013 NJEA convention, which action was consistent with its managerial prerogative and past practice.
>
> 2. The District correctly maintained the confidentiality of personnel records, which the NTU may not waive on behalf of its members.
>
> > (a) The Hearing Examiner disregarded the plain language of the Open Public Records Act (OPRA) and Title 18A, which exempt personnel records from disclosure.
> >
> > (b) PERC is not the appropriate venue to determine an out-of-time OPRA contest.
>
> 3. The District appropriately restricted the NTU representative's emails due to their threatening and harassing nature, which is ultimately a question of fact.

The NTU opposes the District's exceptions, arguing that there are no disputed facts and that the Hearing Examiner's findings and conclusions are correct. It asks that we affirm the Decision in its entirety.

We have reviewed the record. The Hearing Examiner's findings are primarily based upon assertions made in Abeigon's

certification. While Abeigon does not certify that he has personal knowledge of the facts he asserts, and one or two of them do not appear to be based upon personal knowledge,[3/] Asante's certification does not dispute Abeigon's factual assertions. Therefore, except as supplemented and modified below, we find that the Hearing Examiner's findings are supported by the record and we adopt them. A brief summary of the pertinent facts follows.

FACTS

The NTU is the majority representative for the District's teachers, librarians, counselors, clerks and others employed by the District. The District and NTU are parties to a memorandum of agreement dated October 18, 2012, which extends their prior collective negotiations agreement (CNA), as modified by the memorandum, through June 30, 2015.

NJEA Convention Leave

Although the NTU is not affiliated with the NJEA, unit members have historically attended the NJEA convention. Prior to 2012-2013, the District was closed during the convention and

3/ For example, Abeigon states that "many individuals who would have attended the NJEA convention did not do so as a result of the confusion caused by the District." The NTU provided no certification from an NTU member stating that the individual did not attend the convention as a result of the District's action. Having said that, the Hearing Examiner did not find that NTU members did not attend the convention as a result of the District's action, and his legal conclusion on this issue did not require such a finding.

teachers who wished to attend were not required to apply for leave.

Starting with the 2012-2013 school year, the District remained open for instruction during the convention and teachers who wished to attend were required to apply for leave via a "NJEA Convention Authorization Request." This form required the applicant's name, department/school, employee number, telephone number, and signature/date. Sections of the form requiring information pertaining to meals, transportation, mileage, lodging, fees, and proof of private automobile insurance, among others, were marked "NOT APPLICABLE." Neither before nor after the 2012-2013 school year has the District charged employees with personal days if they attended the convention or reimbursed employees for mileage, lodging, and travel costs incurred to attend the convention.

On October 9, 2013, the District Business Administrator notified NTU members that those attending the 2013 NJEA convention would have to complete and submit to their principal two new forms. The first, a "Travel Authorization Request," solicited the cost of meals, transportation, lodging, registration, and mileage, among other information, and required submission of an itinerary, meals breakdown, registration, and for those traveling by private vehicle, proof of car insurance.

The second form, "Justification of Need," required the following information:

> 1. Relationship of attendance at this event to the critical instructional and operational needs of the district, including the link to the NJ Professional Standards for School Leaders or Teachers and/or the NJCCCS as well as to the participants Professional Growth Plan (PGP) and/or Professional Improvement Plan (PIP).
>
> 2. Explanation as to how the person or persons attending will share what was learned with others in the school district.
>
> 3. Documentation that the knowledge and information to be gained at this conference cannot be obtained through more cost effective means.
>
> 4. Explanation as to how the request is consistent with best practices in professional development.

On October 16, 2013, the District's LER Director informed NTU officers that authorization or justification forms submitted to Human Resources or any other department but not to the employee's principal would not be recognized as applying to attend the conference.

On November 5, 2013, after the unfair practice charge was filed, the District converted the dates of the NJEA convention from instructional to professional days, obviating the need for students to attend school those days. The District also modified the requirements for employees who wished to attend the

convention, reverting to the "NJEA Convention Authorization Request" form utilized the prior year.

