

P.E.R.C. NO. 2024-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

WATCHUNG HILLS REGIONAL
HIGH SCHOOL DISTRICT
BOARD OF EDUCATION,

Charging Party/Cross-Respondent,

-and-

Docket Nos. CE-2022-005
CO-2022-168
CONSOLIDATED

WATCHUNG HILLS REGIONAL
EDUCATION ASSOCIATION,

Respondent/Cross-Charging Party.

SYNOPSIS

On a consolidated complaint issued on opposing unfair labor practice charges respectively filed by the Watchung Hills Regional High School District Board of Education and the Watchung Hills Regional Education Association, the Commission dismisses the Board's charge alleging the Association violated the Act when it refused to negotiate for a successor to the parties' collective negotiations agreement without the presence at each session of its "Bargaining Council" (comprised of, and open to, all Association members), and refused the Board's request for a ground rule to permit only small groups designated by each party to attend. While not endorsing or discouraging such "open" collective negotiations, as defined and practiced by the Association, the Commission finds it is not inherently an unfair practice when carried out in accordance with good faith and within the boundaries of the Act. On the Association's charge, the Commission finds the Board violated the Act when it refused to meet and negotiate with the Association in the presence of Bargaining Council members. The Commission cautions the parties to exercise discretion and good faith in implementing large team meetings, ensuring it does not compromise the effectiveness of the process, and does not otherwise obstruct the process or infringe upon the parties' rights under the Act.

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 Board, Schenck, Price, Smith & King, LLP
(Joseph L. Roselle, of counsel and on the brief)

For the Association, Oxfeld Cohen, P.C.
(Samuel B. Wenocur, of counsel and on the brief)

DECISION

On January 14, 2022, the Watchung Hills Regional High School District Board of Education (Board) filed an unfair practice charge (CE-2022-005) against the Watchung Hills Regional Education Association (Association or WHEA), alleging the Association violated sections 5.4b(1), (3) and (5)^{1/} of the New

^{1/} These provisions prohibit employee organizations, their representatives or agents are from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act . . . (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of
(continued...)

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when, at a meeting of the parties' negotiations committees on December 8, 2021 to discuss ground rules for negotiations for a successor to their 2019-2022 collective negotiations agreement (CNA), the Association "refused to negotiate . . . without the presence of its so-called 'Bargaining Council' at each session." More particularly, the Board alleges the Association refused the Board's request for "a ground rule between the parties to permit only each party's designated Negotiations Committee (small groups tasked with negotiating the successor agreement) to attend negotiations sessions and maintain confidentiality of the negotiations process," and "responded that it would only attend future negotiations sessions if up to 100 Association members were permitted to attend each session as Bargaining Council member-observers."

On February 9, 2022, the Association filed a cross-unfair practice charge (CO-2022-168), alleging the Board violated sections 5.4a(1) and (5)^{2/} of the Act by "attempting to limit who

1/ (...continued)
employees in that unit . . . [and] (5) Violating any of the rules and regulations established by the commission."

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

the Association can have on its negotiation team," and thereby "deprive the Association of being able to choose the composition of its negotiations team." The Association further alleges that by "refusing to meet with the Association in the presence of the Bargaining Council members, the Board is depriving Association negotiation team members from having input in analyzing the Board's negotiation offers or craft[ing] the Association's offers during negotiation sessions."

The parties completed the filing of position statements, with exhibits, by January 25, 2023.^{2/} On February 28, 2023, the Deputy Director of Unfair Practices issued a Consolidated Complaint and Notice of Pre-hearing, finding that the allegations in the consolidated charges, if true, may constitute unfair practices. On March 13, 2023, each party filed an answer and

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

3/ The Board filed an initial position statement on September 1, 2022, and a supplemental position statement (with exhibits) on December 8, 2022. On September 15, 2022, the Association filed an initial position statement together with: the certifications of New Jersey Education Association (NJEA) UniServ representatives Brian Rock and Jenn Larsen (the latter with one exhibit); and the certification (with exhibits) of Michael Gangluff, the Association's Negotiations Chair. The Association filed a supplemental position statement on January 25, 2023. Unless otherwise noted herein, our decision will rely on the facts set forth in the parties' Joint Stipulation of Facts (JSF) and the documents contained in their Joint Exhibits, listed infra.

affirmative defenses, each incorporating their respective prior position statements (as exhibits and/or by reference). On June 15, 2023, the parties filed a Joint Stipulation of Facts (JSF) together with Joint Exhibits A through K attached thereto, and agreed to submit the matter to the full Commission for a final agency decision, waiving a hearing examiner's report and recommended decision. On July 21, 2023, each party filed a brief with the Commission. On July 27, 2023, the parties requested oral argument.^{4/} These facts appear.

