

P.E.R.C. NO. 2024-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERVILLE BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-2022-022

SOMERVILLE EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission rejects a Hearing Examiner's Report involving the Somerville Education Association's claim that the Board retaliated against a non-tenured teacher after he requested union representation before an Interim Evaluation meeting. The Commission finds that, although a Weingarten right attached to the meeting, the Board did not violate Act when it denied representation because the meeting never occurred. Furthermore, the Board did not violate the Act because, even assuming the administration evidenced hostility toward the request for union representation, the preponderance of the evidence showed that the administration did not recommend renewal of the teacher's employment contract due to concerns related to his professionalism and teaching performance. Notably, those concerns were documented well before the request for union representation.

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,
Schenck Price Smith and King, attorneys
(Marc H. Zitomer, of counsel)

For the Charging Party,
Mellk Cridge LLC
(Edward Cridge, of counsel)

DECISION

On August 6, 2021, the Somerville Education Association (Association) filed an unfair practice charge alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), and (5),^{1/}

^{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;" and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit (continued...)"

when the Board allegedly refused to allow a non-tenured teacher, Dante Cianni (Cianni), to bring an Association representative with him to an interim evaluation conference with Board administrators. The Association further alleges that the Board later retaliated against Cianni for his request to have Association representation at the interim conference by not renewing his employment contract. On January 7, 2022, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing.

After a two-day, hearing which was conducted virtually on April 5 and 7, 2022, and receipt of post-hearing briefs by June 30, 2022, the Hearing Examiner issued a report and recommended decision, H.E. 2023-10, on April 25, 2023. The Hearing Examiner found that the Board violated subsections 5.4a(1) and (3) of the Act when it refused to allow Cianni to bring an Association representative with him to an interim conference with Board administrators that he reasonably believed may lead to discipline and when the Board later retaliated against Cianni for his request to have Association representation at the interim conference by not renewing Cianni's employment contract. The

1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Hearing Examiner also found that the Board did not violate subsection 5.4a(5) of the Act. The Hearing Examiner recommended that the Commission restore the status quo ante by reinstating Cianni to his position as a teacher with the Somerville Board of Education, together with back pay and interest less interim earnings. On May 5, 2023, the Somerville Board of Education (Board) filed exceptions to the Hearing Examiner's report and recommended Decision and Order.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. We find that the Hearing Examiner's findings of fact are supported by the record and both adopt and amend them.

Summary of Facts

We summarize the pertinent facts as follows. The Association is the majority representative for certificated employees, as well as athletic trainers, secretarial and clerical employees, custodial and maintenance employees, instructional assistants, and bus drivers employed by the Board. The Board and Association are parties to a collective negotiations agreement (CNA) which covers the period of July 1, 2017 through June 30,

2020.

Dante Cianni was employed by the Board as a non-tenured English Language Arts teacher at the Somerville Middle School for three school years, beginning with the 2018-2019 school year, and culminating with the 2020-2021 school year. Prior to his employment with the Board, Cianni graduated from Montclair State University with a bachelor's degree in English, and from Seton Hall Law School in 2011 with a Juris Doctorate. Cianni was licensed to practice law in New Jersey in 2011, and also holds a teaching certificate issued by the New Jersey Department of Education for secondary English. Prior to working for the Board, Cianni was employed by the Teaneck School District for three years as a middle school teacher, and his contract was not renewed at the end of the third year.

During his employment with the Board, Cianni was a member of the Association. At the conclusion of the 2019-2020 school year, Cianni received a summative performance report (2019 Summative Report), written by middle school principal Anthony Benjamin (Benjamin). Cianni received an overall summative rating score of 2.8999, which categorized him as "Effective (2.65-3.49)." In the 2019-2020 Summative Report, Cianni was rated "Effective" for five of the six performance standards, but rated "Partially Effective" for "Performance Standard 1: Professional Knowledge," which

included the following comments:

[C]ontinue to familiarize yourself with the core curriculum and develop higher order thinking questions in response to your understanding of this curriculum. This will assist in creating/sustaining an environment in which students challenge their own and others thinking, and apply skills and concepts accordingly. Furthermore, continue to enhance your understanding of individual students' developmental needs. This will assist you, among other things, when pairing students to engage assignments, and overall growing students confidence and communication skills.

