P.E.R.C. NO. 2017-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

QUEEN CITY ACADEMY
CHARTER SCHOOL,

Respondent,

-and-

Docket Nos. CO-2016-200
CO-2017-007

QUEEN CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision concluding that Queen City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (3), and encouraged and supported an effort to decertify the Association, when: (1) the Director, in response to a communication from the Association President to unit members, sent an email to staff criticizing his tone as combative and divisive; (2) the Director invited an organization opposed to the Association and the NJEA to present to staff during a mandatory professional development day school and later reprimanded the Association President for his conduct at the presentation; (3) Queen City's Board of Trustees released a strategic plan identifying unionization as a threat to the goals and objectives of the school; and (4) the Director bypassed the Association President and Vice President as designated union representatives to accompany a PEOSHA inspector after telling the inspector there was no union contract or dues collected. The Commission rejects Queen City's exceptions, finding that the Hearing Examiner's findings of fact were supported by the record and the Hearing Examiner's conclusions of law were correct.

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, Schwartz, Simon, Edelstein and Celso, attorneys (John A. Boppert, of counsel)

For the Charging Party, Bergman and Barrett, attorneys (Michael T. Barrett, of counsel)

DECISION

This case is before the Commission on exceptions filed by Respondent, Queen City Academy Charter School (Respondent or Queen City), to a Report and Recommended Decision of a Commission Hearing Examiner, [H.E. No. 2017-6, 43 NJPER 380 (¶109 2017)]. The Charging Party, Queen City Education Association (Association) did not file a response to the exceptions.[1/]

1/ On June 26, 2015 the Association was certified, via a card check procedure, to be the majority representative of all regularly employed, non-supervisory certificated and non-certificated employees. Queen City unsuccessfully asserted that the certification should not have been issued. See D.R. No. 2015-11, 42 NJPER 82 (¶22 2015).

Separate unfair practice charges and an amendment, later consolidated, were filed on March 28, July 14, and September 12, 2016, by the Association against Queen City. After the parties submitted testimonial and documentary evidence, during a three day hearing, and legal argument thereafter, the Hearing Examiner concluded that Queen City violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), both derivatively and independently, and N.J.S.A. 34:13A-5.4a(3).[2/]

The Hearing Examiner's report contains detailed Findings of Fact (H.E. No. 2017-6 at 7 to 69) supported by references to the hearing transcript and exhibits. We will not repeat the findings here except in conjunction with our discussion of Queen City's exceptions. The report concludes that the Association had proven that Queen City, particularly Chief Academic Officer/Director Danielle West, took personnel actions based on anti-union animus and/or interfered with, restrained, or coerced employees in the exercise of rights protected by the Act by:

1. West's statements in an e-mail exchange with Association President Gary Corcoran;

2/ 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.

2. Arranging, during a Professional Development Day (PDD),[3/] for a representative of the American Association of Educators (AAE), a group opposed to, and seeking to supplant, traditional teacher collective negotiations representatives, to make an oral and written presentation to Queen City teachers.

3. Reprimanding Corcoran for his exchanges at the meeting with the AAE representative and a fellow teacher.[4/]

4. Issuing a 2015-2020 Strategic Plan that listed "unionization" as among the "threats" to the plan's goals and objectives;

5. Regarding, or in regard to, an incident in which a PEOSHA investigator asked West to have an Association representative present while he was conducting an unannounced inspection at the school, West responding that there was no ratified union contract nor were union dues being paid.[5/]

The Hearing Examiner noted that a representation petition and amended petition seeking to decertify the Association as the majority representative had been filed with the Commission on July 5 and August 2, 2016, respectively, and that on September 27, the Director of Representation and Unfair Practices ordered

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3/ On PDDs students are not present but attendance is mandatory for teachers and counselors.

4/ The other teacher, whom the Hearing Examiner found was opposed to the Association's organizing drive, did not protest his reprimand.