Joint Stipulation of Facts (JSF)

1. The Watchung Hills Regional Board of Education ("Board") is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act"). The Board operates Watchung Hills Regional High School ("WHRHS"), which serves as the public high school for residents of Green Brook, Long Hill, Warren, and Watchung.
2. The Watchung Hills Regional Education Association ("WHREA" or "Association") represents inter alia the professional staff members employed by the Board. During all times relevant hereto, the Association represents approximately 225 Board employees, including but not limited to teachers, secretaries, paraprofessionals, bus drivers, nurses, security personnel, child study team members, counselors, and buildings, grounds and maintenance staff.
3. The Board and Association are parties to a collective negotiations agreement ("CNA") for the period July 1, 2019 through June 30, 2022. The Parties are currently engaged in negotiations for a successor agreement. The expired CNA remains in effect during the negotiations process.
4. During the negotiations for the 2019-2022 CNA, the Association first started utilizing a "Bargaining Council."

^{4/} We deny the request because the issues have been fully briefed.

5. The Bargaining Council was comprised of, and open to, all Association members. Non-Association members are not able to join the group.
6. It is the Association's position that, consistent with the Association's bylaws, the Bargaining Council is part of the Association's negotiation team. Accordingly, any member of the Bargaining Council has the same rights as any other negotiations team member, including lead negotiators. This includes the right to vote on any matter before the Association's negotiation team, to address offers from the Board and to propose contractual language. This has been the case since the creation of the Bargaining Council.
7. It is the Board's position that the Bargaining Council is one and the same with the entire membership of the Association. The Board does not dispute the Association membership's right to separately review, discuss and vote on Board proposals. However, the Board alleges that the Bargaining Council is not a "representative" of the Association for negotiation purposes, and the Association cannot require the Board to negotiate with or in front of its Bargaining Council, comprised of potentially its entire membership.
8. During the negotiations for the 2019-2022 CNA, the Association sought to have its Bargaining Council members attend negotiation sessions with the Board.
9. On at least one occasion during the negotiations for the 2019-2022 CNA, the Bargaining Council attended the bargaining session.
10. Subsequent to the meeting between the Board and Association which was attended by the Bargaining Council, representatives from the Board and Association agreed to meet in a smaller setting in an effort to expeditiously reach a successor Agreement.
11. Prior to this smaller-scale meeting, the Board and Association agreed to pull back all proposals aside from salary and health benefits, and that the smaller setting would also exclude the parties' legal representation.
12. The Association and Board executed the 2019-2022 CNA in or around the Fall of 2019. Neither of the parties filed any unfair practice charges during the negotiations for the 2019-2022 CNA.

13. In or about October of 2021, the parties first reached out to each other to discuss beginning the negotiations process towards a successor agreement to the 2019-2022 CNA.
14. In the intervening two (2) year period after the 2019-2022 CNA was ratified, neither the Association nor the Board had any discussions as to the scope of the Bargaining Council's involvement in the negotiations for the successor CNA.
15. The first negotiations session for a successor agreement between the parties was tentatively scheduled for November 10, 2021.
16. On or around October 28, 2021, [the] Association negotiations chair [M.G.] informed then-Board negotiations chair (and then-Board member) [P.F.] that the Association again sought to have the Bargaining Council be present at all negotiation sessions. [P.F.] objected to the presence of the Bargaining Council at the negotiation sessions.
17. On November 9th, [P.F.] informed the Association that the Board would be proposing a ground rule prohibiting the Bargaining Council from being present at and participating in the negotiation sessions for the successor agreement.
18. Because the parties could not agree on whether to allow Bargaining Council members to attend the meeting, the November 10, 2021 negotiation session was postponed to allow the parties to engage in further discussion regarding the Bargaining Council.
19. Designated representatives of the Association and Board subsequently agreed to meet on December 8, 2021 to discuss ground rules, including the role of the Bargaining Council during negotiation sessions. For this meeting only, the Association agreed to not have its Bargaining Council members present at the meeting.
20. At the December 8th meeting, the Board maintained its position that the Association's Bargaining Council should not be allowed to attend the negotiation sessions. The Association countered that it had the right to include its Bargaining Council members at negotiation sessions. The parties exchanged numerous proposals regarding the Bargaining Council or alternatives but were unable to agree to any solution at this meeting.
21. No agreement was reached on the presence of the Bargaining

Council at future sessions. At the end of the meeting, the parties agreed to exchange proposals for a successor contract by the end of January 2022.