At or before the start of the new school year, take initiative and remain consistent and insistent on seeking your administrator feedback on how to improve your ability and the expectation to enhance/deepen your knowledge base. You should participate in monthly [sic] meeting with administration and/or you yourself need to schedule a monthly meeting with administration to monitor your progress and development with this specific standard/area.

In the 2019-2020 Summative Report, Cianni was rated "Effective" for "Performance Standard 6: Professionalism" and was recommended for continued employment for the 2020-2021 school year. However, it included the following "Areas Noted for Improvement":

The areas for improvement and suggestions for such improvement are noted above in the specific Standards section/box. We expect immediate and significant improvements in all standards at the start of the new school year, especially the Standards noted above which include Professional Knowledge.

Failure to make such noted improvement will likely negatively impact future observations, the interim

report, and your 2020-2021 Summative rating-thus prompting the recommendation for non-renewal for the 2021-2022 school year likely. We believe in you and know you can rise to this expectation.

(a) Cianni's Performance and Disciplinary Issues Prior to the Interim Evaluation Conference

On September 16, 2020, Cianni attended an optional professional development conference. However, that evening, he received an email from Benjamin scheduling a meeting because he had "missed" a mandatory training. Cianni was concerned because he did not understand why Benjamin was accusing him of missing an optional training that he had attended.

At the September 17, 2022 meeting, attended by Benjamin, Cianni, Valentina Carleo (Supervisor of Language Arts), Lani Perusso (Vice Principal), and Freddy Shaker (Mr. Cianni's union representative), Benjamin stated that Cianni had missed a mandatory meeting on September 16 and requested an explanation. Cianni responded that he attended the meeting, which he believed was optional and not mandatory. In acknowledging this, Mr. Benjamin, after looking down, and then back up, said "well that torpedoes..." and then trailed off. Mr. Cianni asked Benjamin what he meant by "torpedoes" but did not receive a response. Based on the false accusation and the "torpedo" comment, Cianni believed he was going to be reprimanded and possibly disciplined at some point in the future.

On November 2, 2020, Perruso observed Cianni's performance in class. In the report, Perruso included the following comment under "Assessment of and for Learning Evidence": "Mr. Cianni is encouraged to circulate the room as students work independently and monitor students' progress and understanding." Cianni was concerned about the comment since teachers were previously advised of school rules requiring teachers to maintain social distance from students due to the COVID-19 pandemic. Instead of circulating, the administration had recommended the use of the remote monitoring software "Securely." During his post-observation meeting with Perruso on November 24, he informed Perruso that he was using that software on his laptop to monitor the student's screens. Cianni believed that Perruso would modify her comment on the report after the conversation, but only added "Mr. Cianni stated that he was using Securely to monitor students' screens instead of circulating the classroom." Perruso also included the following comment under "Professional Evidence": "Mr. Cianni is reminded to contact school administration or the appropriate staff member directly (i.e. the school nurse) regarding concerns/questions about individual students as to maintain confidentiality and professionalism."

During the November 24, 2020 post-observation meeting with Perruso, Cianni asked Perruso what that line meant, but was

informed that because of the pandemic, "this was just boiler plate language" and that she was "putting it in everyone's observation as a precaution" so that nobody "violate[s] any HIPAA laws."^{2/} Prior to the November 2020 observation report prepared by Perruso, Cianni had never seen comments included in an observation report about incidents that did not actually occur either during the classroom observation, or during a pre-observation conference with the observer, but Benjamin stated that observation reports are not limited to the actual observation itself, and may include comments regarding professionalism outside the classroom. Cianni was concerned that the comment was placed on his observation report based on an exchange he had with Benjamin during a faculty meeting earlier that year. At that meeting, Cianni had asked a question of Benjamin regarding potential racial bias in the implementation of virtual schooling. After the question, Benjamin began to publicly reveal confidential student information and Cianni requested that Benjamin not do so during the meeting.

Melissa Stager (Stager), Director of Curriculum, observed Cianni's performance in class on January 22, 2021. On December

^{2/} The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320 et seq. (HIPAA), required the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge.

9, 2020, Stager and Cianni had a pre-observation meeting, and they also had a post-observation meeting to discuss Stager's observation report dated January 28, 2021. Cianni was concerned at the post-observation meeting because of some of Stager's comments in the report, including the following comment under "Professional Evidence": "...However, this school year there have been instances where he failed to maintain professionalism and has engaged in unproductive dialogue." These comments stem from Cianni's concerns regarding the Board's use of a facial scanner for COVID-19 temperature tracking. Although Cianni had objected to the facial scanner at the beginning of the school year, Cianni learned for the first time that his actions during that incident were characterized as unprofessional through Stager's January observation report, even though Stager had not participated in any of his conversations or meetings about facial scanners.

