D.U.P. NO. 2024-18

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

SOMERVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2024-036

SOMERVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Somerville Education Association (Association) filed an unfair practice charge against the Somerville Board of Education (Board) alleging that the Board committed numerous unfair practices that violated sections 5.4a(1), (3), and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq. The Director of Unfair Practices dismisses all of the Association's claims, except for the claims that the Board violated section 5.4a(5) of the Act by requiring staff to perform summer work without pay and by requiring staff to train themselves on a newly implemented staff manual during non-working hours.

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Appearances:

For the Respondent,
DiFrancesco Bateman Kunzman Davis Lehrer and Flaum, P.C., attorneys
(Phil Stern, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Randi Doner April, of counsel)

PARTIAL REFUSAL TO ISSUE COMPLAINT

On September 28, 2023, the Somerville Education Association (Association) filed an unfair practice charge against the Somerville Board of Education (Board). The charge contains six independent counts[1/] and alleges that the Board violated sections

1/ The Association also includes a seventh count in its charge; however, the seventh count merely repeats all of the other allegations and does not contain any new allegations.

5.4a(1), (3), and (5)[2/] of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq.

Count One of the Association's charge alleges that the principal of Van Derveer Elementary School, Robert Reavey (Reavey), threatened to change an Association member's summative evaluation during a June 2023 meeting if she did not "behave." Count Two alleges that Association leadership informed Reavey of a morale problem at the school, to which Reavey responded that it was a "union problem." Count Three alleges that Reavey threatened to cancel a June 2023 summative evaluation meeting if the union representative in attendance did not stop speaking and that Reavey sent an e-mail following the meeting in which he referred to the union representative as "aggressive and combative." Count Four alleges that Reavey unilaterally directed staff to perform summer work without pay. In Count Five, the Association alleges that Reavey unilaterally changed terms and conditions of employment by changing the Staff Manual and PBIS

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;" (3) "Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of 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 refusing to process grievances presented by the majority representative."

Manual and by directing staff to learn about the PBIS manual during non-working hours. Lastly, Count Six alleges that the school was unprepared to respond to an emergency during the first eight days of the 2023-2024 school year.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint. N.J.A.C. 19:14-2.3.

I find the following facts.

The Board is a public employer within the meaning of the Act. The Association is a public employee organization within the meaning of the Act and represents a unit of certificated employees, including teachers and certified non-teaching employees, 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) extending from July 1, 2022 through June 30, 2027.

Reavey is employed by the Board as the Principal of Van Derveer Elementary School. Reavey has been employed in this position for approximately ten years.

In Count One and Count Three of the charge, the Association alleges that there was a summative meeting in June 2023 attended by Reavey and an Association member. The Association does not specify whether these meetings were the same or were two separate meetings with two different Association members.

The Association alleges that union leadership informed Reavey of a morale problem at Van Derveer Elementary School in June 2023 and that Reavey responded by telling union leadership that the morale problem was a "union problem." The Association has not alleged that Reavey's comment was made to anyone other than union leadership.

The Association alleges that Reavey referred to a union representative as "aggressive and combative" in an e-mail following a June 2023 summative meeting. The Association has not provided any information in the charge regarding the recipient(s) of the e-mail.

Van Derveer Elementary School has a Staff Manual and a PBIS Manual. The Staff Manual provides general guidelines about policies and procedures for staff members, which includes evacuation and emergency safety procedures. The PBIS manual provides ideas and information about the school's Positive Behavior Interventions and Supports Initiative. The Association alleges that Reavey unilaterally changed the Staff Manual and unilaterally implemented the PBIS Manual, but it does not specify

any terms and conditions of employment that were affected by the implementation of the manuals.