Request for Information

The parties' memorandum of agreement describes aspects of the evaluation process used in the Newark Public Schools (NPS). Section II, "Compensation and Benefits," states that the "NTU and NPS believe teachers should be compensated based on their performance as well as their years of service." That section goes on to state under "Contract Modifications: A. Base Salary and Performance:"

> 4. NPS shall implement a new educator evaluation system with four summative evaluation ratings beginning in school year 2012-2013... There shall be movement on the steps and remuneration on the scale only by effective professional performance and valued experience.
>
> • Only educators who receive effective or highly effective annual summative evaluation ratings will be entitled to move up one step on the salary scale.
>
> • Educators who receive an ineffective annual summative evaluation rating will stay on their current salary step. These educators may request a Peer Validator. . .
>
> • The specific intent of the parties is to create a new compensation system where increments and raises are earned through effective performance. The parties agree to utilize peer validators and the peer oversight committee to consult with the Superintendent and make recommendations on disputes concerning the new compensation system to avoid expenditures of public funds. The final decision rests with the

> Superintendent. The process set forth in this section shall be the final process and is binding.

The memorandum also provides that teachers who receive a year-end rating of partially effective may receive step movement in "the sole discretion of the Superintendent who shall consult with the Peer Validators."

On September 6, 2013, the District provided the NTU, at its request, with a list containing the names and addresses of teachers who received bonuses for the 2012-2013 school year pursuant to the parties' memorandum of agreement. The transmittal email from the District referred to "HE Bonus Recipients," and therefore, effectively disclosed that the listed teachers had received a "highly effective" rating.

On an unspecified date, the District also provided the "Peer Oversight Committee," which includes NTU officers, with the names and school locations of teachers who received "partially effective" performance ratings for the same school year. The list also indicated whether or not each identified teacher was advanced on the salary guide, the rating notwithstanding.

On September 18, 2013, the NTU filed an "OPRA request" with the District seeking the names and addresses of unit members who received a rating of ineffective on their annual summative evaluation for the 2012-2013 school year. The NTU planned to use the requested information to contact those unit members to inform

them that they could appeal the increment withholding to the Commissioner of Education. The District had not informed unit members that they could appeal the withholding.[4/]

On September 25, the District responded by sending the NTU a list of teachers who received the ineffective rating but their names, addresses, and school locations were redacted. The District's response cited an asserted responsibility to safeguard an employee's personnel information.

On October 1, the NTU, through counsel, advised District counsel that the District had an obligation under the Act to provide the requested information and that failure to do so would be an unfair practice. District counsel responded on October 8,

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4/ The Hearing Examiner found that the "District did not provide notice to unit teachers whose summative evaluations were 'ineffective' and whose increments were withheld." (H.E. at 9, Par. 8) We do not adopt that finding to the extent it means that the District did not notify those teachers of their deficient ratings. Abeigon did not certify that NTU members were not notified of their evaluation ratings. Nor is the record evidence sufficient to support a finding that teachers who received ineffective ratings did not know why they did not receive step movement. Not only were we not provided a certification from a teacher who received an ineffective rating, but the NTU agreed, per the memorandum of agreement, that teachers would be ineligible for step movement if they received an ineffective annual rating. Teachers who file petitions of appeal with the Commissioner of Education to challenge their "increment withholdings" may raise in that forum any claim that the District did not provide the teacher with reasons for the withholding.

stating that the NTU's right under the Act to request and receive information did not extend to confidential information. He continued:

> In addition to the provisions of OPRA and NJDOE regulations limiting personnel information that may be disclosed, the TEACHNJ Act specifically provides that information related to employee evaluations shall be confidential. See N.J.S.A. 18A:6-120d... [T]he School District will provide the NTU with the evaluation rating of any employee who consents in writing to such disclosure or who is represented by the NTU in a specific matter in which the evaluation rating is relevant....