In the "Summary Comments" section of the January observation report, Stager included the following: "...What has held Mr. Cianni back this year is sometimes less than professional responses to issues or concerns he may have faced." Cianni included the following under "Teacher Comments":

My passion for equity and doing right by the students has been mischaracterized into personal attacks about tone, and the fact is that I have not been approached by any administrator at the time any alleged incident took place or any other time prior

to Ms. Stager's observation report. It is disappointing that Ms. Stager chose not to have any direct conversation with me throughout the school year, and waited until what is supposed to be an objective assessment to make allegations that I cannot confront or defend beyond this response.

Following the observations, Cianni received an interim performance report from Perruso, which is required by the Stronge Teacher Effectiveness Performance Evaluation System (Stronge) adopted by the Board. The Board uses Stronge interim evaluations as an opportunity to reflect on a teacher's practice, as Stronge characterizes interim evaluations as an opportunity to "provide systemic feedback prior to the summative review," which relies upon a preponderance of the evidence to evaluate performance based upon all observations collectively, and includes feedback on professionalism both inside and outside the classroom.

In the 2020-2021 Interim Report, Cianni was rated "Effective" for four of the six performance standards, but rated "Partially Effective" for two performance standards: "Performance Standard 3: Professional Knowledge," and "Performance Standard 6: Professionalism." The report included the following comment:

As stated in his first observation, "Although students responded accurately for the majority of the questions, it is recommended that Mr. Cianni challenge the students and encourage them to elaborate on their responses."

As stated in his second observation, "he should consider in the future ways he can give students more opportunity to uncover the learning through deeper questioning and things like a planned thing-pair-share. By adding a turn and talk you would have a better idea if all students had the same understanding. This was a quick review in the beginning. You could consider asking students to elaborate or having other students answer before moving forward as well. Both of those techniques would still give [sic] your formative assessment data but would allow for a broader sample of gauging student understanding."

In addition, after the "Partially Effective" rating for "Performance Standard 6: Professionalism," the report includes comments during his first observation, which reminded him to contact school administration or the appropriate staff member directly regarding concerns/questions about individual students as to maintain confidentiality and professionalism. The report also included comments written after Mr. Cianni's second observation, which cites that "this school year there have been instances where he failed to maintain professionalism and has engaged in unproductive dialogue, in reference to the facial scanner issue and an occurrence where Cianni sent an email, reply-all, criticizing actions of administrators. The comments relate to his concerns regarding the use of facial scanners. The comments also concern Cianni responding to an email from the

principal with a reply-all which publicly questioned the intent of the email.

The 2020-2021 Interim Report stated the following under the "Area Notes for Improvement": "See above comments in areas notes as 'partially effective.'" This was a reference to comments left under the "Performance Standard 3: Instructional Delivery" and "Performance Standard 6: Professionalism" standards. Both comments ended with the following statement:

Please be sure to resolve these concerns and incorporate the suggestions/recommendations prior to your third observation. Please be aware that because of your performance with this standard (& other standards) over the course of two observations put you at risk of a poor Summative evaluation and/or risk of non-renewal for the [2021-2022] school year.

After receiving this interim report, Cianni was concerned that he would not be rehired because he was unable to resolve his concerns after Stager's January observation, and then the negative comments from that January observation were "lifted and pasted" into the March interim report.

(b) Cianni's Request for Union Representation

On March 8, 2021, Perruso e-mailed Cianni a Google Meet invitation for the "Mr. Cianni Interim Conference" to take place the following day, March 9, 2021, at 2:30 p.m. Benjamin was also listed as an invitee on the invitation. Cianni responded on the following day requesting union representation to be present for

the meeting. Perruso advised Cianni via e-mail shortly thereafter that an Association representative was not required for the meeting, as Benjamin did not consider the interim report or the interim conference to be disciplinary in any way. Cianni replied and insisted that an Association representative be present at the meeting since:

[T]his meeting and the results of this meeting could affect my job status as you clearly state in the report, and this falls under my Weingarten rights. Additionally, the interim report contains serious misrepresentations of what has been said in prior meetings, and in one prior meeting Anthony stated that I was being "torpedoed." As such, I feel I cannot effectively participate in this meeting without a union representative taking notes of the meeting.

