H.E. NO. 2023-5

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2020-186

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Trenton Educational Secretaries Association's (TESA) motion for summary judgment, and denies Trenton Board of Education's (Board) cross-motion for summary judgment. The Hearing Examiner determined that the Board violated subsections 5.4a(1) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it sent correspondence to a TESA unit member regarding a proposed interview with an investigator from the New Jersey Department of Children and Family's Institutional Abuse Investigation Unit that specified that the unit member could have a union representative or legal counsel present "in a non-participatory role," and that the Board "expect[s] our employees to cooperate fully and provide accurate information," thereby implying that the unit member's continued employment was conditioned on satisfactory compliance.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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SECRETARIES ASSOCIATION,

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Appearances:

For the Respondent,
James Rolle, Jr., General Counsel
(Elesia L. James, Assistant General Counsel)

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

HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT & CROSS-MOTION FOR SUMMARY JUDGMENT

On January 16, 2020, Trenton Educational Secretaries Association (TESA) filed an unfair practice charge against the Trenton Board of Education (Board). The charge alleges that the Board violated subsections 5.4a(1) and (3)[1/] of the New Jersey

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 "(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

(continued...)

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it sent correspondence dated December 18, 2019 to TESA unit member Teresa Mendenhall regarding a proposed interview with an investigator from the New Jersey Department of Children and Family's (DCF) Institutional Abuse Investigation Unit (IAIU) that specified:

> -the unit member could have a union representative or legal counsel present "in a non-participatory role"; and
>
> -the school district "expect[s] our employees to cooperate fully and provide accurate information."

TESA alleges that the Board's letter "effectively brought the IAIU investigation, and Mendenhall's involvement therewith, under the auspices of the Board's authority and direction"; "purported to curtail Mendenhall's right to effective representation in connection with the IAIU interview . . . by stating that the presence of any representative would be 'non-participatory'"; "purported to curtail [TESA's] right to provide [unit members] with effective representation in connection with [an] IAIU interview"; and "effectively threatened discipline against Mendenhall should she exercise her right to effective representation at the IAIU interview."

On October 17, 2022, the Director of Unfair Practices issued

1/ (...continued)
guaranteed to them by this act."

a Complaint and Notice of Pre-Hearing with respect to TESA's 5.4a(1) allegations; declined to issue a Complaint with respect to TESA's 5.4a(3) allegations; and assigned the matter to me as Hearing Examiner. On October 17, 2022, the Board filed an Answer (in the form of a position statement) denying that it violated the Act, and asserted the following:

> The charge must be dismissed as the Charging Party had no Weingarten right to union representation during a witness interview by a State agency and thus, there was no right which could be curtailed.
>
> * * *
>
> Weingarten rights only attach where: (1) an employer is conducting an investigatory interview; (2) where said employee is the target of the investigation; (3) where such investigation could result [in] discipline against the employer; and (4) where the employee has made a request for union representation.
>
> * * *
>
> . . .[It] is unequivocal that: (1) the interview in question was not initiated by the District; (2) the interview was not investigatory, nor was Ms. Mendenhall the target; (3) there could be no reasonable belief that discipline could flow from this interview; and (4) Ms. Mendenhall did not request union representation as her Weingarten rights never attached and thus, could not have been infringed upon. Furthermore, Ms. Mendenhall expressly rejected the opportunity to bring representation with her to this meeting which further supports the District's position that no unfair practice occurred here. Accordingly, in the absence of any Weingarten right, the District could not have interfered with or restrained same either on the part of Ms. Mendenhall or the Association.

On November 18, 2022, TESA filed a motion for summary

judgment, together with a brief and exhibits. On December 9, 2022, the Board filed opposition to TESA's motion for summary judgment and a cross-motion for summary judgment, together with a brief, exhibits, and certifications of Board General Counsel, James Rolle, Jr., and Assistant General Counsel, Elesia L. James. On December 19, 2022, TESA filed a reply brief and the certification of its attorney, Edward A. Cridge.

On December 20, 2022, the Commission referred TESA's motion for summary judgment and the Board's cross-motion for summary judgment to me for a decision. See N.J.A.C. 19:14-4.8(a).