5/ The Hearing Examiner concluded that the charges made additional allegations that the Association did not prove constituted unfair practices. See discussion, H.E. No. 2017-6 at 77 to 82. The Association has not challenged this recommendation.

that the processing of that petition be blocked until the unfair practice charges were resolved. See D.R. No. 2017-5, 43 NJPER 164 (¶49 2016). The Hearing Examiner, H.E. No. 2017-6 at 61, determined that the filing of the decertification petition was tainted:

> I find that there is an immediate cause and effect between the unfair practices and the filing of the petition which taints the decertification process and prevents the conduct of a free and fair election to decertify the Association. It is apparent that West's and the Board's conduct after the Association was certified had a cumulative effect which demonstrated support for and tacit approval of the decertification effort.

The Hearing Examiner proposed this remedy:

- That Queen City cease and desist from its conduct (specified in the proposed order) that was found to independently violate N.J.S.A. 34:13A-5.4a(1) and N.J.S.A. 34:13A-5.4a(3);
- That the decertification petition filed with the Commission (RD-2017-001) be dismissed;[6/]
- That Queen City remove the reprimand issued to Gary Corcoran based on his conduct at the AAE presentation during the March 24, 2016 Professional Development Day;

6/ This section of the recommended order provides:

> [I]n the event [the employee who filed the decertification petition] and supporters remain displeased with the Association's representation, a new petition may be filed pursuant to N.J.A.C. 19:11-2.8 during the open period for school districts in the 2017-2018 school year or thereafter if permitted under [the Commission's] rules.

- That Queen City sign, post and maintain, for at least 60 days, a Commission prepared Notice to Employees; and

- That Queen City, within 20 days, advise the Commission Chair the steps it had taken to comply with the Order.

Queen City has filed these exceptions:

1. The Hearing Examiner erred in determining that Director West's responses in the Corcoran/West Email Exchange of October 13, 2015 (CP-4, R-1) violated 5.4a(1).

2. The Hearing Examiner erred in determining that the "AAE Presentation arranged and approved by [Director] West independently violated 5.4a(1)," and that "the reprimand of Corcoran for his conduct during the presentation violated 5.4a(3), and derivatively (a)(1) of the Act."

3. The Hearing Examiner erred in determining that the School's 2015-2020 Strategic Plan (listing "unionization" as a "threat") interfered with the Association's right to represent its members and violated 5.4a(1).

4. The Hearing Examiner erred in finding that Director West made a "determination not to include" or a "decision to exclude" Corcoran and (Jennifer) Cherubini from the PEOSHA inspection process, which "interfered with their rights as designated union representatives and violated 5.4a(1)."

5. The Hearing Examiner erred in concluding "a secret ballot election conducted ... at this time would likely not result in an accurate gauge of the employee representational desires," and recommending "that the decertification petition be dismissed."

Queen City identifies alleged errors of fact in connection with each of its exceptions.

With respect to the Hearing Examiner's findings of fact, we cannot consider those de novo. Instead, our review is guided and constrained by N.J.S.A. 52:14B-10(c).[7/] 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 factfinder's "feel of the case" based on seeing

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7/ N.J.S.A. 52:14B-10(c) provides, in pertinent part:

> 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. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

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

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Borough of Carteret, P.E.R.C. No. 2016-28, 42 NJPER 231 (¶66 2015); Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006).

The West-Corcoran e-mails

Queen City challenges findings concerning:

- Whether Corcoran knew that his October 13, 2015 e-mail to teachers would be visible to everyone at Queen City, including West;
- That the Hearing Examiner erred by attaching "little weight" to the testimony of [Kimberly] LaRochelle and [Anibal] Garcia;
- That Corcoran's e-mails constituted protected activity;[8/] and

8/ We do not find it significant, nor did the Hearing Examiner, that the Association's compilation of the e-mails were presented in a composite document (CP-4) rather than in their original form. This version did not alter the content of the messages and we decline to accept Queen City's characterization that the document was a falsification.

