COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PHILADELPHIA FEDERATION OF TEACHERS, AFT LOCAL 3, AFL-CIO	:	
v.	:	CASE NO. PERA-C-20-296-E
SCHOOL DISTRICT OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On December 15, 2020, the Philadelphia Federation of Teachers (Union, Federation, or PFT) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the School District of Philadelphia (District) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the District refused to provide requested information in advance of investigatory interviews with 2 PFT members accused of violating District policies, that the requested information was necessary to protect the due process rights of those employes, and that the provision of that information had been the practice for decades. The attachments to the charge also complain of the District's violating contractual due process rights by refusing to provide the requested information and by using investigators who are not building supervisors.

On February 5, 2021, the Secretary of the Board issued a letter to the Union stating that no complaint would be issued on its charge because, prior to disciplinary action, a union is not entitled to an employer's investigatory materials during the pendency of the investigation. On February 23, 2021, the Union filed exceptions to the Secretary's administrative dismissal of the charge. The Union requested an extension of time to file a supporting brief. The Board declined the Union's request because it was not timely filed. On April 20, 2021, the Board issued an Order Directing Remand to the Secretary for Further Proceedings.

On May 5, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing (CNH) designating a hearing date of October 1, 2021. On June 15, 2021, the Union filed an amended charge additionally alleging that a second investigatory interview was held with one of the same employes after providing the requested information. The Union therein alleged that the second interview resulted in a recommendation for discipline based on the first investigatory conference results, during which the employe did not have the information. On June 24, 2021, the Secretary of the Board issued an Amended CNH again designating a hearing date of October 1, 2021. On September 20, 2021, the Union requested a continuance due to counsel unavailability, without objection from the District, and I rescheduled the hearing for January 28, 2022.

On December 8, 2021, the Union filed another amended charge, additionally alleging more incidents where the District investigators refused to supply the Union with requested information prior to investigatory interviews. On December 16, 2021, the Secretary issued another Amended CNH again designating a hearing date of January 28, 2022. On January 18, 2022, the District requested a continuance due to a scheduling conflict, and I rescheduled the hearing for June 1, 2022.

On May 19, 2022, the Union filed a third amended charge averring further allegations that the District conducted investigatory interviews with PFT members without first providing requested witness statements and other information, developed an extra-contractual procedure for conducting the disciplinary process, and based disciplinary determinations on investigatory conferences with employes who were not prepared for full participation in those conferences, in violation of previously held due process rights. On May 23, 2022, the Board Secretary issued a third Amended CNH, again designating the hearing date for June 1, 2022. During the hearing on June 1, 2022, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On September 6, 2022, the Union filed its post-hearing brief. On October 5, 2022, the District filed its post-hearing brief. On October 17, 2022, the PFT filed a reply brief.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)

3. Jerry Jordan has been the President of the PFT for 15 years. Mr. Jordan began employment with the District as a substitute teacher in the late 1970s and he was appointed to a full-time teaching position in October 1980. In the early 1980s, Mr. Jordan became a building representative for the Union at University City High School. In that role, Mr. Jordan represented faculty bargaining unit members accused of wrongdoing during investigatory conferences. (N.T. 25-27)

4. In 1987, Mr. Jordan became a full-time PFT employe as a District Staff Representative. In that role, Mr. Jordan represented faculty members at approximately 15 schools plus the Kennedy Center and the Administration Building. Since then, Mr. Jordan has been involved in the disciplinary process as well as negotiations regarding the disciplinary process. (N.T. 27)

5. Before early 1992, the District had a 3-step process for investigating and pursuing discipline of PFT members who were alleged to have engaged in misconduct. The first step was a meeting with the school principal or assistant principal. The next step was a hearing or conference with the regional superintendent, and the third step was a hearing with the Office of School Operations. The Superintendent of School Operations made the final decision regarding sustaining the allegations and recommending discipline. (N.T. 28-29)

6. On January 31, 1992, the PFT and the District signed an MOU which reduced the number of hearings from 3 to 2 for instructional employes. By its own terms, the MOU procedure was to be "experimental for a period of one year from the beginning date of implementation (February 1, 1992). Failure of both parties to agree to the continuation of the process shall result in a return to the procedure as it currently exists." Both parties continued to participate in the negotiated 2-step process, without change, until 2020. In 1998, the District and the Union negotiated an agreement reducing the number

of interviews/hearings from 3 to 2 for the non-instructional employes. Since 1998, there have been no changes to the investigatory or disciplinary process for non-instructional employes. (N.T. 30-34; Union Exhibits 1 & 2)