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The Board and TESA are parties to an expired collective negotiations agreement (CNA) in effect from July 1, 2009 through June 30, 2012 (see 2009-2012 CNA, Art. 21) and an expired memorandum of agreement (MOA) in effect from July 1, 2012 through June 30, 2016 (see 2012-2016 MOA, Section 1). The parties are in negotiations for a successor agreement.
2. TESA represents certain secretarial employees employed by the Board, excluding attendance officers, security officers, executive secretarial unit, business and technical unit, cafeteria, para-professional unit, mechanics and laborers,

and custodian unit. See 2009-2012 CNA, Art. I.

3. DCF was established to "focus[] exclusively on protecting children and strengthening families" with "the goal of ensuring safety, permanency, and well-being for all children . . . ." N.J.S.A. 9:3A-2d.

4. DCF's primary concern, like that of "all public agencies involved with abuse and neglect[,] is to ensure the safety, well-being, and best interests of the child." N.J.A.C. 3A:10-1.4; see also N.J.S.A. 9:6-8.8.

5. Acts of child abuse and/or neglect may constitute crimes punishable by imprisonment. See N.J.S.A. 2C:24-4.

6. Failure to report child abuse and/or sexual abuse against a child, where one has reasonable cause to believe that same has been committed, may constitute a criminal offense. See N.J.S.A. 9:6-8.14.

7. DCF is responsible for "conduct[ing] . . . child protection investigation[s]." N.J.A.C. 3A:10-1.1.

8. DCF is required to conduct an investigation whenever it receives "a report . . . [of] at least one allegation which, if true, would constitute a child being abused or neglected . . . as defined in N.J.A.C. 3A:10-1.3." N.J.A.C. 3A:10-2.1.

9. I take administrative notice[2/] that DCF's IAIU is a child protective service unit that investigates allegations of child abuse and neglect in out-of-home settings such as foster homes, residential centers, schools, detention centers; that investigative staff responds to allegations of institutional child abuse/neglect in their assigned region; that after the investigation is completed, a final report is issued within 60 days of the initial report; and that each appropriate entity is notified of the findings of the investigation to enhance its ability to promote safety for the children in care, and minimize the likelihood of future child maltreatment in the setting.[3/] See also N.J.A.C. 3A:10-4.1 thru -4.3.

10. As part of an investigation, an IAIU investigator is required to interview the alleged child victim; the reporter and each other person identified as having knowledge of the incident or as having made an assessment of physical harm; the alleged perpetrator; each identified witness who is reported to have knowledge of the alleged abuse or neglect; and each community professional who has first-hand knowledge of the alleged abuse or neglect. See N.J.A.C. 3A:10-4.1(a),

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2/ See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

3/ See https://www.nj.gov/dcf/about/divisions/iaiu/

(d)-(e).

11. As part of his/her investigation, an IAIU investigator is required to "assess the need to contact and cooperate with law enforcement or a prosecutor . . . ." N.J.A.C. 3A:10-4.1(b).

12. Based upon the investigation findings, a DCF representative is required to "evaluate the available information and, for each allegation, determine whether abuse or neglect has occurred . . . [and] make every reasonable effort to identify the perpetrator for each allegation of abuse or neglect"; to "make a finding that an allegation is 'substantiated,' 'established,' 'not established,' or 'unfounded.'" N.J.A.C. 3A:10-7.3(a), ©.

13. When an IAIU investigation arises in a school setting, the IAIU investigator is required to advise "[t]he institutional caregiver or chief administrator of the institution" that "the investigation has been completed and the finding of the investigation . . . ." N.J.A.C. 3A:10-7.6(e).

14. At the conclusion of an IAIU investigation, the IAIU investigator is required to "forward information within 10 days from the date upon which . . . [there is] a substantiated finding, pursuant to N.J.S.A. 9:6-10.a(e), to the police in the jurisdiction where: (1) the child victim resides; (2) the incident of abuse or neglect occurred; and

(3) the child victim may be at risk of future harm."

N.J.A.C. 3A:10-7.8(d).