Benjamin responded via email later that Association representation was not needed or permitted during the meeting:

Union representation is not needed, permitted, or being allowed at this meeting. You are invited to come or can choose not to come to the meeting, as we cannot force you to do so. We have submitted your Interim Report to you in writing. As with all of our non-tenured teachers who receive an Interim Report, our meeting goal is to provide you clarification and support as you grown and improve in your professional capacity.

Cianni responded with his concerns to comments in his prior reports, and stated: "Evidenced by the incidents I mentioned above, there is a reasonable belief that anything I say will be used to discipline or discharge me. I would enjoy having a

constructive conversation to discuss how I can grow within my practice, but I cannot do so without a union representative present.” Perruso responded about his comment to all staff have been reminded about communicating directly to the appropriate staff member, and his reminder to Cianni was in regards to the student he was speaking about during the faculty meeting, and how a faculty meeting is not an appropriate forum to speak about individual students. Cianni responded once again and reiterated his concerns to the comments in his prior reports.

Cianni did not attend the Interim Conference scheduled for March 9, 2021 because he did not believe Perruso and Benjamin’s assurances that it was not disciplinary, and because he believed that “the whole meeting was premised on documents that contained misrepresentations.” Benjamin did not allow Cianni to bring a union representative to the meeting because:

[T]hat would set a precedent that I wasn’t familiar with that the district has been engaging in the past and there are a myriad of reasons. It also ... doesn’t allow for us to have the opportunity to have honest dialogue and feedback about professional practice, whereas it now becomes a thing of, we are focusing on something disciplinary, when it actually isn’t disciplinary. It actually puts a wrinkle in the ability to effectively engage in ... interim conferences with others, because the time constraint ... we have to coordinate time constraints. We would have to coordinate the schedules with everyone else to ensure that everyone is able to attend union representation and the like

and that would actually impede our ability to actually get the teacher feedback, so they could go back and you know make any corrections or adjustments to their practice, so as to improve it. This has nothing to do with discipline.

Benjamin has not previously allowed other non-tenured employees to bring a union representative to any other interim conference, but if Cianni had attended the interim meeting, Benjamin would have allowed Cianni to request a union representative mid-meeting if the meeting "started to take a disciplinary turn." Benjamin was scheduled to conduct Cianni's next classroom observation, but he asked Krystyna Domagala (Domagala), the newly hired district supervisor, to conduct the observation instead because he "wanted to ensure that Dante - I want the appearance that he knows that he is getting a fair shot and because he has already ... made the statement that he feels I'm targeting him or I am torpedoing him, it wouldn't have actually - our goal is to still, regardless of however someone feels, is to support their growth and professional development."

The following day, on March 10, 2021, Benjamin emailed Board Superintendent Dr. Timothy Teehan (Teehan) making him aware that "because Dante Cianni seemingly is creating a narrative that makes it appear as if he is being target by me, Lani and/or Val, I reached out to Domagala to see if she would be willing to switch/trade observations with me as I have Dante this

[March]..." When Teehan inquired as to whether Cianni attended his Interim Conference, Benjamin replied: "He did not show up and will not come in without union representation. He went back and forth trying to create drama and controversy over the old meeting we had that included Val, Lani and me." Teehan had also not allowed other employees union representation at post-observation and interim conferences because "[i]t definitely has a chilling effect on the conversation that goes on and ... people are checking what they are saying, they are not going to be as open and that can happen on both sides, because sometimes an employee might receive pressure from the union to be present, because of their own perceptions, even the employee might not be open to it."

(c) The Board Does Not Renew Cianni's Contract

On March 24, 2021, Cianni's classroom performance was observed by Domagala, who issued an observation report on April 13, 2021, and Cianni and Domagala met on April 15, 2021 for a conference after that observation. The comments contained positive observations of Cianni's teaching performance.

Cianni received his summative performance report for the 2020-2021 school year (2020-2021 Summative Report) in May, 2021, which was completed by Benjamin, after Benjamin had met with Teehan and Perruso. In that report, Cianni received an overall

summative rating score of 2.6, which qualified as "Partially Effective."