22. On or about January 14, 2022, the Board filed the underlying Unfair Practice Charge against the Association, which was docketed by the Commission as CE-2022-005. On February 9, 2022, the Association filed the underlying Cross-Unfair Practice Charge against the Board, which was docketed as [CO-2022-174]^{5/}.
23. Proposals were exchanged by the parties in or around January 26, 2022.
24. The parties did not meet again to continue negotiations from the filing of unfair practice charges docketed as CE-2022-005 and [CO-2022-174] until on or around March 1, 2023. The purpose of that meeting was to address the role of the Bargaining Council. However, the Parties did not come to a resolution on that issue. Accordingly, the issue of the Bargaining Council remains.

Joint Exhibits

- A. October 28-29, 2021 emails between the Association and Board
- B. November 9-10, 2021 emails between the Association and Board
- C. November - December 2021 emails between the Association and Board
- D. January 15-18 emails between the Association and Board with attachment
- E. Board Charge w/ exhibits
- F. Association Charge w/ exhibits
- G. Board Position statement
- H. Association Position Statement
- I. Board supplemental position statement

^{5/} The JSF incorrectly identified the docket number of the Association's charge as "CE-2022-128" (JSF, ¶22), and "CE-2022-108" (JSF, ¶24).

J. Association supplemental position statement.

K. Joint complaint issuance.

The JSF does not state the exact number of Association members who sat on the Bargaining Council on the one occasion (at least) that the parties stipulate it was present during negotiations for their 2019-2022 CNA. (JSF, ¶9.) The record includes an article published by the NJEA that discusses those negotiations (among others), and states that "over 50 WHEA members [were] in attendance" on that occasion. This article, entitled "Open Bargaining: A Way to Engage and Empower Your Local at the Table and Beyond," is an exhibit to the Board's December 8, 2022 supplemental position statement, found in Joint Exhibit I.

The article defines "open bargaining" as "bringing the membership into the bargaining process." (Joint Exhibit I, NJEA article.) It calls for "more openness and greater transparency in bargaining as a way to engage [union] members" through a lengthy preliminary process of internal union meetings and training sessions by which negotiation proposals and messaging are developed with membership input and feedback, and both sides' initial proposals are shared with the general membership, prior to the commencement of negotiations. The article states that many locals then use "expanded teams - as many as 15 to 25 members," during actual negotiations. (Joint Exhibit I, NJEA

article.) The article provides examples of three locals, including WHEA, that took the concept to the "next level" through "full-on open bargaining: the entire membership is invited to attend bargaining sessions with the board and participate in the process." (Id.) It describes the Watchung Hills negotiations for the 2019-2022 CNA as follows:

WHEA has a good salary guide, good benefits and decent working conditions. However, the district superintendent and board believe they can walk all over members and the contract whenever they want. The last straw came when the board and superintendent unilaterally imposed an August start date for staff. The local leadership decided enough was enough.

The NJEA UniServ field rep trained the local on open bargaining and set up WHEA's first meeting with the board. It did not go well. The board and its attorney were belligerent and condescending. They refused to enter the room and threatened to call the fire marshall if some of the WHEA team did not leave. In response, the team filled the hallway and watched the process from the door.

For the next meeting, the board threatened to bring the press and members of the community into the process, but the members did not back down. They told the board to "bring it on," but if the people invited by the board were not caucusing with the board team, the association would file unfair (sic) practice charges. The stage was set for a showdown.

The day of the meeting the board president contacted WHEA leaders and attempted to persuade them that the field rep was not acting in their best interests. This lead to the association to threaten an additional unfair (sic) practice charge.

When the meeting finally began, the board was confronted with over 50 WHEA members in attendance. The board backed down, pulling all of its proposals off the table and offered an above average settlement to put this round of bargaining behind them. The association had won back its power and is now using that power to even higher numbers.

[(Joint Exhibit I, NJEA article.)]

The article was co-authored by one of the two NJEA UniServ reps who provided a certification in support of the Association's September 15, 2022 position statement. (Joint Exhibit H.) The other UniServ rep certifies "[t]here were about 100 people" at one of the negotiations sessions. (Id., B.R. Cert., ¶3.)

The Association's Negotiations Chair certified (also in support of the of the Association's September 15 statement) that Bargaining Council members actively participated in negotiations for the 2019-2022 CNA. He described the Bargaining Council's composition and role, and the Board's reactions thereto, in pertinent part as follows:

[T]he Association's Negotiation Team [was] comprised of two parts: the Bargaining Council and those individuals at the bargaining table directly across [from] the Board at bargaining sessions ("Negotiators").
 . . .