On October 15, 2013, NTU's counsel replied, claiming that the information sought was relevant and that the District was unable to demonstrate any privacy interest that would cause harm to unit members if the information were disclosed.

Communications

Abeigon, as the NTU's Director of Organization, frequently communicates with non-unit District administrators and unit members. In September of 2013, the District restricted Abeigon's email access, blocking his communications to all District employees, including unit members, except Asante, the Director of LER. The restriction was implemented based upon several pieces of electronic correspondence issued by Abeigon during the 2012-2013 school year that the District characterizes as "offensive and threatening."

Specifically, on February 19, 2013, Abeigon issued an email to a principal, with copies to the superintendent, Asante, and others, stating:

> It has come to our attention that Parents (2) and a Teacher will be evaluating Instructional Staff in your building. P[l]ease direct us to the policy or evaluation tool you are using to justify this action. No teacher has been authorized by this Union or the [District] to evaluate any colleague. Also, to our knowledge, parents are not authorized or qualified to evaluate any Instructional Staff. Please cease such activity until we receive clarity from the [District].

On September 5, 2013, Abeigon issued an email to "Members," stating:

> As if the principals and staff of our schools didn't have enough on their plate-this year especially with new, untested, unproven, state mandated teacher evaluation frameworks and other nonsense designed to make your life miserable and teaching impossible, the [District] has come up with a plan to address student absenteeism "Attend Today, Achieve Tomorrow."
>
> Student absenteeism is a major concern to us all. Most of you, without further prodding, do some of these things already. Many of you go above and beyond. However, for the [District] to roll out this plan after having laid off the Attendance Counselors over the summer is disingenuous and unconscionable. We are forced to wonder how many 10th floor consultants were let go over the summer?
>
> Perhaps if the district had not abolished technical, business, and other vocational training in all the high schools, our students wouldn't be dropping out and into for-profit private trainers like Lincoln

> Tech, Berkeley, etc. Perhaps if our buildings weren't so dilapidated and sick, less students and staff would be sick.
>
> Laying off the attendance counselors against our advise was a mistake, expecting us to do the job of Attendance Counselors they fired is a even bigger mistake. That said, we ask that you work professionally with your administrators to make "Attend Today, Achieve Tomorrow" a success with the following proviso's:
>
> *you are not to use your cell phones to make these calls, your minutes cost money and cell phone use is prohibited by the [District], use [District] office phones only!!!!
> *you must not do this during your duty free lunch or prep, ever under no circumstances
> *if they order you to do it after school, they must pay you
> *call the NTU if you see any violation of the contract or to report any abuse, harassment, intimidation or bullying by an administrator

On September 18, 2013, Abeigon authored a Facebook post about a District administrator, naming her and including her photograph, that was ultimately forwarded to Asante, stating:

> After receiving a Vote of No Confidence from her entire staff, Ms. [] continues to exhibit conduct unbecoming of an administrator. Under the veil of "best practice" she reassigned 10% of her staff in relation for their act of courage. Despite a record of this behavior under previous administrations, the current leadership at [the District], refuses to discipline or undue the harm she inflicts on her staff. We will see what a law judge has to say.

On September 18, 2013, Abeigon authored an email that was forwarded to two personnel administrators, stating:

> Hope you had a pleasant summer.
>
> Do you know when appeals for Newark teachers who received a partially effective rating will be heard?