In the 2020-2021 Summative Report, Cianni was rated "Effective" for five of the seven performance standards, but rated "Ineffective" for two performance standards: "Performance Standard 4: Assessment of/for Learning" and "Performance Standard 6: Professionalism." The Summative Report included the following comment to both sections:

Within this '20-'21 school year, of the three observations that Mr. Cianni received, the preponderance of evidence reveals that Mr. Cianni has not made significant improvement that would render an overall effective rating in this performance standard. This '20-'21 rating is a decline and/or is inconsistent with the overall performance rating of effective that Mr. Cianni received for the '19-'20 school year in this specific standard. The evidence rendering an ineffective for this year includes, but is not limited to the following analysis and/or recommendations in any of three observations this school year:

Observation #1- Mr. Cianni is encouraged to circulate the room as students work independently and monitor students' progress and understanding. During this time, Mr. Cianni can facilitate individual discussions with students as well as use this as an opportunity to gather data and differentiate questioning for students.

Observation #2- By adding a turn and talk you would have a better idea if all students had the same understanding. This was a quick review in the beginning. You could consider asking students to elaborate or having other

students answer before moving forward as well."

Observation #3- While questions were asked of the students to assess their understanding and prompted learning and skill application, reflect upon and take into consideration the level of which a student must respond. Continue to lead through inquiry learning, as questions drive the instruction and students construct meaning to those questions on a deeper level.

Cianni's 2020-2021 Summative Report included a recommendation for non-renewal:

Evaluation Summary

Recommended for Dismissal/Non-Renewal. (The teacher has failed to make progress on a Performance Improvement Plan, or the teacher consistently performs below the established standards, or in a manner that is inconsistent with the school's mission and goals)

On May 10, 2021, Benjamin and Perruso had a post-summative meeting with Cianni and his union representative, Sally Booth. Teehan allows staff members to have union representatives at summative meetings because "that can affect their terms and conditions of employment." On May 11, Benjamin sent Teehan an email summarizing the tense May 10 post-summative meeting with Cianni, as he was upset about his summative evaluation, and left the meeting early. Teehan believed that Cianni's abrupt ending of his summative review was also evidence of Cianni rejecting an opportunity for professional growth "because it further supported

that instead of having a productive conversation, he instead was not and therefore wasn't really interested in growing as a professional." Teehan also believed that Cianni's abrupt ending of his summative review "really solidified the decision that had been made by Mr. Benjamin that he was not going to recommend him for renewal. I think that actually solidified that, wow, that was the right decision."

Teehan sent a letter to Cianni on May 12, 2021 to inform him that he would "not be offered a contract for the 2020-2021^{3/} year and that [his] employment with the District [would] end on June 30, 2021." Cianni did not avail himself of his statutory right to request a statement of reasons for the non-renewal of his contract. Cianni also did not request a Donaldson hearing before the Board to attempt to convince the Board to renew his contract for the 2021-2022 school year.

We add the following pertinent facts concerning Benjamin's and Teehan's testimony as to the business justifications for Cianni's non-renewal, which were not included in the Hearing Examiner's Report. These facts are as follows:

Benjamin, who completed Cianni's Summative Evaluations, noted Cianni's deficiencies in the categories of professionalism

^{3/} Based upon the date of this letter, the Hearing Examiner assumed that this was a typographical error, and the year should have been listed as the 2021-2022 school year.

and the assessment of student learning and stated that Cianni's score dropped as the year went on because "the preponderance of the evidence that has been provided, both in observations, both directly in the classroom and outside the classroom and there was no great significant improvement across the board" and that he held Cianni to a higher standard at the end of his third teaching year than he would a less experienced teacher. 2TR 49:3 to 52:8^{4/}. The summative report specifically documented that Cianni had difficulty in assessing student learning and understanding, such as by adding a "turn and talk" while teaching students and by asking more probing questions of his pupils. Jt. Ex. F. In the professional category, Benjamin found that Cianni did not "solve things in a productive manner and separate emotions from [] work interactions" and failed to raise his workplace concerns "with a respectful tone and through proper channels" which included "a quiet conversation on the side or responding to an email individually." Id.