ANALYSIS

In its charge, the Association generally alleges that the Board violated sections 5.4a(1), (3), and (5) of the Act without articulating which specific conduct allegedly violates which specific section(s) of the Act. Where, as here, a charging party makes multiple unfair practice allegations in a single charge, the charging party must articulate clearly and precisely which specific sections of the Act it believes were violated by each individual allegation of misconduct. See N.J.A.C. 19:14-1.3(a)(3) (charging party must plead a "clear and concise statement of the facts" in support of its claims); Brick Tp. Bd. of Ed., P.E.R.C. No. 88-48, 13 NJPER 846 (¶18326 1987) (the Commission will only consider unfair practice allegations that are sufficiently pled in a charge).

Although the Association generally alleges that the Board violated section 5.4a(3) of the Act, it does not allege anywhere in the charge that any of its members suffered an adverse employment action, which is an essential element of an a(3) claim. See State of N.J. (Dept. of Community Affairs), D.U.P. No. 2015-8, 41 NJPER 315 (¶102 2014) (citing Ridgefield Park Bd. of Ed., H.E. No. 84-52, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER

Supp.2d 150 (¶133 App. Div. 1985)). Accordingly, I dismiss the section 5.4a(3) claims.

Section 5.4a(1) Claims

An employer independently violates section 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, n.1 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion, or motive is unnecessary; the objective tendency to interfere is sufficient. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp.2d 58 (¶39 App. Div. 1979).

Section 5.4a(1) cases require a balancing of two important but conflicting rights: the employer's right of free speech and the employees' rights to be free from coercion, restraint or interference in the exercise of protected rights. State of N.J. (Trenton State Coll.), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987). In striking that balance, all circumstances of a particular case must be reviewed. Id.

Threat to Change Summative Evaluation

In Count One of the charge, the Association alleges that the Board violated the Act when Reavey told an Association member during a June 2023 summative meeting that she should "watch out" because he could change the summative evaluation if she did not "behave." The Association does not provide any additional facts or context for Reavey's statement in the charge.

In deciding whether employer speech violates the Act, the Commission considers the "total context" of the situation and evaluates the issue from a standpoint of employees over whom the employer has a measure of economic power. Mercer Cty. & PBA Local 167, H.E. No. 85-45, 11 NJPER 395 (¶16140 1985), adopted P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985). If, for example, the union member had exhibited performance and/or behavioral problems, Reavey may have had a legitimate and substantial business justification for his comments. However, the Association's failure to provide any additional facts regarding the alleged threat makes it impossible to evaluate the "total context" of the situation in which the threat was made. As a result, the Association has failed to plead sufficient facts to justify the issuance of a complaint on this allegation because it has not alleged any facts which suggest that Reavey's comments tended to coerce, restrain, or interfere with the exercise of any

protected rights. See N.J.A.C. 19:14-1.3(a)(3); Trenton State Coll., 13 NJPER 720. Therefore, this allegation is dismissed.

Statement to Union Leadership that Morale Problem was a "Union Problem"

In Count Two, the Association alleges that union leadership informed Reavey of a morale problem at the elementary school and that Reavey responded by telling union leadership that the morale problem was a "union problem." The Association alleges that Reavey's comment violated the Act by holding the Association responsible for the alleged morale problem at the school.

"[W]hen an Association representative interacts with a supervisor or other representative of management while pursuing protected activity, the two are considered to be on equal footing." Paterson State Operated School Dist., P.E.R.C. No. 2013-74, 39 NJPER 483 (¶153 2013). The Act permits public employers to express opinions about labor relations as long as the statements are not coercive. Pinelands Reg. Bd. of Ed., P.E.R.C. No. 2022-1, 48 NJPER 97 (¶23 2021)(citing Trenton State Coll., 13 NJPER 720). The total context in which the statements were made must be taken into consideration. Mercer Cty. & PBA Local 167, 11 NJPER 395.

The comment Reavey allegedly made about there being a "union problem" appears to be nothing more than Reavey stating his opinion about labor relations. Such statements are permissible under the Act as long as they are not coercive. See Pinelands

Reg. Bd. of Ed., 48 NJPER 97. Further, the charge alleges that the comment was made solely to Association leadership in a situation where the parties were dealing as equals and were free to criticize the other's behavior.