On September 20, 2013, Abeigon authored an email that was forwarded to the superintendent, stating:

> We have received numerous e-mails from members reporting class sizes that were substantially above code limits and/or whose classroom was missing vital suppliers, including teachers' editions, student books and desks (see attached documents). In addition, we have heard from many teachers who have not received proper training on Common Core or new curriculum that is being used in their schools.
>
> The New Jersey Department of Education has created guidelines to the "Teacher Effectiveness and Accountability for the Children of New Jersey" Act. In order to prepare for the evaluation changes outlined by the new law, TEACHNJ and related regulations require districts to meet the following deadlines:
>
> Thoroughly train teachers on teaching practice evaluation instrument DEADLINE July 1, 2013
>
> Thoroughly train evaluators on teaching practice evaluation instrument DEADLINE Aug 31, 2013
>
> Because of these issues, I am calling for a moratorium on all staff evaluations pending correction of these issues and documented proper evaluation training of all staff. Until these staff members are being given the proper training, supports and materials, the district is setting them up for failure.

On October 7, 2013, Abeigon issued an email to Asante, other non-unit District administrators, and the superintendent, stating:

> Never let anyone say the [District] doesn't do the LEAST they can do. . .way to demonstrate respect for in depth respectful dialogue. 2 ½ hrs? Wow, almost as much time as they gave us to review Race to the Top... you would think that they would learn from that experience-nope[.]

The restriction on Abeigon's email access interferes with his ability "to resolve disputes, process grievances, investigate issues relating to contract implementation[,] and communicat[e] with members of the NTU." However, NTU unit members are still able to receive updates directly from other NTU officers.

On September 24, 2013, NTU's counsel wrote a letter to District's counsel contesting the restriction on Abeigon's email access.

## STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

> The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision. . .after receipt of such recommendations. In reviewing the decision. . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the

> decision, but shall state clearly the reasons for doing so... In rejecting or modifying any findings of fact, the agency head shall state with particularly the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954) and N.J.A.C. 19:14-4.8(e).[5/] In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. We have denied summary judgment when the facts in the record do not definitively answer whether a public employer has or has not

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5/ N.J.A.C. 19:14-4.8(e) provides:

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

committed the unfair practices alleged. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. 2006-97, 32 NJPER 232 (¶97 2006).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). An employer violates this subsection if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. UMDNJ-Rugters; see also, Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not prove an illegal motive. UMDNJ-Rutgers. Accord, Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp. This provision will also be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A refusal to supply potentially relevant

information to the majority representative may constitute a refusal to negotiate in good faith in violation of N.J.S.A. 34:13A-5.4a(5) and derivatively a(1). In re Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511, 530-531 (1996) (citing State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988); see also, State of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 87-149, 13 NJPER 504, 505 (¶18187 1987); City of Newark, H.E. No. 2013-18, 40 NJPER 44 (¶18 2013). The Commission has jurisdiction to decide whether information requested under the Act is relevant and is the appropriate forum to resolve such questions. State of New Jersey (Office of Employee Relations), supra; see also, N.J.S.A. 34:13A-5.3.

ANALYSIS

NJEA Convention

The District claims that it did not unilaterally change the terms and conditions of employment when it requested notification of teachers' attendance at the 2013 NJEA convention. It also claims that it had a managerial prerogative to request the information solicited on its forms because it needed the information in order to properly staff schools during the convention.[6/]

6/ The District also claims that this issue is moot because the parties reached an agreement regarding the form to be used (continued...)

N.J.S.A. 18A:31-2 provides in relevant part:

> Whenever any full-time teaching staff member ... applies to the board of education by which he is employed for permission to attend the annual convention of the New Jersey Education Association, such permission shall be granted for a period of not more than two days in any one year and he shall receive his whole salary for the days of actual attendance upon the sessions of such convention upon filing with the secretary of the board a certificate of such attendance signed by the executive secretary of the association.
>
> [Emphasis added.]