15. New Jersey school districts are required to cooperate with child welfare agencies and law enforcement authorities in investigations of potentially missing, abused, or neglected children. See N.J.A.C. 6A:16-11.1(a).

16. N.J.A.C. 6A:16-11.1, entitled "Adoption of policies and procedures," provides:

> (a) The district board of education shall develop and adopt policies and procedures for school district employees, volunteers, or interns to provide for the early detection of missing, abused, or neglected children through notification of, reporting to, and cooperation with appropriate law enforcement and child welfare authorities pursuant to N.J.S.A. 18A:36-25 and 25.2 and 9:6-8.10 and N.J.A.C. 6A:22-4.1(d). At a minimum, the policies and procedures shall include:
>
> 1. A statement indicating the importance of early detection of missing, abused or neglected children;
>
> 2. Provisions requiring school district employees, volunteers, or interns to immediately notify designated child welfare authorities of incidents of alleged missing, abused, and neglected children.
>
> * * *
>
> 3. Provisions requiring the principal or other designated school official(s) to notify designated law enforcement authorities of incidents of potentially missing, abused, or neglected child situations.

* * *

4. Under no condition shall the school district's policy require confirmation by another person to report the suspected missing-, abused-, or neglected-child situation;

5. Provisions for school district cooperation with designated child welfare and law enforcement authorities in all investigations of potential missing, abused, or neglected children including the following:

i. Accommodations permitting the child welfare and law enforcement investigators to interview the student in the presence of the school principal or other designated school official.

* * *

ii. Scheduling interviews with an employee, volunteer, or intern working in the school district who may have information relevant to the investigation;

iii. The release of all records of the student who is the subject of the investigation that are deemed relevant to the assessment or treatment of a potentially missing, abused, or neglected child pursuant to N.J.S.A. 18A:36-19 and 9:6-8.40 and allowable under the Family Educational Rights and Privacy Act (FERPA), 34

CFR Part 99;

iv. The maintenance, security, and release of all confidential information about potential missing, abused, or neglected child situations in accordance with N.J.S.A. 18A:36-19, N.J.S.A. 9:6-8.40, and N.J.A.C. 6A:32-7;

* * *

v. The release of the student to child welfare authorities while school is in session when it is necessary to protect the student or take the student to a service provider.

* * *

vi. The transfer to another school of a student who has been removed from the student's home by designated child welfare authorities for proper care and protection pursuant to N.J.S.A. 9:6-8.28 and 8.29;

6. A provision for the establishment of a school district liaison to designated child welfare authorities to act as the primary contact person between schools in the school district and child welfare authorities with regard to general information sharing, the development of mutual training and other cooperative efforts;

7. A provision for designating a school district liaison to law enforcement authorities to act as

> the primary contact person between schools in the school district and law enforcement authorities, pursuant to N.J.A.C. 6A:16-6.2(b)1, consistent with the memorandum of understanding, pursuant to N.J.A.C. 6A:16-6.2(b)13.
>
> * * *
>
> 8. Provisions for training employees, volunteers, and interns working in the school district on the school district's policies and procedures for reporting allegations of missing-, abused-, or neglected-child situations.
>
> * * *
>
> 9. Provisions regarding due process rights of an employee, volunteer, or intern working in the school district who has been named as a suspect in a notification to child welfare and law enforcement authorities regarding a missing-, abused-, or neglected-child situation.
>
> * * *
>
> 10. A statement that prohibits reprisal or retaliation against any person who, in good faith, reports or causes a report to be made of a potential missing-, abused-, or neglected-child situation pursuant to N.J.S.A. 9:6-8.13.
>
> (b) The district board of education shall develop and adopt policies and procedures for school district employees, volunteers, or interns with reasonable cause to suspect or believe that a student has attempted or completed suicide, to report the information to the Department of Human Services, Division of Mental Health and Addiction Services, in a form and manner prescribed by the Division of Mental Health and Addiction Services pursuant to N.J.S.A. 30:9A-24.a.