Although Reavey's comment was critical of the Association, it did not rise to the level of unlawful interference with protected rights. See Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) (assistant superintendent's criticism of union president at meeting with Association officers did not violate section 5.4a(1) because parties were dealing as equals). Accordingly, this allegation is dismissed.

Conduct Toward Union Representative

The Association alleges in Count Three that a member requested union representation at a June 2023 summative meeting, and Reavey agreed to let the union representative attend as long as the representative would only observe and listen. The Association further alleges that when the union representative spoke on the member's behalf at the meeting, Reavey threatened to cancel the meeting unless the representative stopped speaking. In addition, the Association claims that Reavey sent an e-mail following the meeting in which he referred to the union representative as "aggressive and combative." The Association

contends that Reavey's actions toward the union representative violated the Act.

By alleging that Reavey violated the Act by conditioning the union representative's attendance on being a silent observer, the Association appears to suggest that its member was entitled to a Weingarten[3/] representative at the summative meeting. The charging party bears the burden of proving that an employee is entitled to a Weingarten representative. Union Cty. Vocational Technical Bd. of Ed., P.E.R.C. No. 2022-8, 48 NJPER 135, n.1 (¶34 2021). Under Weingarten, an employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. 420 U.S. at 257. Weingarten was adopted by the Commission in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, NJPER Supp.2d 78 (¶61 App. Div. 1980), and was later approved by our Supreme Court in In re UMDNJ, 144 N.J. 511 (1996). 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. Dover Mun. Utils. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984).

3/ NLRB v. Weingarten, Inc., 420 U.S. 251 (1975).

However, the employer may not condition a Weingarten representative's attendance at the interview upon the representative's silence. See State of N.J. (Dept. Of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001) (citing NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981)).

A summative evaluation, however, does not generally confer Weingarten rights to an employee because such a meeting will not typically give rise to an objectively reasonable belief that the meeting could be disciplinary. See Somerville Bd. of Ed., P.E.R.C. No. 2024-5, 50 NJPER 140 (¶34 2023); State of N.J., D.U.P. No. 97-15, 22 NJPER 339 (¶27176 1996). Regarding the meeting, the Association specifically alleges:

> In or around June 2023, an Association member requested union representation at her summative meeting. Reavey agreed but stated that she would only observe and listen. However, at that meeting, the representative, as was her right, spoke on behalf of the member.
>
> Reavey announced that unless the representative stopped speaking, he would cancel the meeting.

As can be seen, the Association has not alleged any facts that Reavey asked any questions of the member during the meeting or that the meeting was in any way investigatory. Further, the Association has not alleged any facts to suggest that its member had an objectively reasonable belief that discipline would result from the meeting. As such, the Association has not alleged

sufficient facts that its member was entitled to a Weingarten representative at the June 2023 summative meeting. See In re UMDNJ, 144 N.J. at 529; Union Cty. Vocational Technical Bd. of Ed., 48 NJPER 135.

Even though I find that the Association has failed to establish that the employee was entitled to a union representative at the summative meeting, the question remains whether the Board violated the Act by requiring the representative to remain silent at the meeting. In Texaco, Inc., 251 N.L.R.B. 633 (1980), the National Labor Relations Board (NLRB) was confronted with the same issue that exists here. In that matter, the employer conducted interviews with multiple employees. During one interview, which the NLRB deemed to be non-investigatory in nature, the employer demanded that the union representative remain silent. In finding that the employer's actions did not violate section 8(a)(1) of the National Labor Relations Act, the NLRB reasoned:

> . . . Respondent was not statutorily obligated to furnish representation to [the employee] at the interview; and thus it is irrelevant that Respondent effectively muted the representative's role at the interview.