The Commission has held that "[g]iven the unconditional imperative phrasing of the statutory provision on attendance at NJEA Conventions, neither [a board] nor [an association] are invested with any power to alter the provisions of N.J.S.A. 18A:31-2 except, of course, to enlarge or improve upon the rights granted . . . ." East Hanover Tp. Bd. of Ed., H.E. No. 93-21, 19 NJPER 502 (¶24232 1993), aff'd P.E.R.C. No. 93-117, 19 NJPER 352 (¶24158 1993)(holding that it was an unfair practice for the board to unilaterally require NJEA convention attendees to submit a "Professional Day Report" and to require unit members to submit

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6/ (...continued)
for the 2014 NJEA convention. Given the lack of any articulated reasonable justification for the District's solicitation of cost, itinerary, insurance and other information, we cannot say that its conduct is unlikely to recur and, therefore, we do not find that this claim is moot. See Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979)

a request for a professional day, subject to approval, in order to attend the NJEA convention).

Given that N.J.S.A. 18A:31-2 clearly imposes a statutory term and condition of employment (i.e., paid leave to attend the NJEA convention for full-time teaching staff members upon request), we find the District's requirement that unit members complete the "Travel Authorization Request" and "Justification of Need" forms, or not be considered to have applied for this leave, tantamount to imposing a restriction upon a statutory right. Although NTU unit members ultimately were permitted to attend the 2013 NJEA convention without completing these forms or being charged with personal days, the District only modified its requirements on November 5, 2013, two days before the 2013 NJEA convention.

Moreover, even if the District's "Travel Authorization Request" and "Justification of Need" forms were not proscribed by N.J.S.A. 18A:31-2, the District's unilateral imposition of these required forms, given that they required more information than simply whether the staff member would be attending the convention, would be a violation of N.J.S.A. 34:13A-5.4a(1) and (5). Contrary to the District's contention, these conditions were not consistent with the District's past practice regarding NJEA convention leave. And while a district may have a managerial prerogative to require teachers planning to attend the

convention to notify the district sufficiently in advance of the convention to enable the district to secure substitute teachers for schools remaining open, the additional information and documentation required by the District in this case far exceeded any demonstrated need. The "Travel Authorization Request" and "Justification of Need" forms went "far beyond [the District's] right to verify attendance at the Convention and trench[] upon matters that were never before required by the [District]. . . ." East Hanover Tp. Bd. of Ed.

The District's refusal to reconsider, and ultimately reverse, its newly-imposed requirement until just two days before the 2013 NJEA convention constitutes a refusal to negotiate in good faith. N.J.S.A. 34:13A-5.4a(5); see also, Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). Even in the absence of direct proof of interference, restraint or coercion, the undisputed evidence indicates that the District's actions had a tendency to interfere with NTU unit members' statutory right to attend the 2013 NJEA convention. N.J.S.A. 34:13A-5.4a(1); see also, Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

Accordingly we reject this exception.

Request for Information

The District claims that it properly maintained the confidentiality of teacher evaluations and that the NTU may not waive this right on behalf of unit members. The District argues that the plain language of OPRA and Title 18A exempt personnel records from disclosure to the NTU.[7/]

Turning first to OPRA, N.J.S.A. 47:1A-10, part of that law, provides in pertinent part:

> [T]he personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for public access, except that:
>
> . . .personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest. . . .

In Morris Cty. and Morris Coun. No. 6, NJCSA, IFPTE, AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den. 182 N.J. 427 (2005), the issue before us was whether a public employer had an

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7/ The District also argues that the Superior Court or the Government Records Council were the appropriate venues for the NTU to challenge the District's OPRA determination. The issue before us is not whether the NTU had a right to access under OPRA, but rather whether it had a right to the requested information under the Act. Moreover, we may consider statutes besides the Act that bear on terms and conditions of employment. See Board of Education v. Bernards Tp. Education Ass'n, 79 N.J. 311 (1979).

obligation under the Act to provide the majority representative, upon request, with the home addresses of unit employees. The union did not possess this information and was having trouble communicating with its members in person or through the use of the employer's interoffice mail system, which was unreliable and not secure. We noted that like OPRA, an executive order relating to personnel records precluded their disclosure to the public "[e]xcept as otherwise provided by law." We concluded that the employer engaged in an unfair practice by denying the union's request, stating:

> It may be that an employee's home address is not a "public record" disclosable to any member of the public upon demand. Nevertheless, an address may still be disclosed on a limited basis for a proper purpose pursuant to a specific statute, as is the case here.
>
> [P.E.R.C. No. 2003-22, 28 NJPER at 421.]