Teehan testified that he concurred with Benjamin's assessment and noted that he personally saw that Cianni initially was "very passionate and he was very interested in being involved and growing. The concerning part was that [Teehan] saw that

^{4/} "2TR" refers to the transcripts of the April 7, 2022 virtual hearing.

waning as the years went on.” 2TR 141:4 to 142:1. Teehan also stated that Cianni’s 2019-2020 summative evaluation should have been “concerning” and put him on notice that his superiors were demanding professional growth and “interested in [Cianni] becoming what we believe you can become.” 2TR 143:17 to 144:17. Teehan further testified that the bar is high for employees to get renewed in the Somerville school district, and “if somebody is not performing where they should be performing and I think we can find a superior candidate, then I will pull the trigger. I won’t hesitate to do it and put someone better in there.” 2TR 140:4-20.

Arguments

The Board excepts four findings of the Hearing Examiner. Listed as Exception #1 the Board avers:

The Respondent did not violate Dante Cianni’s Weingarten rights when it provided Mr. Cianni with the option to either attend the meeting unaccompanied or to have no meeting. The Hearing Examiner’s finding to the contrary must be reversed (HE55).

The Board claims that since the meeting did not occur and Cianni was given the option of either attending the meeting without a union representative or not attending at all, Cianni’s Weingarten rights could not have been violated. In response, the Association contends that because the Board had adopted the Stronge model of teacher evaluation, the interim evaluation

conference was non-optional and that the failure to have the meeting violated Cianni's rights.

Listed as Exception #2, the Board avers:

Protected conduct was not a substantial or motivating factor in any action taken by Respondent against Dante Cianni (HE55).

The Board argues that the Hearing Examiner was incorrect when she determined that Cianni's failure to attend the interim conference was a substantial or motivating factor in his nonrenewal because it was based on the incorrect determination that the Board violated Cianni's Weingarten rights, that the Administration's testimony regarding Cianni foregoing an opportunity for professional growth when he elected not to attend the meeting was violative of the Act, and misapplied statements by the Employer regarding Cianni's behavior at the Summative Conference. In response, the Association argues that the Board is simply trying to relitigate factual and credibility findings before PERC after failing to convince the Hearing Examiner of its position and incorporates its post-hearing brief by reference.

Listed as Exception #3, the Board avers:

There was no reasonable basis for Dante Cianni to believe that the interim conference was disciplinary in nature (HE49).

The Board argues that prior to the interim evaluation meeting, Cianni was told unequivocally that the meeting was non-

disciplinary and was an opportunity to reflect and grow on his practice and therefore there was no reasonable basis for Cianni to believe he could be disciplined as a result of the meeting. The Board argues that Commission precedent does not require union representation at performance evaluation meetings even where an employee may lose their job if the evaluations are bad. In response, the Association again argues that this is a request to relitigate credibility determinations by the Hearing Examiner that are supported by the record and incorporates its post-hearing brief by reference.

Listed as Exception #4, the Board avers:

Even assuming *arguendo* that Respondent did violate Mr. Cianni's Weingarten rights and take subsequent adverse action against him based on same, it was improper for the Hearing Examiner to order reinstatement and back pay (HE58).

The Board asserts that even if the Administration improperly denied Cianni a representative at the interim performance conference, reinstatement is not the proper remedy if the employer has an independent basis for its actions. The Board argues that it is uncontroverted that Teehan never considered Cianni's request for union representation when deciding whether to recommend non-renewal. The Board also argues that a remedy that would reinstate Cianni could also provide him tenure, which would result in PERC substituting its judgment for the Board in

regards to its long-term employment decisions. In response, the Association argues that the Board cites no authority to support its position that the remedy of reinstatement is inappropriate when it would restore the status quo ante and reaffirms its position that since the Board retaliated against Cianni's protected conduct, a make-whole remedy is appropriate.

Analysis

The first issue before us is whether a Weingarten violation occurred when Cianni requested and was denied a union representative at the 2020-2021 interim evaluation meeting and management decided not to conduct the meeting. Additionally, we must examine whether Cianni's request for a union representative was a substantial factor in the administration's decision not to renew his employment, and also whether the preponderance of the evidence shows that there were legitimate business reasons for his non-renewal. An overall assessment of the complete record shows that the preponderance of the evidence supports that Cianni was not renewed based on the administration's concerns regarding both his professionalism and noted deficiencies with his teaching performance related to his assessment of student learning and understanding in the classroom. The preponderance of the evidence also shows that timing plays a critical role in this case as the administration's concerns were consistently

documented well before Cianni's request for union representation. The record lacks a sufficient nexus between Cianni's request for union representation and the administration's decision not to renew him.

