

P.E.R.C. NO. 2022-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINELANDS REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-161

PINELANDS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge filed by the Association against the Board. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by communicating directly with Association members regarding COVID-19 related safety and scheduling issues. Finding that the Board's communications did not tend to interfere with the Association's rights under the Act because they were informative and did not misrepresent the Association's positions, and that there was no evidence of direct dealing or attempted negotiations with individual employees rather than with the Association, the Commission dismisses the unfair practice charge.

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, Cooper Levenson, P.A., attorneys
(Kasi Marie Gifford, of counsel)

For the Charging Party, Mellk O'Neill, attorneys
(Edward A. Cridge, of counsel)

DECISION

On June 9, 2021, the Pinelands Education Association (Association) appealed the decision of the Director of Unfair Practices refusing to issue a Complaint on the Association's January 26, 2021 unfair practice charge against the Pinelands Regional Board of Education (Board). D.U.P. No. 2021-9. The Association's charge alleges that the Board violated subsections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations

^{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"; 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
(continued...)"

Act, N.J.S.A. 34:13A-1, et seq. (Act) when it communicated directly with Association members regarding issues being negotiated by the Association concerning safety protocols, remote learning, and scheduling related to the COVID-19 pandemic and plans for how to return to school in January 2021. On June 15, 2021, the Board filed opposition to the Association's appeal of the Director's refusal to issue a Complaint.

We summarize the pertinent facts as follows. Since December 2020, the Board had planned to return to hybrid model instruction beginning January 4, 2021. On January 1, 2021, the Association sent a letter to Superintendent Melissa McCooley, Ed.D. regarding its concerns about returning to school on January 4 in light of increasing COVID-19 cases and its preference to continue virtual instruction through January 18, 2021 to allow time for students and staff to quarantine following any traveling or mass family gatherings that may have occurred over the 10 day winter break.

On January 3, 2021, McCooley e-mailed all district families to inform them that the district would shift to all virtual instruction for the week of January 4-8. The e-mail provided:

Yesterday, January 2, 2021, I received a letter from the President of the Pinelands Education Association, written on behalf of the staff represented by this association, regarding concerns staff has with returning

1/ (...continued)
refusing to process grievances presented by the majority representative."

to any type of in-person instruction. In addition, several staff members have now informed us that they need to quarantine due to COVID exposure.

'The current trend of Covid cases increasing nationwide and more importantly locally, has caused much concern as to whether returning to school after a holiday break can be done safely. We have received many inquiries from staff members indicating that they do NOT feel safe returning. Staff members are very concerned that returning to school after a 10 day break, whereas families have traveled out of state and/or participated in large group holiday gatherings, as evidenced in social media postings, the potential for an outbreak in-district could occur, much like it did after both breaks in November' (Mr. Reid, PEA President).

Due to these recent concerns, as well as a lack in adequate staffing for both the Junior High and the High School, the Pinelands Regional School District will shift to an All Virtual Instruction Model from Monday, January 4, 2021 through Friday, January 8, 2021. Please note this includes all afterschool activities such as sports and clubs. VoTech will run as scheduled for the time being.

The administrative team, in concert with the Pinelands Education Association, will reassess COVID concerns and in-person staffing numbers at the end of the week in order to make a decision on the safest and most effective learning model for the following week, January 11, 2021 through January 15, 2021. The safety of our staff and students is paramount.

McCooley certified that she sent the e-mail to notify district families as soon as possible that they would not be returning to hybrid instruction on January 4 as previously planned. She

certified that her e-mail stated the Association's concerns because she thought it was important to share the reasoning behind her sudden decision as school administrators had faced extreme criticism for their decision-making and perceived lack of transparency.

On January 20, 2021, an Association member e-mailed the January 20 Association meeting minutes to a student and the e-mail contained the word "death" which triggered the district's e-mail filter. Due to a death in her immediate family, McCooley was out of the district when that e-mail was sent as well as when Director of Student Services Karen M. Kenny responded to it with a phone call to Association Secretary Michael Rua and a January 22 e-mail to all district staff. McCooley certifies that while she was out, the remaining administrators were doing what they thought needed to be done to quell any concerns in the district.

McCooley certifies that, following receipt of the flagged January 20 e-mail, Kenny contacted Association Secretary Michael Rua because she "wanted to rectify the situation, and was directed by an Association member to communicate with [Rua], not because she was attempting to negotiate with him, but because she was hoping to set up a meeting with the Association and the school nurses and she was incorrectly directed to him by a member as someone who would typically coordinate such events." The Association's charge alleges that Kenny called Rua "to discuss

the subject matter the Association was attempting to negotiate with the District." The Association's position statement asserted that even if Kenny called to arrange a meeting, establishing a meeting agenda constitutes negotiations and requires communicating directly with Reid.