The specific statute that we found provided for disclosure was the Act and the majority representative's duty of representation under it.

Therefore, we agree with the Hearing Examiner that OPRA is not a bar to the District's disclosure of names and addresses of unit members who received ineffective year-end performance ratings.

Turning next to the education laws, N.J.S.A. 18A:6-120(d), part of the Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act, provides:

> Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to. . .[OPRA].[8/]

Consistent with the statute, guidelines of the New Jersey Department of Education (DOE) provide:

> Confidentiality of Evaluation Information Personally identifiable evaluation information is strictly confidential and will not be made available to the public.

Another DOE publication, the Evaluation Score Certification Tool: Technical Manual, provides in pertinent part:

> [E]valuation data of a particular employee shall be confidential in accordance with the TEACHNJ Act and N.J.S.A. 18A:6-120.d and 121.d. Educator evaluation data should be handled in the secure manner you would treat, handle, and store any part of a confidential personnel record and should not be released to the public. Further, such individual data is exempt from the Open Public Records Act (OPRA).[9/]

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8/ The parties' Memorandum of Agreement also sets forth this provision of N.J.S.A. 18A:6-120.

The CNA that preceded the Memorandum of Agreement provides, "The Newark Public Schools agrees to continue its policy of treating these personnel files confidential." This provision was not modified by the Memorandum of Agreement.

9/ The guide and manual are posted on the DOE website at http://www.state.nj.us/education/AchieveNJ/intro/TeachNJGuid

(continued...)

The DOE's "AchieveNJ" website includes a section with "Frequently Asked Questions" that provides in pertinent part:[10/]

> Q: Does the law allow evaluation information to be made available to the public?
>
> A: No. All identifiable information related to personnel evaluations is confidential and not accessible to the public. This includes any individual score on a component of the evaluation, such as the median Student Growth percentile score, Student Growth Objective score, observation ratings, etc.

Based upon the plain and express terms of N.J.S.A. 18A:6-120(d), we conclude that evaluation ratings when paired with information identifying the subject employee are confidential in their own right, independent of OPRA.

In re Univ. of Med. & Dentistry of N.J., 144 N.J. supra, at 531, the Supreme Court noted:

> PERC requires every public employer to provide its employees' union with the information that the union needs to evaluate the merits of an employee's complaint about employer conduct unless such information is "clearly irrelevant or confidential."

The Court was quoting our decision in State of New Jersey (Office of Employee Relations), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18,284

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9/ (...continued)
e.pdf and
http://www.nj.gov/education/AchieveNJ/resources/scoring/ESCTmanual.pdf.

10/ The "Frequently Asked Questions" are available online at the following website:
http://www.nj.gov/education/genfo/faq/faq_eval.shtml.

1987) supra, where we discussed the contours of a majority representative's right to information necessary to evaluate the merits of a potential grievance and then stated,

> We recognized, however, that the majority representative does not have an absolute right to obtain all requested information; rather, the duty to disclose turns upon the circumstances of the particular case. Thus, an employer is not obligated to disclose information clearly irrelevant or confidential.

See also Shrewsbury Board of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981)(finding that board could not rely upon employee's lack of consent to disclosure of requested correspondence and minutes related to employee's involuntary transfer in absence of indication by the board that employee confidentiality was a concern).

In Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979), the U.S. Supreme Court rejected the N.L.R.B.'s conclusion that the respondent company violated its duty under the National Labor Relations Act to bargain in good faith by declining to disclose confidential individual test results to the union absent consent from the affected employees. The Court instead found that the company's willingness to disclose the scores only upon receipt of consents from the examinees satisfied its statutory obligations. We find apt the Court's comments about test results:

> The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is

> sufficiently well known to be an appropriate subject of judicial notice.
>
> [440 U.S. at 318.]