Board Exceptions 1 and 3- Did a Weingarten violation occur when Cianni requested and was denied a union representative at the 2020-2021 Interim Evaluation Meeting and management decided not to conduct the meeting?

We agree with the Hearing Examiner that a Weingarten right attached to the interim evaluation meeting, but the Board did not violate Cianni's Weingarten rights because the meeting never took place. Therefore, we reject the Hearing Examiner's legal conclusion that the Board violated Cianni's Weingarten rights.

It is well-established that employees are entitled to union representation during an investigatory interview that the employee reasonably believes may result in discipline. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).^{5/} The right to representation does not apply in "run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." Id. at 257-58. Once an employee requests union representation, "[t]he

^{5/} This standard was adopted by us in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, rev'd in part, 1980 N.J. Super. Unpub. LEXIS 6 (App. Div. 1980), and approved by our Supreme Court in In re UMDNJ, 144 N.J. 511 (1995).

employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." Id. at 258.

The Hearing Examiner determined that Cianni's Weingarten rights were violated because he requested representation, was entitled to representation, and was improperly denied representation at the Interim Evaluation meeting. The first question before us is whether Weingarten rights attached to the meeting.

We find that there are factors weighing both in favor and against Cianni possessing an objectively reasonable belief that the interim evaluation meeting could have resulted in discipline. Undermining a finding that the evaluation meeting could lead to discipline includes the nature of the evaluation itself, as noted in the Stronge evaluation method and the employee handbook, which is primarily to discuss teaching performance and for the administration to provide feedback. This type of performance or evaluative meeting will not typically give rise to an objectively reasonable belief that the meeting could be disciplinary. See

Wharton Bd. of Ed., P.E.R.C. No. 87-10, 12 NJPER 157 (¶ 17231 2010); North Warren Reg. Bd. of Ed., P.E.R.C. No. 79-9, 4 NJPER 516 (¶ 4187 1991). We also note Cianni's superiors specifically told him that the meeting was not of a disciplinary nature.

However, the Hearing Examiner found the following incidents supported Cianni's belief that the meeting could result in discipline: (1) During a September 17, 202 meeting, Benjamin's use of the word "torpedo"; (2) The reminder that Cianni must follow HIPAA in Perruso's November 2020 Observation report-- Cianni testified that he later learned that the language was not boiler plate language in other staff's observations; (3) Stager's January 2021 Observation Report which included criticism of Cianni's professionalism; and (4) Cianni's 2020-2021 interim performance report wherein he was rated "Partially Effective" for both "Professional Knowledge" and "Professionalism", and also warned that failure to increase performance could result in non-renewal of his contract.

We add the following. N.J.S.A. 18A:27-3.1 provides that non-tenured teaching staff members shall be evaluated at least three times each school year. The statute goes onto state that the purpose of the evaluation procedure is to "recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence." Ibid.

Moreover, Cianni's prior year's (2019-2020) Summative Report also noted teaching performance and professionalism deficiencies and contained a warning that failure to make noted improvements could negatively impact a recommendation for renewal.

On balance, after considering the unique circumstances of this case including the four incidents/factors set out by the Hearing Examiner, in conjunction with Cianni's non-tenured status and warning in the 2019-2020 Summative Report about non-renewal if noted improvements were not made, we find that a Weingarten right should have been afforded to Cianni after he requested union representation for the interim evaluation meeting.

However, we decline to find that N.J.S.A. 5.4a(1) was violated because Benjamin did not require Cianni to attend the meeting without representation and explicitly informed him that they could not force him to attend the interim evaluation meeting. Since Cianni was not required to attend the interim evaluation meeting, nor was he accused of insubordination for failing to attend the meeting, we decline to find that Cianni's Weingarten rights were violated.

Board Exceptions 2 and 4- Was Cianni's request for a union representative a substantial factor in the administration's decision not to renew his employment, and if so, did the administration also have legitimate business reasons for that decision?

Pursuant to the Act, it is "unlawful [to] discharge or otherwise [take an] adverse public employer action against a worker because of his or her union activity." N.J.S.A.