- That the administration's response was discipline or carried a threat of discipline.

We reject this exception. The Hearing Examiner properly concluded that Corcoran's e-mail to teachers, concerning staff meetings going beyond 4 p.m., was a protected communication and West's response, sent to all staff, not just Corcoran personally, was a disciplinary response. See H.E. No. 2017-006 at 26. The issue of Kimberly LaRochelle's and Anibal Garcia's testimony is a credibility issue reserved to the Hearing Examiner. Queen City has provided no basis for us to set it aside given the standard of review imposed by statute and case law for assessing such challenges.

The AAE Presentation and Corcoran's Reprimand

Queen City raises several challenges to the Hearing Examiner's treatment of this incident. Some question findings of fact and some dispute conclusions of law.[9/]

9/ Queen City asserts that the Hearing Examiner erred in these rulings:

a. The AAE presentation "was for all intents and purposes a captive audience meeting to promote the AAE as an organizational alternative to the Association." (H.E. No. 2017-6 at 70; see also, Findings of Fact ¶34 at 33-35.)

b. "The administration's actions, in this instance, do not implicate employer free speech rights ... and the right to comment on union efforts." (H.E. No. 2017-6 at 70.)

c. "The AAE ... was promoted as an alternative to the Association, not as an added benefit as Respondent

(continued...)

9/ (...continued)
asserts." (H.E. No. 2017-6 at 71.)

d. "Any on-line research of the AAE philosophy demonstrated that it considered unionization as antithetical to the charter school movement." (H.E. No. 2017-6 at 71.)

e. "[B]y allowing this presentation at the end of a mandatory PDD [Professional Development Day] West and the administration were tacitly promoting the benefits of the AAE, dissatisfaction with the Association, and, thereby, encouraging staff to reject the Association as the majority representative in favor of the AAE." (H.E. No. 2017-6 at 71.)

f. "[AAE Representative] Middleton refused to answer [Corcoran's] questions despite answering questions from others. Corcoran continued his questioning to no avail." (H.E. No. 2017-6 at 71.)

g. "Corcoran's statements made during Middleton's presentation were protected conduct." (H.E. No. 2017-6 at 72.)

h. "West's reprimand of Corcoran for 'bombarding Middleton with questions' (R-10) was in retaliation for that conduct. The fact that Garcia was also reprimanded was immaterial." (H.E. No. 2017-6 at 72.)

I. "[A]lthough Garcia was 'reprimanded' for his behavior at the presentation, the reprimand was not an impediment to his career advancement, since West recommended him for a new position shortly thereafter which was approved by the Board and resulted in an $11,000 salary increase for 2016-2017." (H.E. No. 2017-6 at 73.)

j. "Garcia... instigated the exchange with Corcoran that led to them both being reprimanded." (H.E. No. 2017-6 at 71.)

k. The Hearing Examiner could not "credit [Guidance Counselor] Morrison's assertion that she did not attend [the AAE presentation]... Also, I infer that since
(continued...)

We need not respond specifically to each of these points given the context of the AAE presentation, how it was arranged, and the date on which it occurred.

When it was certified as the exclusive majority representative on June 26, 2015, the Association was entitled to an unrebuttable presumption of majority status for one year from that date. See Brooks v. NLRB, 348 U.S. 96 (1954). A Commission rule, N.J.A.C. 19:11-2.8(b) embodies that status by providing:

> Where there is a certified or recognized representative, a petition for certification or decertification will not be considered timely filed if during the preceding 12 months an employee organization has been certified by the Commission as the exclusive representative of employees in an appropriate unit. . .

Director West arranged for the AAE presentation. It occurred on March 24, 2016, within the one year period when the Association's majority status, as a matter of law, was unassailable. From the statements of the AAE representative and the material distributed at the meeting, the purpose of the presentation was to convince Queen City teachers that traditional unions like the Association were incompatible with a charter school environment. We hold that the Hearing Examiner properly

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9/ (...continued)
their attendance would ordinarily have been mandatory, West approved their absence."

concluded that this incident was part of Queen City's actions that violated N.J.S.A. 34:13A-5.4a(1).