Kenny's January 22, 2021 e-mail to all district staff provided:

Please be advised that a PEA member emailed the minutes from the PEA meeting on January 20, 2021 to a student. All student emails are screened with a Google filter for key words such as murder, suicide, death, etc. The minutes included the word death and therefore, the email was flagged and sent to myself, Karen Kenny, and Eric Pschorr.

I feel the need to clarify a situation that was stated in the minutes. According to the minutes, Mel Reid said the following:

I was exposed to Covid and sent home—for two weeks—after sitting through first period class. It is sad that I was in the building for 1 hour before I was sent home. The process of informing staff bothers me.

I would like to outline the situation clearly since there are pertinent details missing:

- Mel Reid contacted the Nurse at 7:52 pm on Thursday (1/14/21) that a colleague informed him that they were positive for COVID.

- As of 5:34 am the following morning (1/15/21), the Nurse provided Mr. Reid the definition of close contact and described the contact tracing process.

- At 6:12 am, Mr. Reid said that he and the colleague tried to maintain 6 feet distance at all times.
- At 6:13 am, the Nurse advised Mr. Reid that if he and the colleague were able to maintain the 6 ft. distance that he would not be considered a close contact.
- The Nurse called the colleague at approximately 7:20 am to confirm they were positive and discussed possible close contacts, confirming that some measuring needed to occur to see if desks were 6 feet apart. Mr. Reid and an additional staff member were identified as close contacts of the staff member that tested positive. Mr. Reid and the other close contact were contacted to discuss the situation and to verify distance and time to the positive individual.
- Mr. Henderson went to Mr. Reid's classroom to measure the distance between the two Teacher desks and informed the Nurses that the desks were not six feet apart.
- Nurse called Mr. Reid again to confirm that he was indeed a close contact, needed to quarantine, and that she was arranging coverage via the Main Office. Mr. Reid informed Nurse that he only had 15 minutes left so he would finish out the period and head down since his next period 2 was a free period.

The purpose of this email is twofold. One, I would like to assure you that our Nurses are following all protocols and procedures as per the CDC and the O.C. Department of Health. Both Nurses are in constant communication regarding all positive COVID cases and close contacts for all staff and students. The Nurses are on your team! Secondly, please be mindful of the six feet distance with Teacher desks in the classroom.

In full transparency, we will be posting the active positive COVID cases and quarantine numbers weekly on the school website. As of January 22, 2021, there are six staff members and seven students that are COVID positive (one of the students is completely virtual and has not been in the building). In addition, we have 70 students/staff quarantining due to travel, presenting as symptomatic, or being a close contact. For every positive case, we are required to contact the Ocean County Department of Health and the Ocean County Department of Education, providing all demographic information, as well as information for all close contacts.

As always, should you have any questions or concerns regarding any aspect of COVID, please do not hesitate to contact me or the Nurses.

The Director found that McCooley's January 3, 2021 e-mail to district families did not tend to interfere with the Association's negotiating position regarding terms and conditions of employment affected by the COVID-19 pandemic. D.U.P. No. 2021-9 at 14. He found that the Board did not misrepresent the Association's concerns, but explained the recent change in the mode of instruction for the upcoming week. Ibid. The Director noted that the Board acknowledged the Association's safety concerns regarding in-person instruction and accepted its suggestion to continue virtual instruction. Id. at 15.

The Director similarly found that Kenny's January 22, 2021 correspondence with district staff did not tend to interfere with the Association or its confidential information. D.U.P. No. 2021-9 at 14. He found that the Board "pointed out a situation

involving the school district's quarantine protocols that was circulated within the Association e-mail; attempted to clarify the timeline of events/circumstances as well as how the school district's actions in response were consistent with its quarantine protocols; and provided an update regarding posting of positive COVID-19 cases and quarantine numbers." Ibid. The Director concluded that Kenny's e-mail was not an invitation to deal directly with it or avoid union representatives, but was an attempt to resolve a problem informally. Id. at 15-16. Finally, the Director found that Kenny's communication with Secretary Rua to arrange a meeting does not support a finding of direct dealing because no benefits were negotiated and there is no indication the Board attempted to convene a meeting with the Association that would exclude the Association President. Id. at 17.