The Association . . . did not seek to open up the sessions to the general public or to anyone other than the Board and Association's Negotiations Team.

During these negotiations, the Board contested the presence of the Bargaining Council To counter, the Board tried

to open up the meeting to the public. This resulted in two reporters showing up to watch the meeting.

The Association contested the Board's attempt to open up the meeting to the general public. We explained how . . . the Bargaining Council was in fact, like the Negotiators, part of the Negotiations Team.

. . .

[T]he Board [then]. . . agreed to allow the Bargaining Council into the closed session[,] . . . conditioned . . . on . . . the Association be[ing] the party publicly requesting to remove the reporters from the session. Once we made this request, we were able to proceed with the closed session with the Bargaining Council's inclusion.

In total, the Bargaining Council participated in about 3 bargaining sessions for the 19-22 CNA. The Bargaining Council's presence did not interfere or delay these negotiations. We chose the location of the face-to-face sessions ahead of time to accommodate all of the expected Bargaining Council members. The Bargaining Council members also complied with the Association's directions to not speak during the face-to-face sessions with the Board so as to minimize noise and prevent disruptions.

Even though Bargaining Council members did not talk during the face-to-face sessions with the Board, they were still actively participating in numerous respects. For one, they were able to research and analyze any Board offers or arguments presented during the face-to-face sessions and provide written responses for the negotiators to consider while still at the table. Additionally, because the Bargaining Council members were already fully informed about the communications at the bargaining table, the full Negotiation Team was able to quickly discuss during caucusing. In fact, the Association was able to complete its

caucusing and return back to the table faster than the Board was able to complete its caucusing.

During caucusing each Bargaining Council member's vote weighed the same as each Negotiator's vote for the purposes of negotiation strategies and responses to the Board.

[(Joint Exhibit H, M.G. Cert., ¶¶ 5-13.)]

The Negotiations Chair further certified that in the current negotiations, the Association offered to discuss "whether to set a ground rule to limit how many members of the Bargaining Council could attend a negotiations session or limit how many sessions the Bargaining Council could attend." (Id., ¶33.)

Arguments of the Parties

The Board argues that section 5.3 of the Act requires majority representatives in New Jersey to "designate" or "select" representatives to bargain on their behalf, and that negotiations must be conducted exclusively between the designated representatives of each party, not between the entire Association and the entire Board of Education. The Board contends it is "self evident" that the entire Association cannot be a representative of itself; and that interpreting section 5.3 to the contrary would lead to "absurd results," including by requiring parties to "rent out MetLife Stadium or Prudential Stadium to conduct negotiations" if a public union with thousands of members (for example, CWA) designates all of its members as

negotiation representatives. Allowing an entire union to dictate the terms of the negotiation process, attend all meetings, and essentially act as its own negotiation committee does not lead to good faith or efficient negotiations, the Board contends.

The Board characterizes the Association's position as being contrary to the Act in the same manner as that of a school board's refusal to negotiate except during open public session. The Board asserts that the "concept of exclusivity of representation" could be compromised by open public negotiations. The Board further cites decisions from other jurisdictions including California's Public Employment Relations Board, a Minnesota federal district court, and the National Labor Relations Board (NLRB), among others. These decisions ruled against the presence of bargaining unit member-observers and/or members of the public during negotiation sessions between unions and employers.

The Board accuses the Association of attempting to effectuate a strategy of "intimidation and so-called 'winning' at the bargaining table" per the open-bargaining "playbook" described in the NJEA article (discussed supra).^{6/} The Board

6/ In its December 8 supplemental position statement, the Board argued "that the Association seeks to . . . force the Board's Negotiations Committee to sit down with its entire membership present in the room in an effort to intimidate the Board into either agreeing to the Association's proposals or refusing to offer various proposals due to the
(continued...)"

contends this violates sections 5.4b(1), (3) and (5) of the Act. The Board further argues that its actions do not violate the Act, as it has requested to meet with the Association's bargaining representatives for nearly two years now to engage in negotiations for a successor agreement, while the Association has refused to do so, and meanwhile the Board has not unilaterally altered any terms and conditions of employment.

The Association argues that employers must negotiate in good faith with a union's representatives, pursuant to N.J.S.A. 34:13A-5.3, and that the Association identified the Bargaining Council as part of its negotiations team and announced to the Board the group's planned presence and stated purpose at upcoming negotiations sessions. The Association also contends that a majority representative's right to choose its negotiation representatives includes the right to determine the number of such representatives.