34:13A-5.4(a)(1) and (3). "Public employers still retain the right, however, to discharge a worker for a legitimate business reason, unrelated to the employee's union activities." In re Bridgewater Twp., 95 N.J. 235, 237 (1984). To establish a prima facie case for a violation of N.J.S.A. 34:13A-5.4a(3), the employee must show "the protected activity was 'a substantial, i.e., a motivating factor' in the employer's disputed action. Once this is accomplished, the burden shifts to the employer to 'go forward and establish by a preponderance of the evidence' that the action occurred for legitimate business reasons and not in retaliation for the protected activity." Id. at 244 (quoting East Orange Pub. Library v. Taliaferro, 180 N.J. Super. 155, 163, (App. Div. 1981)).

We agree with the Hearing Examiner that Cianni's request for union representation at the interim evaluation meeting was protected activity. However, the Hearing Examiner went on to find that Cianni's request was a substantial factor in the Board's decision not to renew his employment. The Hearing Examiner based her findings on Benjamin's and Teehan's testimony, as well as their email exchanges, which evidenced their belief

that the presence of a union representative at an evaluation meeting changes the dynamics and focus of the evaluation and prevents an honest dialogue about professional growth.

Even assuming that Benjamin's and Teehan's beliefs on this point evidenced anti-union animus and contributed to their decision not to renew Cianni, the Association's retaliation claim cannot prevail on this record. This is because the record shows that the Board proved by a preponderance of the evidence that it had legitimate business reasons for Cianni's non-renewal relating to his professionalism and teaching performance, and therefore, his employment contract would not have been renewed anyway. On this record, there is an insufficient nexus between Cianni's request for union representation and the administration's decision not to renew his employment.

The Hearing Examiner's Report did not include or discuss the testimony of Benjamin and Teehan which established the administration's concerns related to Cianni's teaching performance and professionalism. Their testimony was corroborated by documentary evidence. Both Benjamin's and Teehan's testimony, and the 2019-2020 Summative Evaluation, as well as the November 2020 and January 2021 Interim Performance Reports and the 2020-2021 Summative Evaluation, evidence that the administration was concerned with how Cianni conducted himself

when displaying disagreements in the workplace. A theme emerged, whereby Cianni would not engage in a productive discussion, which included numerous tense exchanges with administrators and a reply-all email criticizing the actions of administrators.^{6/}

With regard to Cianni's teaching performance, the above cited documentary evidence reflects mixed reviews. The observations and evaluations included in the record show many positive aspects to Cianni's teaching performance, and we note that the March 24, 2021 Observation Report, conducted by Domagala after Cianni's request for union representation, was largely favorable. However, starting with Cianni's Summative Evaluation for the 2019-2020 school year and continuing with all of the evaluations and observations thereafter, there is a consistent memorialization of teaching performance concerns related to Cianni's assessment of students' learning and understanding in the classroom.^{7/}

Timing plays a critical role in this case. The administration began to raise teaching performance and

^{6/} This includes Cianni's behavior at the Summative Evaluation Conference, which included ending the meeting early. We note that while Teehan and Benjamin had already decided to recommend non-renewal, the decision was not final and this additional incident was properly taken into consideration.

^{7/} We note Teehan's testimony that he will not renew non-tenured teachers who do not meet the high bar for teaching performance that is set in this school district.

professionalism concerns starting with Cianni's 2019-2020 Summative Evaluation, and continuing through the November 2020 and January 2021 Observation Reports, as well as the early March Interim Performance Report. These documented concerns all precede the March 8, 2021 Interim Evaluation meeting wherein Cianni requested union representation. This timing shows that the Board's professionalism and teaching performance concerns about Cianni began well before any issues that the administration may have had regarding his request for union representation.

An overall assessment of the complete record shows that the preponderance of the evidence supports that Cianni was not renewed based both on the administration's concerns regarding his professionalism and noted deficiencies with his teaching performance related to his assessment of student learning and understanding in the classroom. These aspects of the record were not discussed in the Hearing Examiner's Report. Especially after considering the timing of the documentation of the administration's concerns, which began with the 2019-2020 Summative Evaluation and continued thereafter, this record does not establish a significant connection between Cianni's March 8, 2021 request for union representation and the administration's decision not to renew him. Accordingly, the record does not

support a finding that N.J.S.A. 34:13A-5.4a(3) was violated.

ORDER

The Recommended Decision and Order of the Hearing Examiner is rejected and the Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Higgins voted in favor this decision. Commissioner Voos opposed. Commissioners Ford and Papero abstained.

ISSUED: August 24, 2023

Trenton, New Jersey