P.E.R.C. NO. 2017-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2012-349

SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission rejects a Hearing Examiner's recommended decision in which the Hearing Examiner concluded that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by sending two letters to Association members setting forth the Board's then-current collective negotiations offers in violation of the parties' ground rules. The Commission holds that an isolated breach of a ground rule is not a per se violation of subsections 5.4a(1) or (5). The Commission also finds that neither the content nor the sending of the letters was, or tended to be, coercive and that the evidence does not establish that the Board refused to negotiate in good faith.

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, Adams, Gutierrez & Lattiboudere (Adam Herman Esq., of counsel)

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

DECISION

This case comes to us by way of exceptions to a Hearing Examiner's Report and Recommended Decision. H.E. 2017-5, 43 NJPER 281 (¶80 216). On June 22, 2012, the Somerset Hills Education Association (Association) filed an unfair practice charge against the Somerset Hills Board of Education (Board) alleging that the Board violated sections 5.4a(1), (2), and (5) of the New Jersey Employer Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)[1/] by sending a letter dated May 8, 2012 (the May letter) to

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence (continued...)

Association members about the status of negotiations in violation of agreed-upon ground rules.

On December 16, 2013, the Director of Unfair Practice issued a Complaint and Notice of Hearing with regard to the 5.4a(1) and (5) allegations only. On January 2, 2014, the Board filed an Answer, admitting it sent the letter but denying that doing so violated the Act.

A hearing was held on June 19, 2014. During the hearing, the Association sought to amend its charge to include a June 18, 2012 letter (the June letter) sent by the Board to Association members. The Hearing Examiner allowed the amendment over the Board's objection, finding that the document had been provided in discovery.

We adopt the Hearing Examiner's findings of fact, H.E. at 4-12, with two exceptions. First, we do not adopt the last sentence of the findings grouped as #17. As more fully discussed below, given that the Association had the burden of proof on its allegations, N.J.A.C. 19:14-6.8, given the parties' stipulation that the contents of the May letter had previously been

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(...continued)
or administration of any employee organization; and (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.

communicated to the Association's negotiations team, and given the Hearing Examiner's finding that the record does not reflect whether the entire content of the June 18 letter had been previously communicated to the Association's negotiations committee, we reject her inference that it had not been so communicated. Second, while we accept the findings grouped as #5, including the Hearing Examiner's crediting the testimony of Association negotiator Judith Martin (Martin), we clarify that the historical interpretation of the ground rules, as explicated by Martin's testimony, pertained only to the Association's interpretation of them, not the Board's negotiations team for the successor agreement.

We summarize only the pertinent facts. The parties stipulated as follows:

- The Board and Association were parties to a collective negotiations agreement effective July 1, 2008 through June 30, 2011.
- Negotiations between them for a successor agreement began in January 2011.
- They agreed to ground rules for negotiations in January 2011. Ground rule #8 provides:

  > The contents of regular negotiations sessions shall be confidential between the respective Committees. However, each Committee shall have the right to advise and update their respective memberships as to the progress of negotiations. Neither party shall contact or advise the public as to the contents of negotiations unless the parties agree to do so jointly.

- Negotiations for the successor agreement to the 2008-2011 contract were long and contentious.

- The Board's negotiations committee sent a letter dated May 8, 2012 to the teaching staff members, which was delivered to teachers' school mailboxes.

- The Association was not notified before the Board sent Association members the May letter.

The May letter, signed by the Board's Negotiations Chairman and three members of its negotiations committee, states as follows:

> Dear Somerset Hills Board of Education Staff Member,
>
> The Somerset Hills Board of Education values all staff members and realizes the toll that the unsettled employment contract has taken on the entire school community. The purpose of this letter is to provide the facts to you regarding the Board's current offer.
>
> - The last Board salary offer to SHEA is 1.5% for the 2011-2012 school year; 2% for the 2012-2013 school year; and 2% for the 2013-2014 school year. The current offer represents significant movement from the Board's initial offer.
>
> - The Board has also offered an increase in longevity and an increase in stipends.
>
> - The Board will not be offering any retroactive salary if the agreement is not settled before the end of the current school year.
>
> The Board will continue to work with the Somerset Hills Education Association (SHEA) to settle the contract either through the upcoming fact-finding process or by direct communication with SHEA. The Board looks forward to resolving negotiations as quickly as possible. Thank you for continuing to serve the students of Somerset Hills School District.
>
> Sincerely,

The Negotiation Committee, on behalf of the Somerset Hills Board of Education

The parties' stipulations included that the three bullet points set forth in the May letter were part of the Board's then-current offer, which had been previously communicated to the Association's negotiations committee.