Id. at 637. Applying the same logic in Texaco to the instant charge, I find that Reavey did not violate the Act by demanding

the union representative to remain silent at the June 2023 summative meeting.[4/]

Next, the Association alleges that Reavey committed an unfair practice by referring to the union representative as "aggressive and combative" in an e-mail following the summative meeting. An employer has the right to criticize an employee representative as long as the employer's actions do not rise to the level of unlawful interference with protected rights. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). "Unflattering descriptions, although unfortunate, are sometimes part of both the work and the labor relations environment. They are not, however, necessarily illegal." Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd 31 NJPER 290 (¶113 App. Div. 2005).

Reavey's alleged statement referring to the representative as "aggressive and combative" appears to be nothing more than a heated remark between management and an employee representative. Absent specific threats, changes in terms and conditions of employment, or an intent to undermine the Association, these

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4/ Although Texaco was decided under the National Labor Relations Act, "the 'experience and adjudications' under the federal act may appropriately guide the interpretation of the provisions of the New Jersey statutory scheme." See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1, 8 (1978) (quoting Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 424 (1970)).

remarks would constitute permissible criticism. See In re Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp.2d 150 (¶133 App. Div. 1985). The charge does not allege that the statement was accompanied by any threats or a change in terms and conditions of employment. Further, the Association does not specify the recipient(s) of Reavey's e-mail. Without any facts alleging that remark was made to union membership, the Association has not pled sufficient facts to suggest that Reavey's e-mail tended to undermine the Association. Compare East Orange Bd. of Ed., H.E. No. 2008-9, 34 NJPER 173 (¶ 71 2008), adopted P.E.R.C. No. 2009-24, 34 NJPER 374 (¶121 2008)(board of education violated 5.4a(1) when its principal repeatedly referred to union representative in a derogatory manner in front of several unit members because it was an attempt to weaken support for the union and interfere with its activities), and Orange Bd. of Ed., 20 NJPER 287 (principal' s critical comments at captive audience staff meeting about how union representatives handled members tended to undermine the union' s leadership and lacked any legitimate management concern), with Matawan-Aberdeen Reg. Bd. of Ed., 15 NJPER 411, supra.

For all of the reasons set forth above, none of Reavey's actions alleged in Count Three of the charge violate the Act. Therefore, all of the claims in Count Three are dismissed.

Section 5.4a(5) Claims

Section 5.4a(5) prohibits public employers from refusing to negotiate in good faith over terms and conditions of employment with the majority representative. N.J.S.A. 34:13A-5.4a(5). The duty to negotiate is not only limited to the period of negotiations for a new agreement but applies at all times when a public employer proposes to change any negotiable term or condition of employment. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 49 n.9 (1978). Further, a duty to negotiate exists even mid-contract as to subjects which were neither discussed in the successor contract negotiations nor embodied in contract terms. N.J. Tpk. Auth., P.E.R.C. No. 99-49, 25 NJPER 29 (¶30011 1998). A public employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a mandatorily negotiable term and condition of employment, even though the practice or rule is not explicitly or implicitly included under the terms of the parties' agreement. Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983) (citing Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. at 49, n.9).

Directive to Perform Summer Work

In Count Four, the Association alleges that Reavey directed staff to perform work during the summer of 2023. Specifically, the Association claims that Reavey directed staff to "read

through their work emails on a daily basis" despite not getting paid for summer work and the contractual school year having not yet begun. The Association maintains that Reavey's actions in directing staff to work without pay during summer constituted a unilateral change to terms and conditions of employment in violation of the Act.

"While some assignments are within an employer's non-negotiable managerial prerogative, assignments that impact working hours, workload, or compensation of employees affect terms and conditions of employment and are mandatorily negotiable." Cty. College of Morris, P.E.R.C. No. 2022-44, 48 NJPER 433 (¶99 2022) (citing Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983)). Here, the alleged facts suggest that Reavey's unilateral action in ordering staff to perform summer work may have impacted working hours, workload, and compensation, which are mandatory terms and conditions of employment. See id. As a result, I find that the Association has pled sufficient facts to warrant the issuance of a complaint for the allegation that the Board violated section 5.4a(5) of the Act by directing staff to perform summer work.