17. In accordance with N.J.A.C. 6A:16-11.1, the Board has

promulgated District Policy 8642, entitled "Reporting Potentially Missing or Abused Children," which provides in pertinent part:

> Employees, volunteers, or interns working in the school district shall immediately notify designated child welfare authorities of incidents of alleged missing, abused, and/or neglected children.
>
> * * *
>
> The person having reason to believe that a child may be missing or may have been abused or neglected may inform the Principal or other designated school official(s) prior to notifying designated child welfare authorities if the action will not delay immediate notification. The person notifying designated child welfare authorities shall inform the Principal or other designated school official(s) of the notification, if such had not occurred prior to the notification. Notice to the Principal or other designated school official(s) need not be given when the person believes that such notice would likely endanger the reporter or student involved or when the person believes that such disclosure would likely result in retaliation against the student or in discrimination against the reporter with respect to his or her employment.
>
> The Principal or other designated school official(s) upon being notified by a person having reason to believe that a child may be missing or may have been abused or neglected, must notify appropriate law enforcement authorities. Notification to appropriate law enforcement authorities shall be made for all reports by employees, volunteers, or interns working in the school district. Confirmation by another person is not required for a school district employee, volunteer, or intern to report the suspected missing, abused, or neglected child situation. School district officials will cooperate with designated child welfare and law enforcement

> authorities in all investigations of potentially missing, abused, or neglected children in accordance with the provisions of N.J.A.C. 6A:16-11.1(a)5.
>
> [James Cert., Ex. 3; see also Rolle Cert., ¶¶5-9.]

18. In accordance with N.J.A.C. 6A:16-11.1, the Board has also promulgated District Regulation 8642, entitled "Reporting Potentially Missing or Abused Children," which provides in pertinent part:

> E. School District Cooperation with Designated Law Enforcement Authorities
>
> 1. The school district will cooperate with designated child welfare and law enforcement authorities in all investigations of potentially missing, abused, or neglected children.
>
> a. Accommodations shall be made permitting the child welfare and law enforcement investigators to interview the pupil in the presence of the Building Principal or designee.
>
> (1) If the pupil is intimidated by the presence of the school representative, the pupil shall be requested to name an employee, volunteer, or intern working in the school district, whom he or she feels will be supportive, and who will be allowed to accompany the pupil during the interview.
>
> b. District administrative and/or supervisory staff members will

assist designated child welfare and law enforcement authorities in scheduling interviews with any employee, volunteer, or intern working in the school district who may have information relevant to the investigation.

c. In accordance with N.J.A.C. 6A:16-11.1(a)5.iii., the district will release all records of the pupil who is the subject of the investigation that are deemed to be relevant to the assessment or treatment of a potentially missing, abused, or neglected child pursuant to N.J.S.A. 18A:36-19, N.J.S.A. 9:8-8.40 and N.J.A.C. 6A:32-7 and allowable under the Family Education Rights and Privacy Act (FERPA), 34 CFR Part 99.

d. In accordance with N.J.A.C. 6A:16-11.1(a)5.iv., the district will ensure the maintenance, security, and release of all confidential information about potential missing, abused, or neglected child situations is in accordance with N.J.S.A. 18A:36-19, N.J.S.A. 9:8-8.40 and N.J.A.C. 6A:32-7.

(1) All information regarding allegations of potentially missing, abused, or neglected children reported to authorities about an employee, volunteer, or intern working in the school district shall be considered confidential and may be disclosed only as required in order to cooperate in investigations pursuant to N.J.A.C.

> 6A:16-11.1(a)2. and 3. or by virtue of a Court Order. Records pertaining to such information shall be maintained in a secure location separate from other employee personnel records and accessible only to the Superintendent or designee.
>
> [James Cert., Ex. 3; see also Rolle Cert., ¶¶5-9.]

19. Consistent with the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232g and 34 C.F.R. Part 99, the Board has promulgated District Policy and Regulation 8330, entitled "Pupil Records," which requires the school district to control access to, disclosure of, and communication regarding student education records and limits disclosure to authorized persons only. See James Cert., Ex. 4; see also Rolle Cert., ¶10.