It may well be that teachers who receive ineffective annual ratings will have no objection if the District shares their identities and ratings with the NTU. However, we are unwilling to presume that is the case and think the better balance is that reached in Detroit Edison Co.

Accordingly, we reject the conclusion that the District violated the Act by refusing to provide the evaluation information to the NTU absent employee consent. In reaching this result, we also note that the NTU did not clearly articulate how access to the evaluation information was necessary for it to discharge its representational duties under our Act. Such duties normally pertain to contract negotiation or contract administration. Here, the NTU's Abeigon certifies that the NTU sought the evaluation information in order to advise teachers of their right to appeal their increment withholding to the Commissioner of Education. While Abeigon also refers to enforcing teachers' rights "under the parties' Agreement," he does so in only general terms that do not make clear how access to the information is necessary for the NTU to discharge its representational duties. However, to the extent that the information is somehow relevant to the NTU's duties, we believe that our order will permit the NTU to carry out its duties.

Lastly, in terms of the NTU's need for the requested information, Abeigon concedes that the NTU could request, via its website, that teachers who receive ineffective ratings contact the NTU. However, he states that that option might not identify all affected teachers and that getting their addresses from the District is the "best means" of communicating with them. We clarify that the duty to provide potentially relevant information is not intended to afford the best means but an effective means of communicating with employees.

While we do not find that the District violated the Act by declining to provide the NTU with the names and addresses of unit members who received ineffective ratings, we will order the District to provide the NTU with the names and home addresses of teaching staff members in the unit employed during the 2012-2013 school year. We think this result strikes an appropriate balance and avoids the disclosure of confidential evaluation information.[11/]

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11/ Further with regard to this claim, we note the NTU's suggestion in its motion for summary judgment that the District's disclosure of the names of teachers who received merit bonuses and those rated partially effective demonstrates that its stated reasons for not disclosing the names of teachers rated ineffective is pretextual. The Hearing Examiner did not specifically address this argument, nor did the parties do so in their exceptions. While we therefore need not address this argument, we add that the NTU did not prove by the preponderance of the credible evidence that the District's reliance upon N.J.S.A. 18A:6-120d was a pretext for motives deemed illegal under the Act.

(continued...)

Communications

The District claims that it appropriately restricted NTU representative Abeigon's email access because they were "threatening and harassing" and that the nature of the communications presents a question of fact. The issue before us is whether the District's action tends to interfere with protected rights and, if so, whether the District had a legitimate and substantial business justification for its action. The totality of evidence and particular facts must be examined and a balancing of the parties' interests made. City of Hoboken, H.E. 2016-15, _NJPER_ (¶_ 2016).

N.J.S.A. 34:13A-5.3 provides in pertinent part:

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;
>
> . . .
>
> A majority representative of public employees in an appropriate unit shall be entitled to

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11/ (...continued)
It is just as plausible that District personnel failed to recognize that disclosing the names of teachers who had received step movement for the year would also effectively disclose the fact that they had been rated highly effective. Likewise, the parties have not addressed whether N.J.S.A. 18A:6-120d bars school teams involved in the evaluation process, which appears to include the Oversight Peer Review Committee under the parties' memorandum of agreement, to be informed of the evaluation results. While the statute would presumably require the Committee members to maintain the confidentiality of the evaluation information, we find it unnecessary to resolve that question.

> act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The Commission has held that employees have "the right. . . to communicate with each other about employment conditions." State of New Jersey (Dep't of Transp.), P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990). "[T]he Act confers a statutory right of communication between majority representatives and unit members," and same is considered a "term and condition of employment." City of Newark, H.E. 2001-3, 26 NJPER 407 (¶31160 2000).

In Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976), the Commission stated:

> School Boards. . .[are] charged. . .with the authority and responsibility for the conduct of schools in their districts. . . [which includes] control over bulletin boards, mail boxes, and all the other facilities included within the various contract provisions under discussion. The School Boards have an interest in conducting the schools, including the efficient use of these school facilities, in as stable a manner as is legally possible. Their authority is effected, however, by the Act's requirement that they negotiate in good faith with the majority representatives of

> their employees concerning terms and conditions of employment. One such condition of employment is the ability of employees to communicate in furtherance of the rights guaranteed by the Act. The School Boards thus have an obligation to negotiate over access to school facilities by its employees in furtherance of their legal collective activities.
>
> [Emphasis added.]

In addition, a school board cannot "place restrictions on the composition or parameters of [an] association's negotiations team." Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980); accord Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991). "[P]ublic employees are guaranteed the right to present grievances through representatives of their own choosing and. . . the majority representative, by statute, is entitled to and must represent the interests of all employees in the unit." Dover Tp. Bd. of Ed., P.E.R.C. No. 77-43, 3 NJPER 81 (1977).

Initially, we find that the restriction on Abeigon's email access tends to interfere with protected rights, specifically, the right of communication between majority representatives and unit members. Although other NTU representatives can communicate directly with unit members via the District's email server, and Abeigon can communicate with unit members through other means, the District's action impedes communication between unit members and a majority representative of their own choosing (i.e.,

Abeigon) via the District's email server. In turn, this infringes on the rights of the unit and its members to have a majority representative function effectively on their behalf in order to resolve disputes, process grievances, and investigate issues, among other responsibilities. Dover Tp. Bd. of Ed.; City of Newark.

Turning to whether the District had a legitimate and substantial business justification for its action, we disagree with the District that Abeigon's emails were so disrespectful, inflammatory, or threatening so as to warrant blocking his access to unit members. Therefore, we agree with the Hearing Examiner's ultimate conclusion and find that the District has failed to adequately demonstrate a legitimate and substantial business justification for permanently restricting Abeigon's email access to unit members. N.J.S.A. 34:13A-5.4a(1); see also, UMDNJ-Rutgers Medical, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Cumberland County College, P.E.R.C. No. 2011-65, 37 NJPER 74 (¶28 2011).

Accordingly we also reject this exception.

ORDER

The State Operated School District, City of Newark, is ordered to:

A. 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 imposing conditions or restrictions upon unit employees' attendance at the NJEA annual convention, governed by N.J.S.A. 18A:31-2, and by blocking NTU representative Abeigon's email access to unit employees commencing September, 2013.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit, particularly by imposing conditions or restrictions upon unit employees' attendance at the annual convention of the New Jersey Education Association, governed by N.J.S.A. 18A:31-2.

B. Take the following affirmative action:

1. Provide forthwith to the NTU a list of names and addresses of all teaching staff members in the unit employed during the 2012-2013 school year.

2. Provide forthwith to NTU representative John Abeigon email access to all unit employees for the purpose of communicating about terms and conditions of employment, including but not limited to contract administration and grievance processing.

3. Post in all places where notices to employees 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.

4. Notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: September 22, 2016

Trenton, New Jersey

# 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 imposing conditions or restrictions upon unit employees' attendance at the annual convention of the New Jersey Education Association, governed by N.J.S.A. 18A:31-2 and by blocking NTU representative Abeigon's email access to unit employees commencing September, 2013.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit, particularly by imposing conditions or restrictions upon unit employees' attendance at the annual convention of the New Jersey Education Association, governed by N.J.S.A. 18A:31-2.

WE WILL provide forthwith to NTU representative John Abeigon email access to all unit employees for the purpose of communicating about terms and conditions of employment, including contract administration and grievance processing.

WE WILL provide forthwith to the NTU a list of names and addresses of all teaching staff members in the unit employed during the 2012-2013 school year.

Docket No. CO-2014-098

State Operated School District, City of Newark
(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) 984-7372

APPENDIX "A"