Citing decisions from other state agencies that relied on NLRB decisions, the Association argues that employers are not permitted to dictate the composition of a union's negotiating team, and may not insist that the union limit the size of its

6/ (...continued)
fear of angering Association members who normally would not be privy to such discussions." (Joint Exhibit I.) The Board argued this had a chilling effect on negotiations, and also raised concerns about potential breaches of confidentiality with a large number of Association members present during negotiations. (Id.)

team absent any facts indicating that its participation in negotiations jeopardizes safety or security, or causes a conflict of interest. It argues that since Bargaining Council membership is limited to Association members, the Board can easily determine its composition and address any concerns arising from the inclusion of specific individuals that the Board believes in good faith would interfere with the bargaining process. The Association further argues that the Board has presented no evidence that the Bargaining Council's presence resulted in one of those limited circumstances which made good faith bargaining between the parties a futility or impossibility.

The Association further contends that allowing the Bargaining Council into the sessions would still maintain closed session negotiations. The concerns raised by the Board are speculative, and its opinion that the Bargaining Council may be disruptive or cause embarrassment to Board members is not a substitute for evidence that may be independently assessed.

The Association concedes that an employer could limit the involvement of a bargaining council upon a demonstration that the group's involvement is interfering with the negotiations process. The Association further admits that the size of a negotiations team could be limited if the available meeting spaces could not accommodate a full bargaining council; and that an employer could also object in good faith if a bargaining council becomes

disruptive during face-to-face talks so as to make further productive negotiations unattainable. The Association also avers that the existing exceptions to a union's general right to choose its representatives can be applied to negotiation teams of any size; and that confidentiality ground rules are just as enforceable whether two negotiation representatives or 200 are present at a meeting. The Association further points to the 2019-2022 negotiations, wherein the Association agreed to exclude the Bargaining Council from a session, as evidence that it has demonstrated a willingness to break its team into smaller groups when necessary for productive and good faith negotiations.

Analysis

At the outset, we acknowledge that historically there has been a practical basis for parties not using larger negotiation teams for collective negotiations. The use of smaller teams may be more conducive to a process that often involves "numerous, informal exchanges of ideas and written data . . . during a series of negotiations sessions" in which "proposals and counter-proposals may be exchanged between the parties." Brielle Bd. of Ed., P.E.R.C. No. 77-72, 3 NJPER 310 (1977). We further acknowledge that in the conduct of public sector collective negotiations it is essential to strike a balance between transparency and effective negotiations.

With that said, we also stress that our decision today is

not intended to endorse or discourage "open" collective negotiations, as defined by the Association. But, as further discussed infra, we find that its practice, when carried out in accordance with good faith and within the boundaries of the Act, is not inherently an unfair practice. However, the parties are cautioned to exercise discretion and good faith in implementing large team meetings, ensuring it does not compromise the effectiveness of the process, and does not otherwise obstruct the process or infringe upon the parties' rights under the Act.

The New Jersey Constitution at Article 1, Para. 19 guarantees public employees the right to present proposals to their employers and make known their grievances "through representatives of their own choosing." Section 5.3 of the Act implemented this constitutional provision "through the use of majority representatives selected by the employees in an appropriate unit." Dover Tp., P.E.R.C. No. 77-43, 3 NJPER 81, 83 (1977). N.J.S.A. 34:13A-5.3 provides, in pertinent part:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

. . .

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. . . . 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.

"Application of the majority rule concept," our Supreme Court has held, "brings the collective strength of all the employees in the unit to the negotiating table and thus enhances the chances of effectuating their community purposes and serving the welfare of the group." Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 426-427 (1970).

N.J.S.A. 34:13A-5.4(a)(1) and (5) implicitly prohibit a public employer from interfering with, restraining, or coercing an employee organization's selection of its representatives, while N.J.S.A. 34:13A-5.4(b)(2) expressly prohibits an employee organization from interfering with restraining, or coercing a public employer's selection of its representatives for negotiations or grievance adjustments. Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-46, 22 NJPER 35 (¶27017 1995), citing, Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 254 (¶22134 1991); Bergen Pines Cty. Hosp., P.E.R.C. No. 91-98, 17 NJPER 254 (¶22117 1991); Salem Cty., P.E.R.C. No. 87-122, 13 NJPER 294 (¶18124 1987).

Applying these principles, we have held that "[n]either the

employer nor the majority representative may dictate the other's choice of representatives for collective negotiations," and that "with certain exceptions . . . an employer violates the Act when it attempts to dictate the composition of the union's negotiations team." Atlantic County (Dept. of Corrections), P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997), aff'g as modified H.E. No. 97-22, 23 NJPER 206, 208 (¶28100 1997) (county violated Act when it refused to recognize police union's president because of his termination, and objected to his continued presidency and participation in negotiations).^{7/} See also, Southampton Tp., D.U.P. No. 97-34, 23 NJPER 258 (¶28124 1997) (employer's past choice to not have attorney at grievances did not preclude it from ever being represented by attorney in grievances); Middletown, supra (restraining arbitration of grievances contesting number and identity of board representatives at grievance hearings).