20. On December 18, 2019, the Board's confidential secretary Denyce Carroll sent an email on behalf of Rolle to Mendenhall, and TESA representatives Judy Martinez and Marizol Tirado, which copied, among others, IAIU Investigator Brianne E. Regan, that provides:

> Per the attached letter addressed to Ms. Mendenhall, kindly advise if you and your TESA representative will be available on either Thursday, December 19, 2019 at 10:00 a.m. or Friday, December 20, 2019 at 8:45 a.m. to be interviewed as a witness by Ms.

> Brianne Regan, Investigator with IAIU. The interview will take approximately 15 minutes.
>
> [Rolle Cert., ¶¶2-4, Ex. 2.]

21. Attached to Carroll's December 18, 2019 email is a letter dated December 18, 2019 from Rolle to Mendenhall that provides:

> Please be advised that you are being asked to be interviewed as a witness by Ms. Brianne Regan, Investigator with IAIU. The interview will take place at the Trenton Restorative Program on either Thursday, December 19, 2019 at 10:00 a.m. or Friday, December 20, 2019 at 8:45 a.m. The interview should last approximately 15 minutes. Please note that you may have a union representative or legal counsel present at the interview in a non-participatory role. Kindly reply to Denyce Carroll, Confidential Secretary with the Division of Law, with the date(s) and time(s) you will be available. If you are not available on the above dates and times, kindly advise when you will be available as Ms. Regan needs to close out this case as soon as possible. As a witness in this confidential investigation, you are also reminded not to share any information you become privy to with other staff and/or members of the public. The District is committed to working with IAIU on any and all investigations. Accordingly, we expect our employees to cooperate fully and provide accurate information.
>
> [TESA Br., Ex. A.]

22. Rolle certifies that "[t]he term 'non-participatory' in the December 18, 2019 correspondence was intended to reflect any such union representation or counsel's inability to interfere with or obstruct DCF-IAIU's Child Protection

Investigation for which Respondent-Employer had no right or authority to alter, interfere." See Rolle Cert., ¶11.

23. Also on December 18, 2019, Carroll sent an email to IAIU's Regan, copying, among others, Rolle, Mendenhall, Martinez, and Tirado that provides in pertinent part:

> I have spoken to Ms. Mendenhall who has advised the following:
>
> 1. She will be available for the interview on Thursday, December 19, 2019 at 10:00 a.m.
> 2. She has elected to be interviewed in the absence of her Association
>
> [Rolle Cert., ¶¶2-4, Ex. 2.]

24. Also on December 18, 2019, IAIU's Regan sent an email to Carroll that provides:

> Thank you so much! I will be there tomorrow at 10:00 a.m. So Ms. Mendenhall does not want any representation?
>
> [Rolle Cert., ¶¶2-4, Ex. 2.]

25. Also on December 18, 2019, Carroll sent an email to Regan that provides:

> Nope. She stated she will do the interview by herself. I also explained to her that she is being interviewed as a witness and to not disclose what transpires at the interview with anyone else as the interview is confidential. Let me know if you need anything else.
>
> [Rolle Cert., ¶¶2-4, Ex. 2.]

26. On January 16, 2020, TESA filed the underlying unfair practice charge.

27. TESA attorney Cridge certifies that he has "represented well over 100 teaching staff members in connection with investigations conducted by [DCF and IAIU]. . . includ[ing] both persons accused of alleged child abuse/neglect, and persons identified as potential witnesses of such alleged abuse/neglect"; that his "representation of such teaching staff members has almost always been initiated by and through contact with, and referral from, their majority representative"; and that "representation of teaching staff members in connection with DCF investigations includes, inter alia, accompanying those persons to interviews conducted by DCF investigators . . . and actively and substantively participating in the interview process." See Cridge Cert., ¶¶3-5.

28. Cridge certifies that "[he has] never had a school district administrator, board of education member, or school board attorney purport to direct or instruct me as to the parameters of my representation of teaching staff members at DCF investigations, nor would [he] tolerate any such interference in [his] representation." See Cridge Cert., ¶6.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material

facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).[4/] In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

While a party is not required to file an affidavit or

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

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

certification in support of summary judgment, where a "party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party's affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding")). As the New Jersey Supreme Court explained in Judson:

> [I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

[17 N.J. at 7.]