7. The 1998 document, relating to the non-instructional employes, was in the form of a Memorandum. The Memorandum was hand signed through the printed name of the District's Executive Director of Human Resources by the Executive Director. The Memorandum was also hand signed through the printed name of the District's Chief of Staff by the Chief of Staff. Mr. Jordan credibly testified that he negotiated the agreement contained in the Memorandum with the District.(N.T. 51; Union Exhibit 2)

8. After applying the 2-level hearing process to the teachers for 6.5 years, the agreement with the Union over the non-instructional employes did not contain any language that the process modification was experimental or time limited. In this regard, the 1998 Memorandum was permanent and the MOU became permanent. The 1998 Memorandum provides, in relevant part, as follows:

> As a result of discussions with the Philadelphia Federation of Teachers, there has been a modification of the disciplinary process for many employees represented by PFT. As you know, many PFT represented employees have had a disciplinary process that included three hearing or conference levels. Effective September 1, 1998, the number of hearing or conference levels has been reduced to two in every instance.

(Union Exhibit 2)

9. Under that process and prior to 2020, a school principal or assistant principal, who had a concern or complaint about a faculty member or non-instructional employe, would send a conference notice to the employe requesting a hearing at least 24 hours in advance. The principal's concerns may arise from a complaint from a student(s), a parent(s), an employe(s), or from personally witnessing behavior. The conference notice provided the reason for the conference and a reminder that the employe was entitled to a Union representative. The CBA, the MOU and the Memorandum do not require the District to provide investigatory materials in the District's possession prior to or during the first investigatory interview with employes. (N.T. 34, 51, 58)

10. The initial conference with the principal may not always be investigatory. For example when there is an established attendance problem and there are no disputed facts that the employe inexcusably missed days or arrived late. In that situation, the purpose of the conference is simply to impose discipline. The initial first conference is investigatory when the principal receives a parent, student, or employe allegation concerning an employe that has to be investigated before the allegations can be sustained. The practice of the principal, assistant principal, or building supervisor conducting the initial interview with an accused employe has been the same since 1987. (N.T. 35-37)

11. Under this practice, the principal would provide documents, including original complaints or statements, relating to the allegations along with the initial conference notice. The principal did not make any determination about whether a policy violation had occurred or whether discipline should be imposed at the first conference. The first conference

was designed to question the employe about the allegations. After the first conference, the principal would decide whether the employe did something improper. If the principal decided that there was no policy violation, nothing more was done. If a policy violation was established, the principal issued either a warning of future discipline or documented the discipline on a "204-form." (N.T. 39-40, 57, 115)

12. After a 204-form is issued, the principal would hold another conference with the employe and the Union representative to review and discuss the principal's recommendation. After the 204-form review, a second-step hearing is held. Historically, the second-step hearing was held by the Regional Superintendent or the Office of Employee and Labor Relations (OELR). (N.T. 40, 115)

13. Sometime between 2006 and 2010, there was a cheating scandal at the District. As a result, there were "so many" employes who were having hearings that the District hired an outside law firm to have attorneys investigate the employes' possible involvement. The District negotiated with the Union before using outside investigators, and the Union agreed. (N.T. 37-38)

14. In the summer of 2020, District officials believed that the City of Philadelphia and the Country as a whole were experiencing civil unrest as a result of police misconduct. As a result of that perception, the District wanted to improve its own commitment to diversity, equity and inclusion. In this context, the District sought to improve its investigations of complaints of harassment and discrimination and focus more resources on those types of complaints. These improvements took the form of hiring trained professional investigators.(N.T. 161-162)

15. Prior to 2020, all allegations of misconduct were investigated by an employe's building supervisor, which was the principal of the school in most cases. Many schools do not have an assistant principal, and the principal handled all matters in the school building. Prior to 2020, the school principal opened an investigation upon receiving a student, parent or other employe complaint. The principal collected statements and invited the PFT member to an investigatory conference where the principal provided the statements he collected, if there were any, to the accused employe with the conference notice. (N.T. 162-164)