Martin has been employed by the Board for thirty-two years. During negotiations for a successor agreement to the 2008-2011 contract, she was President of the Association and also one of its negotiators. Martin had also been a negotiator for several prior contracts. Ground rule #8 had been included in ground rules for the prior contracts. According to Martin, the Association interpreted the rule to prohibit each party's team from going back to their constituency with any specific details of the negotiation until a memorandum of understanding (MOA) was reached. Martin testified that she interpreted the sentence stating, "[h]owever, each committee shall have the right to advise and update their respective memberships as to the progress of negotiations," to allow a committee to update only other committee members, not the general membership, on the progress of negotiations.

According to Martin, the Association took issue with the May letter because they believed ground rule #8 prohibited such a communication. Martin also testified that the Association took issue with the statement in the May letter about retroactive pay

because they felt the statement was meant to pressure the Association team to settle the contract. Martin further testified that during prior contract negotiations in which she had been involved, the Board had never sent a letter directly to Association members on the topic of negotiations.

Three other Association members testified on behalf of the Association. One testified that the Board had never previously sent Association members a letter similar to the May letter. Another testified that he was surprised by the May letter because his understanding was that the Board would not communicate directly with the teachers, and he was very upset with the third bullet of the letter, taking it as an ultimatum. The third testified that he was a little upset by the third point of the May letter, thinking it was intended to create a divisive reaction as far as the union was concerned.

Robert Baker (Baker) has been a member of the Board's negotiations committee since 2008. He served as Chairman of the negotiations committee for the contract that expired in 2008, as well as for the 2011-2014 contract negotiations. He signed the ground rules on behalf of the Board on January 25, 2011.

Baker testified that the Board understood that ground rule #8 gave Board members the right to discuss the status and progress of negotiations with one another and that he expected the Association negotiations committee would do likewise with its

full membership. Baker acknowledged that ground rule #8 was silent with regard to the Board's right to communicate with the Association membership, but he testified that his understanding of the law was that it allowed for such communications. We add that Baker testified that he believed ground rule #8's prohibition on communicating with the "public" did not restrict the Board from communicating with employees regarding the status of negotiations.

Baker testified that the Board sent the May letter for two reasons. The Board had feedback from other members who had discussions with Association members who felt that "they were in the dark," that they "didn't understand what was going on," and that some of the numbers they were hearing did not make sense. The Board sent the May letter to clarify any confusion regarding its offer. Also, it sent the letter because the parties had finished mediation and were going to fact-finding. Baker testified that the offer that was highlighted in the May letter, including that there would be no retroactive salary if the contract was not settled by the end of the school year, was factual and had been communicated to the Association's negotiations committee before the letter was distributed.

The Board's offer in the May letter was rejected by the Association. The Board sent a second letter, the June letter,

directly to Association members. This letter stated in its entirety:

> Dear Somerset Hills Board of Education Staff Member,
>
> The Somerset Hills Board of Education is sad to report that our last offer has been rejected by the negotiating team for the Somerset Hills Education Association (SHEA). The purpose of this letter is to provide the facts to you regarding the Board's current offer:
>
> - The Board's current salary offer to SHEA is 1.0% for the 2011-2012 school year; 2.75% for the 2012-2013 school year; and 2.75% for the 2013-2014 school year for a total salary offer of 6.5% for the three year period.
> - The current offer will expire at 6 pm on June 27, 2012.
> - The Board has also offered an increase in longevity and an increase in stipends.
> - There are no reductions to health benefits.
> - New employees who work 25 hours or less per week would not be entitled to health benefits. All current full time employees will be grandfathered.
> - There is a proposed cap on tuition reimbursement of $150,000 per year in the second and third year of the contract with a maximum of 9 credits per employee per year. Tuition reimbursement expense for the current school year is $123,000.
> - The fact-finding process could take one and one-half years to conclude, based upon feedback from other districts.
>
> The Board was very hopeful that the contract would have been settled today. We are extremely grateful to our staff for their hard work and dedication to our students over this past school year. The Board will continue to work on a settlement either through the upcoming fact-finding process or by direct communication with SHEA.

Sincerely,

The Negotiation Committee, on behalf of the Somerset Hills Board of Education

The Association also rejected the offer set forth in the June letter. After mediation, in July or August 2012, the parties ultimately reached an agreement, which was later ratified.