^{7/} Citing: No. Brunswick Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980) (board violated Act when it refused to meet with union's negotiating team unless non-unit employees were removed); Boro. of Bradley Beach, P.E.R.C. No. 81-74, 7 NJPER 25 (¶12010 1980) (employer illegally sought to prevent union from putting new hires on its negotiations team); Bogota Bd. of Ed., supra, aff'd P.E.R.C. No. 91-105, 17 NJPER 254 (¶22134 1991) (employer violated Act when it refused to meet with union negotiations team unless it removed its union president, who had been fired from district); Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986) (employer illegally refused to negotiate because union's negotiator had been suspended for striking his foreman).

_____Moreover, proposals concerning the composition of a negotiation team are not mandatorily negotiable. Middletown, supra ("Neither the employer nor the majority representative may interfere with each other's choice of representatives for negotiations and grievance processing or insist upon negotiating over the identity of those representatives").^{8/}

But a union's right to choose its representatives for collective negotiations is not absolute. We have found it may be limited under circumstances involving conflict of interest, "persuasive evidence" of ill will, and safety or security concerns. For example, we have held that when individuals' presence on a negotiations team, or the manner of their selection, created a substantial potential for conflict of interest, the team composition had to be changed. See, e.g., Borough of Somerville, P.E.R.C. No. 88-77, 14 NJPER 218 (¶19077 1988), aff'g H.E. No. 88-33, 14 NJPER 102 (¶19037 1988) (employer may refuse to negotiate with negotiations team purportedly

^{8/} Citing: Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991) (proposal not mandatorily negotiable to extent it would circumscribe employer's right to designate representative to negotiate over overtime compensation); Borough of Bradley Beach, P.E.R.C. No. 89-116, 15 NJPER 284 (¶20125 1989) (proposal requiring police commissioner to be present at negotiations not mandatorily negotiable); Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980) (proposal setting number and identity of negotiations team members not mandatorily negotiable); Jackson Tp., I.R. No. 90-16, 16 NJPER 210 (¶21083 1990) (article prohibiting Director of Public Safety from sitting on negotiations team unenforceable).

representing supervisors, but in fact illegally dominated by non-supervisors); Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 339 (¶12153 1981) (patrolman could not choose negotiations team for superior officers unit). In Middletown, supra, discussing the exceptions to a party's right to choose its negotiations representatives, we cited private-sector precedent holding that "an employer or employee organization need not deal with a particular member of a negotiations team given persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." Id., citing KDEN Broadcasting Co., 225 NLRB 25, 35, 93 LRRM 1022 (1976) (emphasis in original). And in Burlington County College, H.E. No. 2017-1, 43 NJPER 256 (¶78 2016), it was held that a union retained its right to designate a dismissed employee as its negotiations representative, absent "any facts indicating that [her] participation in collective negotiations . . . jeopardized campus safety or security."

In sum, the foregoing establishes that neither party may dictate or challenge the other's choice of its negotiations representatives (including as to a specific number or identity of such representatives), absent evidence of conflict of interest or ill-will, or evidence that a party's choice of representatives jeopardizes safety or security. Although we have not previously had occasion to apply these principles to a matter involving a

union's designation of a large number of individuals (potentially including its entire membership) as part of its negotiations team, we do not believe the stipulated record presented here requires us to modify or disregard those principles in resolving this dispute.

The Association's use of its Bargaining Council in negotiations may be unusual or atypical.^{9/} But neither our Constitution nor our Act place express limitations on the size of a party's collective negotiations team. The parties stipulate that the Association is composed of approximately 225 Board employees, that Bargaining Council membership is open to all Association members, and that non-Association members are not able to join the group. (JSF, ¶¶ 2,5.) The parties further stipulate that on at least one occasion during their previous round of negotiations, the Bargaining Council was present at a negotiations session, that neither party filed unfair practice charges on that occasion (although the Board did object to its

^{9/} In, Brielle, supra, we stated, "[t]ypically, a negotiations session involves and is restricted to small groups or single individuals representing both the public employer and the majority representative." We do not find this statement controlling or dispositive here, as the size of the parties' negotiations teams was not at issue in Brielle. The observation appears in the context of a general discussion about public-sector collective negotiations processes, which led to our conclusion that such processes "are clearly excluded from the purview of the 'Sunshine Law' [N.J.S.A. 10:4-12], as they involve neither public bodies, meetings, nor public business as defined by that law." Id.

presence), and that the parties reached an agreed-upon settlement of their 2019-2022 contract under those conditions. (Id., ¶¶ 8-12.)