16. As of 2020 and thereafter, the District decided that discrimination and harassment claims against employes are complex and decided to employ 2 investigative labor relations officers who work for OELR (hereinafter "LROs"). The professional investigators are attorneys with litigation and investigation experience who conduct only discrimination and harassment investigations, instead of principals, who are not trained investigators. Currently, the 2 LRO investigators are Lindsay O'Brien and Kristin Johnson. Tashell Jenkins was an LRO who is no longer employed by the District. School principals/supervisors continue to investigate other types of policy violations. (N.T. 165-166, 197-198, 200-201)

17. The District now has a "portal" through which employes or parents can lodge complaints of discrimination or harassment directly to the OELR, which will assign an LRO. The LROs will open a case file and determine whether policies prohibiting discrimination or harassment were violated. They do not determine specific discipline or consult with any principals about specific discipline. (N.T. 166-169)

18. The Office of Inspector General (OIG) is a District office, and employes of the OIG are District employes. The OIG has also conducted investigations of employes prior to 2020 and currently. It investigates violations of District policy focusing on fraud, corruption, abuse of funds, and general violations of District policy. Investigators for the OIG have never provided information prior to their investigations, and the PFT did not at any time object to that practice. (N.T. 170-171, 187, 200-201, 231-236)

19. John Saraceno is the Director of Investigations in the OIG. He has investigated PFT members without providing witness statements or other documents prior to interviewing the employe suspected of wrongdoing, and the PFT has not requested those documents. If allegations are founded, Mr. Saraceno issues a report that he sends to the Superintendent of Operations and the School Board of Education. (N.T. 231-235)

20. In 2020, PFT staff contacted Mr. Jordan complaining that an unknown investigator, who was not a school principal or assistant principal, was requesting first level conferences without providing documents, witness statements or other information. At this time, Mr. Jordan did not know whether the investigator would be making recommendations regarding policy violations. (N.T. 41-43)

21. The 1992 MOU, pertaining to instructional employes, does not explicitly state that only a principal or assistant principal can conduct first level conferences. The 1998 Memorandum, pertaining to non-instructional employes, provides a list of non-instructional positions and provides that the first level conference will be conducted by either the school principal or the employe's supervisor. Both agreements eliminate the three-level hearing process. The MOU refers to the levels of conferences and hearings as "Due process hearings." The Memorandum refers to the first and second level of hearings as a "disciplinary process." (N.T. 47-48; Union Exhibits 1 & 2)

22. The CBA, the MOU, and the 1998 Memorandum do not provide that the District has an obligation to provide documents or other information before or during the first level conference to investigate policy violations or misconduct. (N.T. 51)

23. Suzanne Cataline has been a District Staff Representative since August 2019. She began teaching fourth and fifth grade in 2008. As a District Staff Representative, Ms. Cataline resolves labor-management issues in 34 District schools, enforces the CBA and represents employes at due process conferences. (N.T. 56-57)

24. Alyse Weisbrod was a 24-year veteran faculty member at Spruance Elementary School in 2020. On November 23, 2020, LRO Tashell Jenkins emailed Ms. Weisbrod stating as follows: "We received a complaint regarding conversations you had during instruction on September 3, 2020. I would like to schedule an interview via Google Meet. Are you available to meet on Wednesday, December 2 at 10 am, 11 am, or 12:30 pm[.]" (N.T. 59; Union Exhibits 3 & 4)

25. Prior to 2020, a school principal could ask a District labor relations officer to attend the first level conference, but the principal would conduct the conference. Prior to November 23, 2020, Ms. Cataline had not experienced an investigative officer contacting her for a first level conference. An investigator from the OELR is not a principal or assistant

principal at the school level who is familiar with the employes or "stakeholders." (N.T. 60-61, 64, 79)

26. On November 24, 2020, Ms. Cataline responded to LRO Jenkins seeking more information about the alleged "conversations during instruction" and stated that the conference notice was vague. Ms. Cataline further stated that Ms. Weisbrod was entitled to a copy of any complaints or allegations. On November 25, 2020, LRO Jenkins responded that the matter was being treated as an allegation of discrimination for having a conversation with someone where she was discussing students and stated that the conference was not investigatory. LRO Jenkins further responded that, "pursuant to the District's discrimination policy, no documentation is presented at this state as we are still gathering facts." LRO Jenkins did not specify the type of discrimination alleged, and she did not provide the policy that was allegedly violated. (N.T. 62; Union Exhibit 3)