Staff and PBIS Manuals

In Count Five, the Association alleges that Reavey (1) unilaterally changed the Staff Manual; (2) unilaterally implemented the PBIS Manual; and (3) unilaterally implemented a

directive that staff learn about the PBIS Manual during non-working hours. The Association contends that all of these actions violate of the Act.

The Association specifically avers in the charge that "[t]he Staff Manual was unilaterally changed by Reavey thus affecting the terms and conditions of employment." Although a unilateral change to mandatorily negotiable terms and conditions of employment would undoubtedly violate the Act, see Sayreville Bd. of Ed., 9 NJPER 138, the Association has not identified a single term or condition of employment that has been affected by the change to the Staff Manual. Similarly, the Association alleges that Reavey unilaterally implemented the PBIS Manual but again fails to identify any terms and conditions of employment that have been affected by the implementation of the PBIS Manual. Because the Association has failed to allege that the manuals have had any identifiable impact on terms and conditions of employment, its unfair practice claims regarding the Board unilaterally changing and implementing the manuals are dismissed. See Town of Kearny, H.E. No. 98-28, 24 NJPER 369 (¶29176 1998) (final agency decision) (employer's unilateral adoption of a personnel manual is not a violation of the Act if it does not have an identifiable impact on terms and conditions of employment); City of Trenton, D.U.P. No. 95-12, 21 NJPER 10 (¶26004 1994) (an employer does not violate its obligation to

negotiate by unilaterally adopting departmental rules and regulations on policy issues that do not have an identifiable impact on terms and conditions of employment).

Next, I turn to the Association's allegation that the Board violated the Act when Reavey ordered staff to train themselves on the PBIS guidelines during non-working hours. In Cty. College of Morris, supra, the Commission explicitly stated that assignments impacting working hours affect terms and conditions of employment and are mandatorily negotiable. Because the Association has alleged that Reavey's unilateral action impacted working hours, I find that the Association has pled sufficient facts to justify the issuance of a complaint on this allegation.

Emergency Safety Procedures

In Count Six of the charge, the Association alleges that Reavey did not provide staff with fire drill procedures and instructions until September 14, 2023, the eighth day of the 2023-2024 school year. The Association contends that the Board's inability to provide for an emergency during the first eight days of school violated the Act because health and safety are mandatory subjects of negotiations.

It is well settled that matters of employee health and safety are mandatorily negotiable terms and conditions of employment. See In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 332 (1989) (citing State of N.J., P.E.R.C. No. 86-

11, 11 NJPER 457 (¶16162 1985)); City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378, n.4 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. denied 88 N.J. 476 (1981). This notwithstanding, the Association has not alleged that the Board altered any past practice or implemented any work rules related to employee health and safety without negotiations. In addition, the Association does not allege that it made a demand to negotiate over the emergency safety procedures and that the Board refused to negotiate.

Here, the Association's claim concerns alleged health and safety breaches. "Such allegations may implicate other statutory protections covered by other state agencies but they do not state an allegation of an unfair practice under our Act and thus are not within the Commission's jurisdiction." Newark Library & IUOE Local 68 (Shaw), D.U.P. No. 2005-6, 30 NJPER 494 (¶168 2004) (dismissing unfair practice claim alleging health and safety breaches as being outside Commission's jurisdiction). Therefore, this allegation is dismissed.

ORDER

A complaint will be issued under separate cover for the allegations that the Board violated section 5.4a(5) of the Act by requiring staff to perform summer work and by requiring staff to train themselves on the PBIS manuals during non-working hours. All of the other allegations contained in the charge are dismissed.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: June 26, 2024
Trenton, New Jersey

This decision may not be appealed pre-hearing except by special permission to appeal from the Chair pursuant to N.J.A.C. 19:14-4.6. See N.J.A.C. 19:14-2.3(c); N.J.A.C. 19:14-4.6(b).

Any appeal is due by July 3, 2024.