The record contains no persuasive evidence substantially implicating conflict of interest, ill-will, or safety and security concerns in connection with the Association's designation of the Bargaining Council as part of its negotiations team. That is, there are no facts indicating the Board was (or is) unable to accommodate the presence of the Bargaining Council in a negotiation session due to room size limitations or concerns regarding safety and security, or that Bargaining Council members demonstrated ill will or otherwise behaved disruptively during prior negotiations or will do so in current negotiations. Nor does the record contain any evidence that confidentiality ground rules were broken during the 2019-2022 negotiations.

There is also no evidence suggesting Bargaining Council members are mere passive observers of the negotiations process, as opposed to active participants in it. The parties' joint exhibits include Association certifications as to the Bargaining Councils' role in the process, including that it was "able to research and analyze any Board offers or arguments presented during the face-to-face sessions and provide written responses for the Negotiators to consider while still at the table," and the Association's full team was able to complete its caucusing

faster because Bargaining Council members "were already fully informed . . . at the bargaining table." (Joint Exhibit H, M.G. Cert., ¶¶ 12-13.) The record contains no certified facts submitted by the Board refuting these assertions.

Thus, we are unpersuaded by the Board's reliance on decisions wherein the presence of union members in negotiation sessions was challenged based upon their status as passive observers who, unlike the Association's Bargaining Council, were not designated by the union as part of its negotiations team and took no part in negotiations.^{10/}

Likewise, while we find the cases involving the exclusion of members of the public from negotiation sessions, including Brielle, supra, to be instructive, they are not wholly applicable

^{10/} For example, in Petaluma Federation of Teachers, Local 1881, California P.E.R.B. Decision No. 2,485 (2016), the employee-observers at issue were "not designated or even prospective representatives or officers" of the union, which exercised "no authority" over them, and this was found to pose a risk of "direct dealing and bad-faith bargaining" if such employees asserted "an independent statutory right to attend negotiations, even against the wishes of their bargaining representative." And in Aircraft Mechs. Fraternal Ass'n v. Northwest Airlines Corp., 394 F. Supp. 2d 1082 (2005), the union's constitution specified the composition of its negotiating committee, which did not include employee-observers, while the observers at issue were "selected by lottery" and did not "'act for' the employees" but rather "silently spectate[d] the negotiating process for 'a couple of hours, a half-day or all day if time permits.'" Id., 1088. Such facts are not present here. See also, Brooke Glen Behavioral Hosp., 365 NLRB No. 79 (2017) (observers at issue were not only "not members of the bargaining team [with] nothing to add to the bargaining," but "were represented by a different labor organization").

to the instant facts. In Brielle, the Commission found that a school board's refusal to collectively negotiate except during open public session was inconsistent with its duty to negotiate in good faith. The Commission expressed a concern that the concept of "exclusivity of representation" could be compromised by open public negotiations because the public could include rank and file unit members and leaders of minority organizations. Here the Association has expressly designated its Bargaining Council as part of its negotiations team, and limited access to Association members. The only evidence in the record that members of the public were present during the parties' 2019-2022 negotiations indicates it was at the Board's invitation, and was short-lived as the Association objected to it. (Joint Exhibit H, M.G. Cert., ¶¶ 8-10; Joint Exhibit I, NJEA article.) It is also clear from the record that in negotiation sessions, going forward, the Association does not seek to include members of the public, other unions or groups of employees who are not part of its designated negotiations team.

We also reject the Board's argument that the exclusivity principle set forth in section 5.3 of the Act somehow prohibits the Association's use of the Bargaining Council. Section 5.3 provides, "Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit . . . shall be the exclusive

representatives for collective negotiation,” and “shall be entitled to act for and to negotiate agreements covering all employees in the unit.” N.J.S.A. 34:13A-5.3.

There is no indication here that the designation of the Bargaining Council as part of the Association’s team was or is unsupported by a majority of employees in that unit.^{11/} Nor do any facts suggest that the size of the Association’s negotiations team (or its potential size), standing alone, renders it unable “to act for and to negotiate agreements covering all employees in the unit.” Id.