27. On prior occasions, the first level conference notice included a reference to the alleged statements that could be understood as discriminatory. LRO Jenkins conducted the first interview with Ms. Weisbrod. Ms. Cataline was present for the interview during which LRO Jenkins showed, for the first time, a recording of a virtual classroom during which a voice could be heard in the background. The voice recording, statements, and complaints were not provided before the interview. (N.T. 63, 65-66, 82)

28. Ronak Chokshi, Esquire, is an attorney in the District's Office of General Counsel (OGC). He has been in the OGC since December 2021. In June 2019, Mr. Chokshi became the Interim Deputy in the OELR, until his transfer back to the OGC. (N.T. 157-159)

29. On May 4, 2021, as Interim Deputy of OELR, Mr. Chokshi issued a memorandum to Kwand Lang, the Principal of Spruance Elementary School, regarding the "Harassment/Discrimination Claim" against Ms. Weisbrod based on LRO Jenkins' investigation. Mr. Chokshi issued the memorandum because LRO Jenkins had left the District. Mr. Chokshi concluded that Ms. Weisbrod violated the District's Code of Ethics and recommended "appropriate personnel [action] consistent with [school] Board policies, administrative procedures, and applicable collective bargaining agreements." Mr. Chokshi would not serve as the "second-level" conference officer for OELR if he was involved in the initial investigation. (N.T. 67-76, 180-181; Union Exhibit 4)

30. On May 19, 2021, Ms. Cataline received a notice of a second investigatory conference from the Assistant Principal of Spruance Elementary, Kenneth Christy. Mr. Christy attached parent email complaints and a link to the recorded video of the virtual classroom to his notice. (N.T. 71; Union Exhibit 4)

31. Ms. Cataline attended the second investigatory conference, during which Assistant Principal Christy asked questions about the parent complaints, which Ms. Weisbrod answered. On May 26, 2021, after the second interview, Mr. Christy issued a 204-form to Ms. Weisbrod recommending termination and providing notice of another conference to review the 204-form and the recommendation for termination. The 204-form referenced the report issued by Mr. Chokshi and provided that the investigation was completed by the OELR. (N.T. 72-73; Union Exhibit 5)

32. Ms. Weisbrod was first interviewed by LRO Jenkins, who was not a school administrator and who reported to Mr. Chokshi, without documents or

information. Based on that interview, Mr. Chokshi recommended Ms. Weisbrod receive some form of personnel action. After receiving Mr. Chokshi's recommendation, Mr. Christy then sent the documents and information to Ms. Cataline and Ms. Weisbrod and conducted a second interview, after which he recommended termination. Mr. Christy's 204-form would have gone to OELR for a final determination by OELR, which office already recommended personnel action. However, Ms. Weisbrod resigned rather than appeal to what would have been a third level. Once a principal or assistant principal issues a 204-form, he or she has another conference with the employe to review the 204-form recommendations and the employe again has a chance to defend, but the principal usually adheres to his or her prior determination. (N.T. 71-76, 95-101)

33. Leshawna Coleman has been a Union Staff Representative at the District for 5 years. She began her employment at the District in 2001 teaching English to Speakers of Other Languages (ESOL). She has participated in thousands of investigatory interviews with employes. (N.T. 113-114)

34. On November 28, 2020, LRO Jenkins emailed teacher George Filip scheduling a first level investigatory conference with him regarding 3 complaints allegedly constituting harassment or discrimination. On November 30, 2020, Ms. Coleman emailed Ms. Jenkins stating that the PFT objects to these conferences because they violate members' due process rights "while ignoring [Mr. Filip's] contractual rights to have access to witness statements and an investigatory conference with his 'rating officer'" (i.e., building supervisor). Ms. Coleman requested the witness statements. LRO Jenkins responded that she would not provide documentation in advance of the interview. Ms. Coleman again demanded all statements and complaints in advance of the interview and asserted that failure to provide the information violated Mr. Filip's due process rights. Ms. Coleman added the following: "Herein lies the problem. By attempting to force [Mr. Filip] to discuss this incident without full access to the accusations being made against him and as you admit in this email, you will be deciding whether he violated policy, you are violating his due process rights. In addition, sending your findings to his supervisor is obviously just for show once you've already done the investigation that should be completed by his supervisor." This email exchange was admitted as Union Exhibit 7 and was attached to the specification of charges filed on December 15, 2020, as Exhibit B. (N.T. 118-121; Union Exhibits 7 & B)