We also conclude that the issuance of a reprimand to Corcoran for questioning the AAE representative (who responded to all inquiries except those posed by Corcoran) about her organization's capacity to engage in collective negotiations was discipline for engaging in protected activity, in violation of N.J.S.A. 34:13A-5.4a(3), and derivatively, N.J.S.A. 34:13A-5.4a(1). Certainly, the President of a newly minted majority representative organization has the right to respond to a person or organization seeking to undermine the Association's status.

The Stragetic Plan listing "Unionization" as a "threat"

Queen City asserts that these findings and conclusions were inaccurate or erroneous:

a. "[S]ince Queen City was already unionized, characterizing unionization as an external threat is inaccurate and does not diminish the plan's clear negative message as it related to the Association." (H.E. No. 2017-6 at 74, n.22.)

b. "It is not a stretch...for any employee reading this plan to conclude that support for the Association might not be good for professional growth." (H.E. No. 2017-6 at 74.)

c. The "timing of the plan's release in May 2016 shortly before the Association's protection from challenging under its certification bar was ending in June 2016 was particularly damaging to the Association's existence and encouraging to the decertification effort which culminated in the filing of a petition in July 2016." (H.E. No. 2017-6 at 74.)

We reject this exception and hold that the Hearing Examiner reasonably concluded that issuing a strategic plan labeling "unionization" as a threat to the goals and objectives of Queen City tended to interfere, restrain, or coerce employees in the exercise of rights guaranteed by the Act in violation of N.J.S.A. 34:13A-5.4a(1).

The PEOSHA Inspection

Queen City challenges these findings related to West's statement's to the PEOSHA inspector after he asked, per his agency's guidelines, for a union representative to accompany him on the inspection of Queen City's facilities.

a. "West's response (to the PEOSHA inspector) was that there was ... no designated union representative." (H.E. No. 2017-6 at 75.)

b. "It is apparent that West did not understand or chose not to accept that the Association was the majority representative." (H.E. No. 2017-6 at 75.)

c. West's explanation of her remarks to the PEOSHA inspector was "weak." (H.E. No. 2017-6 at 75.)

d. "West provided no plausible explanation why LaRochelle who was shredding paper could not have covered either Corcoran or Cherubini while they performed inspection duties." (H.E. No. 2017-6 at 76.)

e. Corcoran and Cherubini had a "right as designated union representatives" to "perform inspecting duties." (H.E. No. 2017-6 at 76.)

f. "West could have found acceptable coverage [for Corcoran and Cherubini] without unduly

compromising the education of students." (H.E. No. 2017-6 at 76, n.24.)

g. "PARCC testing ... was completed for the day when [Inspector] Gaudin arrived." (H.E. No. 2017-6 at 76.)

h. The Hearing Examiner's inference that "West was more comfortable with LaRochelle's participation than either Corcoran or Cherubini," due to the "well established and known by West" views of LaRochelle "opposing the Association as majority representative." (H.E. No. 2017-6 at 76.)

The record amply supports the Hearing Examiner's findings. She reasonably concluded that West's efforts to exclude Association officials from participating in the PEOSHA inspection interfered with their rights as designated union representatives and violated N.J.S.A. 34:13A-5.4a(1).

Recommendation to Dismiss the Decertification Petition

In challenging the Hearing Examiner's conclusion that the decertification petition should be dismissed, Queen City repeats challenges to the Hearing Examiner's findings that led her to conclude that: the West-Corcoran e-mail exchange; the AAE presentation and the resulting reprimand of Corcoran; the listing of "unionization" as a "threat" in the strategic plan; and the PEOSHA inspection; all violated N.J.S.A. 34:13A-5.4a(1).[10/]

10/ The Hearing Examiner concluded that the reprimand of Corcoran violated N.J.S.A. 34:13A-5.4a(3)

Queen City also contests these findings and/or conclusions:

- "It stretches credulity to believe that West was not aware of decertification efforts" before the decertification petition was filed. (H.E. No. 2017-6 at 83-84.)