The Hearing Examiner found that the Board violated N.J.S.A. 34:13A-5.4a(1), independently and derivatively, and 5.4a(5) when it sent the May and June letters. Although noting that the ground rules were "technically silent" as to a party's right to communicate with the "opposite constituency," but relying upon her finding that "both parties clearly construed the rule to define the 'public' as anybody outside of the parties' respective negotiations representatives," the Hearing Examiner found that the letters violated the "spirit" of the long-established ground rules. She also found with regard to the May letter that the Board intended to influence Association members by negotiating directly with them. She based her finding upon Baker's answer to the question whether he thought anything in the May letter constituted a threat, which he answered, "No, we used the word offer every single time. The word offer doesn't have to be accepted. We were negotiating." The Hearing Examiner made the same finding with respect to the June letter based upon her inference that the expiration date in it had not been previously

communicated to the Association's negotiations team. The Hearing Examiner also found that the letters contained threats of reprisal and were coercive in that they implied consequences for the Association's continued refusal to enter into a successor contract.

The Board excepts to the following: the Hearing Examiner improperly permitted the Association to amend its unfair practice charge to include the June letter; since the Association failed to file an amended charge following the hearing, the amendment must also be denied; the May and June letters were not coercive but were consistent with the Board's right to advise employees of the status of contract negotiations; the Hearing Examiner erred by considering whether the Board violated the ground rules given that the charge only alleges that a statement in the May letter constituted a threat of reprisal; and the Board did not violate the ground rules.

We deal first with the procedural issues. N.J.A.C. 19:14-6.3(a)(8) authorizes Hearing Examiners to consider and rule upon motions to amend pleadings before a case is transferred to the Commission. The Association did not proffer an explanation why it waited two years and until the hearing before seeking to amend the unfair practice charge. While we do not endorse last minute amendments because of their potential prejudice to the other party, we note that the June letter arose from the same set of

facts as the May letter, and the Association produced the June letter during discovery as a document it might rely upon at the hearing. More importantly, the Board did not request an adjournment or the scheduling of an additional hearing date in order to call a witness to testify regarding the June letter, and it did not explain how the amendment prejudiced the Board. Therefore, and given that the Association adduced little evidence during the hearing about the June letter,[2/] we find no prejudice to the Board in allowing the amendment.

The Association failed to formally amend the charge after the hearing. We also do not endorse a party's failure to follow the procedural requirements relating to amending a charge. N.J.A.C. 19:14-1.5a(1). However, we find no harm in the Association's procedural error and, therefore, reject this exception.

Lastly, we reject the Board's exception that since the charge makes no mention of the ground rules and since the Association never sought to amend the charge to include a claim based upon them, the Hearing Examiner could not consider the

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2/ Of all the witnesses, the Association asked only Martin about the June letter, and these questions were limited to asking if she recognized it, how she received it, and if she had any "issue" with it being sent to members. As to the latter, Martin answered, "Yes, we did. The same issues of direct communication with our members and an attempt to put pressure on our members to put pressure on us to settle. . . ."

issue of whether the Board violated the rules by sending the May and June letters to employees. In contrast to the exception regarding consideration of the June letter, the parties' stipulations of fact included the ground rules, the Board did not object to the Association questioning Martin as to her and the Association's interpretation of the rules, and the Board questioned Baker in some detail about them. Also, and as discussed below, an alleged breach of ground rules might be relevant to the 5.4a(1) and (5) claims, particularly the latter since it turns on the "totality of circumstances" standard we have adopted in determining whether a party has refused to negotiate in bad faith. Therefore, we find no prejudice to the Board by the Hearing Examiner's consideration of the ground rules in relation to those claims.

We now turn to the legal framework governing the substantive issues of whether the Board violated the Act by sending the May and June letters to staff members. N.J.S.A. 34:13A-5.4a (1) prohibits a public employer from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act. An employer violates this section independently of any other violation if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. An employer violates the section derivatively when it violates another unfair practice

provision. Lakehurst Bd. of Ed., P.E.R.C. No 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

N.J.S.A. 34:13A-5.4a(5) prohibits public employers 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. . . ." A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

At the outset, we clarify that an isolated breach of a ground rule is not a *per se* violation of 5.4a(1) or (5), meaning that such a breach, standing alone, does not necessarily give rise to a violation of these provisions of the Act.[3/] Rather, if a breach of a ground rule is found to have occurred, it must still be determined, with regard to a 5.4a(1) allegation, whether that conduct interfered or would tend to interfere with an employee's statutory rights and the offending party lacked a

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3/ It appears that most public employment labor relations agencies that have considered the issue have concluded a ground rule violation is not a per se refusal to negotiate. See cases collected in Grand Rapids Public Museum and Grand Rapids Employees Independent Union, July 18, 2002, C01 G-132 & CU01 F-32, posted at http://www.michigan.gov/documents/lara/c01g132_520034_7.pdf.

legitimate and substantial business justification for its action. As to a refusal-to-negotiate claim, if a breach of a ground rule is found, the offending party's overall conduct and attitude must be examined in the context of the negotiations. Such an analysis is consistent with the standards we have formulated for 5.4a(1) and (5) claims, the subordinate role ground rules play in the negotiations process, and the need to allow each party some degree of flexibility as the process proceeds.