ANALYSIS

I. Employee Rights under 5.4a(1) and Weingarten

The Commission has held that "an employer action that tends to interfere with a public employee's statutory rights without a legitimate and substantial business justification violates 5.4a(1)." Union Tp., P.E.R.C. No. 2008-20, 33 NJPER 255 (¶95 2007) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990)).

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

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;
>
> * * *
>
> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith

> with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The Commission has held that employees have "the right. . . to communicate with each other about employment conditions." State Operated School District, City of Newark, P.E.R.C. No. 2017-14, 43 NJPER 106 (¶32 2016) (citing State of New Jersey (Dep't of Transp.), P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990)). "The Act confers a statutory right of communication between majority representatives and unit members, and same is considered a 'term and condition of employment.'" Id. (citing City of Newark, H.E. 2001-3, 26 NJPER 407 (¶31160 2000)).

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

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

In West Orange Tp., H.E. No. 90-53, 16 NJPER 378 (¶21151

1990), adopted P.E.R.C. No. 91-20, 16 NJPER 487 (¶21212 1990), the Commission stated:

> It is well-settled that public employees are entitled to representatives of their own choosing in contract negotiations and administration and that a public employer normally cannot object to a majority representative's choice of an agent to discharge these functions. N.J.S.A. 34:13A-5.3; Dover Tp. Bd. of Ed., P.E.R.C. No. 77-43, 3 NJPER 81 (1977). The rights of public employees in this area track those of private sector employees. See General Electric Co. v. NLRB, 412 F.2d 512, 71 LRRM 2418, 2421 (2d Cir. 1969); Auto Workers v. NLRB (Fitzsimmons Mfg.), 670 F.2d 663, 109 LRRM 2810, 2812 (6th Cir. 1982); see also New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Our Act does not require that a non-attorney agent of the majority representative secure permission to represent an employee in a departmental disciplinary hearing or any other proceeding.
>
> . . .
>
> The Commission has also held that "[a]n employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline"; that "[t]his principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right" and "applies in the New Jersey public sector as well." Union Cty. Voc. Tech. Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, n.1 (¶34 2021) (citing UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001)).
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> [T]he right arises only in situations where the employee requests representation. In

> other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative. . . [T]he employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believe the investigation will result in disciplinary action.
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> [E]xercise of the right may not interfere with legitimate employer prerogatives. The 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.
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> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that

> they, too, can obtain his aid and protection if called upon to attend a like interview.
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> . . .
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> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "'read in the light of the mischief to be corrected and the end to be attained.'" NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124 (1944).
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> The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest.
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> . . .
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> The union representative . . . is safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer

> does not initiate or continue a practice of imposing punishment unjustly.
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> [420 U.S. at 256-264.]

Accordingly, the Commission has held that "a specific showing is required to establish a violation of an employee's Weingarten rights" including "that the meeting was investigatory; that the employee reasonably believed that discipline might result; that the employee requested representation; and that the employer denied the request and proceeded with the meeting." Sterling Reg. Bd. of Ed., D.U.P. No. 2023-12, 49 NJPER 190 (¶45 2022) (citing State of New Jersey (Division of State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992)). "The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case." Id. (citing Dover Municipal Util. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey (Div. of Taxation)/Kupersmit, D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990), aff'd NJPER Supp.2d 279 (¶226 App. Div. 1992)). "If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview." Union Cty. Voc. Tech. Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, n.1 (¶34 2021) (citing Dover Municipal Util. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984)). "If an

employee is to be interviewed as a witness, whether the employee has a right to representation will be based upon an application of traditional Weingarten principles to the specific facts of the case." Id. (citing State of New Jersey (Dep't of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001)). "The charging party bears the burden of proving that an employee is entitled to a Weingarten representative." Id.

"The Act does not limit a public employer's right to express opinions about labor relations if the statements are not coercive." South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466 (¶22222 1991). In Black Horse Pike Reg. Bd. of Ed., H.E. No. 81-41, 7 NJPER 262 (¶12116 1981), adopted P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission stated:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.
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> . . .
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> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other.