- That an employee opposed to the Association attended an "initial information session... to spy on the attendees and report back to West." (Finding of Facts ¶7 at 11-12.)

- Director West "apparent[ly]" turned "a blind eye" to activities related to the decertification efforts of certain employees "on school premises during school hours, while during negotiations, the administration was denying the Association's request to conduct meetings after school on school premises without a rental fee." (H.E. No. 2017-6 at 87-88.)

These findings are all supported by substantial evidence. The previously discussed incidents which the Hearing Examiner concluded violated N.J.S.A. 34:13a-5.4a(1) and (3) inexorably led to a determination that the workplace atmosphere was tainted and prevented the holding of a decertification election as an accurate measure of the employee's free choice regarding union representation.

As part of the proposed remedy, the Hearing Examiner recommended the following:

> [I]n the event [the employee who petitioned for decertification] and supporters remain displeased with the Association's representation, a new petition may be filed pursuant to N.J.A.C. 19:11-2.8 during the open period for school districts in the 2017-2018 school year or thereafter if permitted under our rules.

The "open period" referenced above will occur beginning September 1, 2017 and ending October 16, 2017, because the normal closing date, October 15, falls on a Sunday. We will adopt this recommendation.

ORDER

The Queen City Academy Charter School is ORDERED to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by (1) on October 13, 2015, Director West responding critically to an email sent to members by Association President Gary Corcoran regarding union business and characterizing Corcoran as hostile and divisive; (2) West inviting the American Association of Educators (AAE), an organization which is an alternative to the Association and opposed to the NJEA, to present to staff during a mandatory professional development day (PDD); (3) releasing a Strategic Plan designating unionization as a threat to the objectives and goals of Queen City; (4) during a PEOSHA inspection, Director West's excluding union representatives to accompany the inspector; and (5) by these actions, tacitly approving and encouraging employees to support the effort to decertify the Association as majority representative.

2. Discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Association President Corcoran for conduct during the AAE presentation.

B. That the representation petition and amended petition seeking to decertify the Association as the majority representative filed on July 5 and August 2, 2016 (RD-2017-001) which have been blocked by the Complaint issued under Docket Nos. CO-2016-200 and CO-2017-007 be dismissed. Queen City Academy Charter School, D.R. No 2017-5, 43 NJPER 164 (¶49 2016). That in the event petitioner and supporters remain displeased with the Association's representation, a new petition may be filed pursuant to N.J.A.C. 19:11-2.8 during the open period for school districts in the 2017-2018 school year or thereafter if permitted under our rules.

C. That the Queen City Academy Charter School take the following action:

1. Remove the Corcoran reprimand regarding his conduct at the March 24, 2016 PDD AAE presentation.

2. 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.

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

BY ORDER OF THE COMMISSION

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

ISSUED: June 29, 2017

Trenton, New Jersey

RECOMMENDED

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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by (1) on October 13, 2015, Director West responding critically to an email sent to members by Association President Gary Corcoran regarding union business; (2) West inviting the American Association of Educators (AAE), an organization which is an alternative to the Association and opposed to the NJEA, to present to staff during a mandatory professional development day (PDD) on March 24, 2016; (3) releasing a Strategic Plan designating unionization as a threat to the objectives and goals of Queen City; (4) during an PEOSHA inspection, West's excluding union representatives to accompany the inspector; and (5) by these actions, tacitly approving and encouraging employees to support the effort to decertify the Association as majority representative.

WE WILL cease and desist from discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Corcoran for conduct during the AAE presentation.

WE WILL remove the Corcoran reprimand regarding his conduct during the AAE presentation.

Docket No. CO-2016-200 CO-2017-007

Queen City Academy Charter School
(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