Thus, the principal issue before us is not whether the Board violated ground rule #8, but whether the content or the sending of the letters was or tended to be coercive, whether the Board's conduct lacked a substantial and legitimate basis, and whether its overall conduct demonstrated an intent not to negotiate. While we find that the Association's interpretation of ground rule #8 to be reasonable despite the rule's silence as to whether the Board was permitted to communicate its offers to employees, we find that the Association failed to meet its burden of proving that the Board violated the Act by sending the May and June letters to employees.

Turning first to the 5.4a(5) allegations, the record is devoid of evidence that the Board lacked a desire to reach a successor agreement. If anything, its action in sending the letters demonstrated that it wanted to enter into an agreement. Moreover, the Association did not offer testimony to rebut

Baker's testimony that the letters were sent to employees because some employees had approached Board members about what was occurring in negotiations and it appeared that the members were unaware of what was happening or confused by what they had heard. By this time, the parties were at impasse. The Board continued to negotiate after the Association rejected the offer memorialized in the May letter. There is no evidence that the negotiations or their outcome was affected as a result of the letters. We note that the Association does not address the Board's overall conduct and attitude, but rather relies solely upon the Board's action in sending the two letters to establish its claims. Considering the totality of circumstances, we conclude that even if the Board's action in sending the letters amounted to a technical violation of ground rule #8, the evidence does not establish that the Board refused to negotiate in good faith.

We turn next to whether the Board violated the Act by including a threat of reprisal or force or a promise of benefits in the May and June letters. We find that it did not.

Employers are not prohibited from communicating with employees during periods of negotiations, and may inform employees of the status of negotiations, proposals previously made to the union, or its version of a breakdown in communications. However, such communications may not contain a

threat of reprisal or force or a promise of benefit. In re Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982), adopting H.E. No. 82-34, 8 NJPER 181 (¶13078 1982); In re Rutgers, The State Univ., P.E.R.C. No 83-136, 9 NJPER 276 (¶14127 1983), adopting H.E. No, 83-26, 9 NJPER 177 (¶14083 1983); Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985), adopting H.E. No. 85-43, 11 NJPER 382 (¶16138 1985).

In Camden, the Fire Chief distributed a memorandum to employees during negotiations stating that the union president had made a misrepresentation during negotiations that financially disadvantaged union members. In Rutgers, the University sent notices to unit employees during negotiations advising them that, as a result of negotiations, the salary figure ultimately agreed upon could be the same, higher, or lower than current salaries. In Spotswood, the employer held a meeting for employees during negotiations to discuss the options being considered by the parties in negotiations to reduce labor costs. The meeting was conducted on employee time and on a voluntary basis, and Association officers were in attendance. We found no threat of reprisal or force or promise of benefits in either Camden, Rutgers, or Spotswood.

The Board's May letter simply set out the offer that it had already communicated to the Association's negotiations team. Nothing in the letter, and nothing in Baker's testimony about its

contents, suggests that the Board's motive in sending it was to negotiate directly with staff. The Board's June letter also communicated its then-current offer. As noted in our discussion of the Hearing Examiner's findings of fact, there was no evidence in the record to support her inference that the entire content of the June letter had not been communicated to the Association's negotiations team. The Hearing Examiner's conclusion that the letter contained a threat of reprisal was based in part upon her unsupported inference. Here, the Board's communications during the lengthy negotiations were limited to two letters, sent after Board members received inquiries about the status of negotiations and after the parties reached impasse. The facts of this case are most similar to those in Spotswood, where the employer held a meeting for employees to set out the options the parties were discussing in negotiations to reduce labor costs. There, like here, the employer's action of limiting its communications to informing union membership as to the status of negotiations did not constitute a threat of reprisal or force or promise of benefits. Therefore, we also dismiss the 5.4a(1) claim.

ORDER

The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: June 29, 2017

Trenton, New Jersey