"In analyzing speech cases, a balance must be struck between conflicting rights: the employer's right of free speech and the rights of employees to be free from coercion, restraint or

interference in their exercise of protected activities." South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466 (¶22222 1991) (citing Mercer Cty., P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985)).[5/]

A. The Board's December 18, 2019 Correspondence

Here, although Mendenhall was notified that IAIU wished to interview her as a witness related to an ongoing child abuse/neglect investigation (see TESA Br., Ex. A), it is undisputed that Mendenhall's failure to report child abuse and/or sexual abuse against a child could constitute a criminal offense (see N.J.S.A. 9:6-8.14); that the IAIU investigator was required to assess the need to contact and cooperate with law enforcement or a prosecutor (see N.J.A.C. 3A:10-4.1(b)); and that the IAIU investigator was required to forward information to the police within 10 days from the date upon which there was a substantiated finding (see N.J.A.C. 3A:10-7.8(d)). Moreover, although the school district was required to cooperate with DCF/IAIU and law enforcement related to child abuse/neglect investigations (see

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5/ The standard adopted by the Commission in these cases mirrors that developed in the private sector under the Labor Management Relations Act. See 29 U.S.C. § 141 et seq.; see also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 1, 9 (1978); NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In determining whether a statement is coercive, the NLRB considers the "total context" of the situation and determines the question from the standpoint of employees over whom the employer has a measure of economic power. See NLRB v. E.I. DuPont de Nemours, 750 F.2d 524, 528 (6th Cir. 1984).

N.J.A.C. 6A:16-11.1), it is also undisputed that Mendenhall's failure to report child abuse/neglect could constitute a violation of school district policy/regulation (see James Cert., Ex. 3 (District Policy/Regulation 8642); Rolle Cert., ¶¶5-9); and that Mendenhall's failure to maintain the privacy/confidentiality of student records could constitute a violation of school district policy/regulation (see James Cert., Ex. 4 (District Policy/Regulation 8330); Rolle Cert., ¶¶10).

Accordingly, I find that the Board's December 18, 2019 correspondence that Mendenhall could have "a union representative or legal counsel present at [an IAIU] interview in a non-participatory role" in conjunction with the admonition that Mendenhall was "expect[ed] to cooperate fully and provide accurate information" to the IAIU investigator, thereby implying that Mendenhall's continued employment was conditioned on satisfactory compliance, had a tendency to interfere with, restrain, or coerce Mendenhall in the exercise of the rights guaranteed to her under the Act.

In particular, Mendenhall had the right to communicate with her majority representative and/or legal counsel about the interview requested by IAIU, especially given that same could expose Mendenhall to criminal liability and/or disciplinary consequences related to her employment. See State Operated School District, City of Newark, P.E.R.C. No. 2017-14, 43 NJPER

106 (¶32 2016); Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); West Orange Tp., H.E. No. 90-53, 16 NJPER 378 (¶21151 1990), adopted P.E.R.C. No. 91-20, 16 NJPER 487 (¶21212 1990). Whether considered objectively or subjectively, the Board's December 18, 2019 correspondence had a propensity to discourage Mendenhall from communicating with her majority representative and/or legal counsel about the interview requested by IAIU. In other words, Mendenhall may have been discouraged from contacting a union representative and/or legal counsel if her employer already specified that those individuals were not permitted to participate, and if the Board implied that her continued employment was conditioned on satisfactory compliance.

In addition, Mendenhall had the right to request a majority representative and/or legal counsel's assistance during an investigatory interview that she reasonably believed might lead to discipline. See NLRB v. Weingarten, 420 U.S. 251 (1975); Union Cty. Voc. Tech. Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, n.1 (¶34 2021); UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dep't of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). Although TESA has conceded that an "IAIU investigation . . . is not concomitant with an investigatory interview implicating Weingarten" (see TESA Br. at 9-10), the Board's December 18, 2019 correspondence had a propensity to discourage Mendenhall from communicating with her majority

representative and/or legal counsel about the interview requested by IAIU. As a consequence, the Board's December 18, 2019 correspondence also had a propensity to prevent Mendenhall from learning - vis-a-vis communication with her majority representative and/or legal counsel – that the IAIU interview could expose her to criminal liability and/or disciplinary consequences related to her employment; and from making an educated determination regarding whether to insist upon the presence of her majority representative and/or legal counsel at the IAIU interview. TESA's summation of the intertwined nature of this violation is most succinct: "[T]he Board essentially attempted to limit Mendenhall's representation rights below the Weingarten standard, in an interview where Mendenhall's right to representation was not bound by Weingarten's limitations." See TESA Br. at 10.