35. In her email notification of the first investigatory interview of Mr. Filip, LRO Jenkins notified Mr. Filip of general allegations of inappropriate speech some of which dated back 5 years. There are no specific allegations of what he may have said or students involved and there were no witness statements. When Ms. Coleman and Mr. Filip went into the first conference with LRO Jenkins they had no knowledge of the time, place or nature of the comments that Mr. Filip was accused of making or the conduct in which he allegedly engaged. Ms. Coleman and Mr. Filip felt that they could not prepare a proper response. Mr. Filip attended, but did not participate in, the investigatory conference with LRO Jenkins. (N.T 135-140, 150; Union Exhibits 7 & 8)

36. On May 28, 2021, Mr. Chokshi wrote an investigative report as a result of LRO Jenkins' interview of Mr. Filip, and he sent the report to the President of Central High School, Timothy McKenna. Mr. Chokshi, in his report, concluded that Mr. Filip violated school policy, and he recommended personnel action. On August 24, 2021, Mr. Filip attended a conference with

his assistant principal, Dr. Tracy Scott. Prior to attending that conference, Mr. Filip had Mr. Chokshi's investigative report that resulted from LRO Jenkins' investigation. Mr. Filip received no other documents or witness statements. Ms. Coleman requested those documents, but the District refused to provide them. (N.T. 124-129, 135-140, 150; Union Exhibits 7 & 8)

37. On May 17, 2021, Betsaida Ortiz, Principal of the McDaniel Delaplaine School, filed a sexual harassment report against Megan Gerber, formerly the Director of Student Affairs at McDaniel. On June 11, 2021, Megan Gerber filed a complaint with OELR alleging harassment and retaliation against Betsaida Ortiz. LRO O'Brien scheduled an investigatory interview for Ms. Gerber for September 28, 2021. (N.T. 221-223; Union Exhibit 11; Employer Exhibit 2)

38. On September 27, 2021, Cyndi Bolden, a Union Staff Representative, emailed Ms. O'Brien requesting "all statements and related documents pertaining to the allegations against Ms. Gerber." LRO O'Brien declined to provide the requested information. On September 28, 2022, Ms. Bolden emailed LRO O'Brien as follows: "As a recap of our conversation during today's interview, I requested again that the statements be forwarded to Ms. Gerber. You opted to end the meeting rather than share the statements with the allegation(s). We look forward to reconvening once Ms. Gerber and I have received the statements." LRO O'Brien issued a report concluding that any allegations against Ms. Gerber were unfounded, and she terminated the investigation. (N.T. 223; Union Exhibit 11; Employer Exhibit 2)

39. On September 13, 2021, Mr. Filip attended a hearing with Dr. Scott resulting in the issuance of a 204-form that was withdrawn because Ms. Coleman objected to the District's refusal to provide witness statements before the hearing. On October 21, 2021, Mr. Filip attended another hearing with Dr. Scott. After the second interview, Dr. Scott issued a 204-form recommending a 5-day suspension and a transfer. Thereafter, another hearing was supposed to be held by Mr. Chokshi, but after Ms. Coleman's objections, he sent it back to the school level for another hearing. At that point, Ms. Coleman received some, but not all, witness statements. Then, the District held a "second-level" hearing with Michelle Chapman from the OELR, which constituted a third level of hearing/interview. By this time, Mr. Chokshi transferred to the OGC. Ms. Chapman, who is the new Deputy of OELR, upheld the principal's recommendations. (N.T. 129-133; Union Exhibit 9)

40. On March 29, 2022, over 1 year and 4 months after LRO Jenkins initially contacted Mr. Filip, Ms. Chapman issued a "second-level" (effectively a third-level) hearing summary to Mr. Filip upholding the previously determined discipline for Mr. Filip, i.e., 5 days suspension without pay and a transfer from Central High School. (N.T. 133-134; Union Exhibit 10)[1]

41. On May 20, 2022, LRO O'Brien sent a notice of investigation to John Lewis, a teacher at the Honorable Luis Munoz-Marin Elementary School to conduct the first interview with him concerning allegations of sexual

[1] The record is unclear regarding the date that Mr. Filip's discipline was actually implemented. Article XIV(A)(7) of the CBA provides: "Any disciplinary action shall be implemented within a reasonable time after the event giving rise to the disciplinary action or knowledge thereof." However, any alleged delays in implementing Mr. Filip's discipline is not at issue.

harassment. The School Principal, Amanda Jones, was copied on the notice, but she did not conduct the initial investigation with the teacher regarding the sexual harassment claim.