We agree with the Association that this matter is, in broad strokes, similar to disputes addressed in a pair of decisions by the Massachusetts Commonwealth Employment Relations Board (CERB). These cases involved a teachers union’s unfair practice charges against a school employer over the union’s attempts to include “silent” bargaining team members at negotiation sessions. We are in general accord with CERB’s reasoning therein. See, IMO Belmont School Committee, 45 MLC 185, 2019 MLRC LEXIS 16 (2019), and 48 MLC 107, 2021 MLRC LEXIS 15 (2021).^{12/} However, the second

^{11/} Were this the case, the Board might reasonably have a good faith doubt concerning the Association’s majority status, which should ordinarily be addressed not in an unfair practice proceeding but through a representation petition. See N.J.A.C. 19:11-1.1(a)2 and 19:11-1.4(a); Hillside Tp., I.R. No. 2019-14, 45 NJPER 260 (¶70 2019).

^{12/} In the first case CERB held that because the union failed to
(continued...)

Belmont decision focused, among other things, on the parties' inability to agree on the number of silent bargaining representatives (the parties' competing proposals varied between approximately eight and twenty). And, in the first Belmont decision CERB stressed that its decision was limited to the facts before it, where approximately seven silent representatives were at issue.

The facts in the instant matter involve a significantly larger number of employee representatives than was the case in the Belmont decisions. The joint documentary record indicates that during the parties' 2019-2022 negotiations, the number of individuals on the Bargaining Council ranged from "over 50" to "about 100." (Joint Exhibit I, NJEA article; Joint Exhibit H, B.R. Cert.) The potential also exists for a negotiation session to include up to several hundred individuals on the Bargaining

12/ (...continued)

provide notice to the employer before a bargaining session that its silent representatives were part of its negotiations team, the employer did not commit an unfair practice by refusing to bargain on that occasion. In the second case, addressing a subsequent round of negotiations between the same parties two years later, the union gave the employer advance notice that its negotiations team would be comprised of both "Core Speaking Representatives" and "Silent Bargaining Representatives." Under those circumstances, CERB found the employer violated its duty to bargain in good faith by its subsequent refusal to allow the silent bargaining representatives into bargaining sessions. Here, the Board has also refused to commence negotiations for the parties' successor agreement after receiving advance notice of the Association's intention to use its Bargaining Council in negotiations. (JSF, ¶¶16-22.)

Council, as participation is open to all Association members.

We do not underestimate the possibility that such large numbers of people in a negotiation session could become problematic, both as a practical matter (in terms of accommodations as well as safety and security), and in the event the group becomes disruptive, otherwise demonstrates ill will or fails to observe confidentiality ground rules. But we find that those issues have not yet materialized in a manner that would support a good faith refusal to negotiate on the part of the Board, based on on the stipulated record before us. Our decision today is limited to that record.

Significantly, we note the Association's demonstrated willingness (in the last round of negotiations) to negotiate without the presence of its Bargaining Council if necessary, and its certified willingness to set ground rules pertaining to the maximum size of the Bargaining Council and the number of sessions it may attend in current negotiations. We caution that the Association should continue to remain open to reasonable restrictions on the deployment of its Bargaining Council in negotiations, as well as to ground rules that will reasonably maintain effective negotiations when large negotiations teams are present.

Our decision also does not preclude the Board, going forward, from asserting any good faith challenges during the

parties' negotiations if actual evidence arises of conflict of interest or ill-will, breach of confidentiality, or concerns over safety and security in connection with the Association's use of its Bargaining Council.

Based upon the foregoing, we find the Board violated N.J.S.A. 34:13A-5.4a(5) and, derivatively, 5.4a(1), when it refused to meet and negotiate with the Association in the presence of Bargaining Council members. The Board's charge against the Association is dismissed.

ORDER

The Watchung Hills Regional High School District Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by refusing to negotiate in good faith with the Watchung Hills Regional Education Association in the presence of its Bargaining Council.

B. Take the following 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) consecutive days.

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

2. Negotiate in good faith with the Watchung Hills Regional Education Association over mandatorily negotiable subjects, including over negotiations ground rules respecting the presence of the Association's Bargaining Council during negotiations sessions.

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford recused himself.

ISSUED: October 26, 2023

Trenton, New Jersey



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 employees in the exercise of the rights guaranteed to them by this Act, by refusing to negotiate in good faith with the Watchung Hills Regional Education Association in the presence of its Bargaining Council.

WE WILL negotiate in good faith with the Watchung Hills Regional Education Association over mandatorily negotiable subjects, including over negotiations ground rules respecting the presence of the Association's Bargaining Council during negotiations sessions.

Docket No. CE-2022-005
CO-2022-168
CONSOLIDATED

Watchung Hills Regional High School
District Board of Education
(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