I also find that the Board has failed to sufficiently demonstrate a legitimate and substantial business justification for specifying that Mendenhall could have "a union representative or legal counsel present at [an IAIU] interview in a non-participatory role" in conjunction with the admonition that Mendenhall was "expect[ed] to cooperate fully and provide accurate information" to the IAIU investigator, thereby implying that Mendenhall's continued employment was conditioned on satisfactory compliance. Despite conceding that the "[Board]

does not direct nor control [an IAIU] interview and . . . cannot alter the process by which DCF-IAIU conducts its interview and investigations nor the privacy protections that govern such work" (see Board Br. at 8), the Board has failed to cite any legal authority specifying that a unit member could only have "a union representative or legal counsel present at [an IAIU] interview in a non-participatory role." Similarly, despite contending that the "[Board] is within its right and . . . obligated . . . to protect the confidentiality and privacy rights of its students" and that "no exception exists to permit employees to consult with their chosen representatives in connection with a witness interview for an IAIU investigation" (see Board Br. at 9-10), the Board has failed to cite any legal authority specifying that a unit member could only have "a union representative or legal counsel present at [an IAIU] interview in a non-participatory role."

Moreover, the Board has failed to provide any evidence demonstrating that DCF and/or the IAIU investigator specifically requested or directed the Board to include such language in any notification or correspondence; and relies upon the retrospective, subjective intentions of the author of the December 18, 2019 correspondence to Mendenhall. See Rolle Cert., ¶11. To the contrary, TESA has provided evidence that "representation of teaching staff members in connection with DCF

investigations includes, inter alia, accompanying those persons to interviews conducted by DCF investigators . . . and actively and substantively participating in the interview process"; and that same does not include "a school district administrator, board of education member, or school board attorney purport[ing] to direct or instruct [legal counsel] as to the parameters of [his/her] representation of teaching staff members at DCF investigations . . . ." See Cridge Cert., ¶¶3-6.

Under these circumstances, I find that TESA has established that the Board's December 18, 2019 correspondence had a tendency to interfere with, restrain, or coerce Mendenhall in the exercise of the rights guaranteed to her under the Act. Even when viewed in the light most favorable to the Board, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that summary judgment must be granted in TESA's favor.

CONCLUSION

For these reasons, I grant TESA's motion for summary judgment and deny the Board's cross-motion for summary judgment. I find that the Board violated subsection 5.4a(1) of the Act by

specifying that Mendenhall could have "a union representative or legal counsel present at [an IAIU] interview in a non-participatory role" in conjunction with the admonition that Mendenhall was "expect[ed] to cooperate fully and provide accurate information" to the IAIU investigator, thereby implying that Mendenhall's continued employment was conditioned on satisfactory compliance.

RECOMMENDED ORDER

I recommend that the Commission order the Board 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 specifying that unit members can have a union representative or legal counsel present at an IAIU interview in a non-participatory role in conjunction with the admonition that unit members are expected to cooperate fully and provide accurate information to an IAIU investigator, thereby implying that a unit member's continued employment is conditioned on satisfactory compliance.

B. Take this affirmative action:

1. 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) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

/s/ Lisa Ruch
Hearing Examiner

DATED: February 23, 2023
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 6, 2023.

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 specifying that unit members can have a union representative or legal counsel present at an IAIU interview in a non-participatory role in conjunction with the admonition that unit members are expected to cooperate fully and provide accurate information to an IAIU investigator, thereby implying that a unit member's continued employment is conditioned on satisfactory compliance.

WE WILL 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) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

WE WILL notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Docket No. CO-2020-186 City of Trenton
(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) 292-9830