42. On May 23, 2022, Tamika Gilliam, Principal of the Samuel W. Pennypacker School, sent a notice of investigatory conference to Donna Podolsky notifying her of an investigation of her "inappropriate conduct towards a student on May 6, 2022" and "alleged inappropriate use of technology . . . during instructional time." In this instance, the School Principal conducted the initial investigatory interview with Ms. Podolsky, and the first-level conference notice sent to Ms. Podolsky from Principal Gilliam contained attached documentation of first-hand witness statements. The allegations against Ms. Podolsky did not involve discrimination or harassment. This is historically the manner in which all types of investigations of employes were conducted. (N.T. 116-117, 151; Union Exhibit 6)

43. Currently, LROs are involved in the initial investigation of discrimination and harassment claims only, and they do not provide witness statements and other documents prior to the first investigatory interview with the employe. This is a change from past practice where the principals investigated all claims. Once the disciplinary process advances from the LRO level to the principal level, the documents are provided to the employe and Union. The LRO or someone else from OELR sends a report to the principal either finding a policy violation or no violation. The report summarizes the investigation. When the principals used to perform the first level investigation of discrimination and harassment claims, they provided witness statements and documents to the employe and Union before the first conference. The District did not negotiate with the Union before changing the investigative process for discrimination and harassment claims against PFT employes. (N.T. 193-199, 212-213, 223)

DISCUSSION

The relevant facts in this case are mostly undisputed, and the testimonies of both sides' witnesses were generally consistent. The Union contends that the District violated a past practice involving a mandatory subject of bargaining, as well as a negotiated procedure, by changing disciplinary procedures and the manner in which the District conducted due process hearings/interviews. (Union Brief at 6-9).

The Union claims that the District made two primary changes to the disciplinary process. First, it changed the person conducting the first investigatory interview with the employe for discrimination and harassment claims. (Union Brief at 7-8). Secondly, the LROs refused to provide requested information in discrimination and harassment cases. Formerly, the employe's building supervisor, i.e., the principal, assistant principal, or other supervisor, would perform the initial interview with the accused employe in all types of cases. The employe's building supervisor provided the employe with witness statements and other investigation documents prior to that initial interview. (Union Brief at 7-8) After the first interview, the building supervisor determined both whether a District policy was violated and, if so, whether discipline should result. (Union Brief at 7-8). The Union contends that, after the building supervisor determined that discipline was warranted, he/she issued a "204-form" and met again with the employe to review the disciplinary recommendation and made a final determination

regarding discipline. (Union Brief at 7-8). The supervisor's final recommendation could be subject to review by OELR. The Union contends that this was the practice in all cases and was negotiated into agreements for both the instructional and non-instructional bargaining units. (Union Brief at 7-8).

The Union specifically complains that the District unilaterally changed the past practice and the negotiated procedures when, in 2020, the District began using professional investigators employed by the District, but who are not building supervisors, in discrimination and harassment cases. (Union Brief at 8). The Union contends that these investigators do not provide witness statements and other requested documents prior to conducting their initial interview with the accused employe. (Union Brief at 8). The professional investigators, argues the Union, make an initial determination about policy violations without the employe being properly prepared for the interview, and the employe cannot refuse to attend the interview. (Union Brief at 8-9). The Union emphasizes that the investigator also recommends discipline, although the form and level of discipline remains within the discretion of the building supervisor. (Union Brief at 8). In this regard, the issuance of discipline is directly affected or determined by the LRO investigator, and the change in investigatory procedure, before the matter gets to the principal. (Union Brief at 8-9). The Union posits that the use of an outside investigator in discrimination and harassment cases, the failure to provide pre-interview witness statements and documentation, and the investigator's authority to determine whether some discipline should ensue, thereby influencing the principal, are changes to over 30 years of past practice and agreements, which cannot be unilaterally changed without negotiating with the Union. (Union Brief at 8-9).

The District does not dispute that it changed the manner in which initial interviews are conducted as of 2020 in discrimination and harassment cases. The District contends that the manner in which pre-disciplinary investigations are conducted constitute a managerial prerogative. The District further contends that the CBA and the two side agreements do not require the District to provide information prior to interviewing the employes and thus there is no negotiated obligation to do so. Moreover, the District asserts that the original charge was limited to the District's refusal to provide requested information prior to an initial investigatory interview. The District posits that the original charge did not mention the use of investigators from outside the employe's supervisory chain of command to conduct initial interviews nor did it mention a contractual violation. The District therefore argues that the claims regarding the use of outside investigators for initial interviews and their refusal to provide information as a contractual violation are untimely. (District Brief at 1-2, 11-12).