The Association's appeal asserts that the Director erred in refusing to issue a Complaint by relying on the fact that Kenny's phone conversation with Association Secretary Rua did not result in benefits actually being negotiated or result in a meeting with the Association that excluded Association President Reid. The Association argues that the Director should have found that Kenny's unsuccessful attempt at direct dealing, or bargaining around President Reid, regarding mandatorily negotiable employee safety protocols, could constitute an unfair practice. Citing Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254

1984), the Association asserts that the improper solicitation to negotiate with an individual employee is an unfair practice because it undermines the majority representative.

The Board opposes the appeal, asserting that McCooley's January 3, 2021 e-mail was necessary to inform district families of the changed mode of instruction for the upcoming week and that it referenced the Association's concerns to be transparent about the reasons for the change. The Board argues that Kenny's January 22, 2021 e-mail to district staff was a necessary response to the release of misinformation regarding the district's COVID-19 protocols. The Board asserts that Kenny's phone call with Secretary Rua was not an attempt to negotiate with Rua or cut Reid out of the process, but was an attempt to arrange an informative meeting between the Association and staff nurses to discuss COVID-19 safety protocols and concerns. The Board contends that it did not refuse to negotiate in good faith with the Association and that its communications did not tend to interfere with, restrain, or coerce employees.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. Where the complaint issuance standard has not been met, the issuance of a complaint may be declined. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No.

2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012). After a careful review of the parties' submissions, we sustain the Director's decision not to issue a complaint and dismiss the Association's unfair practice charge.

The Commission has held that direct dealing by employers with employees that are represented by a majority representative can constitute a violation of the Act. See Hillsboro Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005); Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). The Act permits public employers to express opinions about labor relations provided such statements are not coercive. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18629 1987). An employer has the right to advise employees of the status of contract negotiations as long as the communication does not contain a threat of reprisal or promise of benefits. The total context in which the statements were made must be taken into consideration. See Somerset Hills Bd. of Ed., P.E.R.C. No. 2017-70, 44 NJPER 14 (¶6 2017); Spotswood Bd. of Ed., P.E.R.C. No. 86-34, 11 NJPER 591 (¶16208 1985).

Considering the totality of the context surrounding the Board's communications in this dispute, we cannot find that the Association's allegations support the issuance of a Complaint. We agree with the Director's determination that McCooley's January 3, 2021 e-mail to district families did not tend to

interfere with the Association's rights under the Act because it did not misrepresent the Association's concerns in its explanation of the reasons for the change.

As for the direct dealing allegations, there is no specific allegation that Kenny's phone call to Rua or her January 22, 2021 e-mail to district staff sought to remove the Association from negotiations over COVID-19 related issues. The certified facts indicate that Superintendent McCooley was out of the district and that Kenny communicated with both staff generally and the Association specifically in order to quell concerns about the district's handling of the COVID-19 exposure incident referenced in the Association's January 20 e-mail. Kenny's e-mail expressed the Board's view of that particular COVID-19 exposure and reviewed the district's COVID-19 safety protocols generally, but did not include any solicitation for negotiations over such issues. We note also that as the e-mail was sent to all district staff, it included President Reid and other Association officers. There is also no specific allegation or certified fact to suggest that Kenny's phone call to Rua, even if it did seek to create an agenda for a meeting between the Association and nurses to review COVID-19 safety protocols, sought to negotiate over such safety issues. We also find it significant that Kenny's call was to an Association officer, Secretary Rua, which does not support an inference that the Board was attempting to avoid the Association and directly deal with rank-and-file unit members.

This case is distinguishable from Newark Bd. of Ed., P.E.R.C. No. 85-24, supra, cited by the Association, in which the school board, rather than negotiating with the union, solicited individual employee input on an attendance improvement program and then unilaterally implemented that program. Here, not only were no terms or conditions of employment adjusted, but the circumstances of Kenny's e-mail to district staff and phone call to Secretary Rua do not suggest direct dealing or an intent by the Board to exclude the Association from any COVID-19 related meetings or negotiations. See, e.g., Englewood Bd. of Ed., P.E.R.C. No. 94-1, 19 NJPER 409 (¶24180 1993) (no direct dealing where, during negotiations, Board solicited teachers' opinions on year-round classroom instruction); Rumson-Fair Haven Reg. Bd. of Ed., P.E.R.C. No. 87-46, 12 NJPER 831 (¶17318 1986) (no direct dealing where Board solicited teachers' opinions on scheduling of labs; Commission found no evidence that Board sought to negotiate with anyone other than the Association, no terms and conditions were adjusted, and no unilateral action was taken).

ORDER

The Director's refusal to issue a complaint is sustained and the Association's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Voos voted in favor of this decision. Commissioners Jones and Papero voted against this decision.

ISSUED: August 26, 2021

Trenton, New Jersey