In its reply brief, the Union parries that the District unilaterally altered the procedural method for disciplining employes involving allegations of harassment and discrimination without notifying the Union. The Union contends that the original charge was timely with regard to the discovery of those changes. (Union Reply Brief at 2-3). Thus, the Union contends that it learned about the extent of the unilateral changes on a piecemeal basis, necessitating the filing of amended charges to include newly discovered facts and the ongoing contractual and/or procedural due process violations, and that the original and amended charges were timely with respect to those amended facts. (Union Reply Brief at 2-3).

Section 1505 of PERA prohibits the processing of an unfair practice charge for claims supported by events that the filing party knew or should have known occurred more than 4 months prior to the filing of the charge. 43 P.S. § 1101.1505. Section 95.32(a) of the Board's Rules and Regulations provide that a charge may be amended "if no new cause of action is added after the statute of limitations has run." 34 Pa. Code § 95.32(a).

The Union's initial charge, filed on December 15, 2020, alleged that the District violated its bargaining obligation under the Act by refusing to provide investigatory materials in the District's possession prior to the initial investigatory interview of certain employes. Paragraph 8 of the initial charge provides: "For decades prior to Ms. Jenkins' November 25, 2020 refusal, the District and the PFT had always recognized that the furnishing of documents and information (including witness statements and underlying complaints) in advance of investigatory interviews was necessary to protect the due process rights of PFT members."

Attached to the original charge as Exhibit B, is an email from PFT Staff Representative Leshawna Coleman, dated November 30, 2020, to LRO Jenkins responding to Ms. Jenkins' email to Mr. Filip dated November 28, 2020, requesting an interview. Ms. Coleman's email stated:

> As I expressed during our last meeting, the Federation objects to these conferences on the grounds that they violate our members' due process rights.
>
> [Ms. Jenkins'] email states many allegations against Mr. Filip that he is being asked to respond to while ignoring his CONTRACTUAL rights to have access to witness statements and an investigatory conference with his RATING OFFICER.

(Exhibit B attached to the original charge)(emphasis added). The specification of original charges read with the attached Exhibit B timely alleged and preserved the Union's claims that the refusal to provide requested information prior to initial investigatory interviews, and not having the building supervisor (i.e., rating officer) conduct those initial interviews, constituted an alleged violation of contractual due process rights. The Board considers attachments to a complainant's charge of unfair practices as part of the specification of charges in support of a cause of action. Williams et al. v. Allegheny County, 29 PPER 29045 (Final Order, 1998); AFSCME, Council 13 v. Commonwealth of Pennsylvania, Office of Inspector General, 20 PPER 20024 (Final Order, 1988); Erie Education Ass'n v. City of Erie Sch. Dist, 16 PPER 16112 (Final Order, 1985); Gildow v. SEIU, Local 585, 16 PPER 16128 (Final Order, 1985).

Also, in its exceptions, filed within the limitations period for the complained of events, the Union supplemented its factual allegations. The Board acknowledged the supplemental and timely factual averments by stating the following:

> the Complainant provided [in its exceptions] additional factual allegations and clarification of the charge, supported by a sworn affidavit, which raised factual issues regarding the adequacy of the Employer's notice of the investigatory interview. Given the allegations set forth in the charge, and the clarification and amendment thereto as alleged in the exceptions, we conclude that

> resolution of this matter will best be served by a thorough examination of the factual and legal issues raised.

(Order Directing Remand to Secretary for Further Proceedings).

The Board-accepted, additional allegations in the Union's exceptions provided as follows:

> For at least the past several decades, the parties have mutually understood the CBA as requiring the District to provide information (including the underlying complaint or allegations) to PFT staff representatives prior to the District conducting investigatory interviews of PFT members.

(Union Exceptions at P. 4)(emphasis added). The Affidavit attached to the Union's exceptions specifically references the parties' CBA and the due process procedures contained therein as having been violated. (Affidavit of Denise Rogers, Ps. 4-6, 10). Accordingly, the District, on December 15, 2020, did timely file and preserve claims that the refusal to provide requested information, in late November 2020, was an alleged contractual violation.

The District argues that the Union complained about the use of LROs for initial interviews for the first time in its third amended charge, filed on May 19, 2022, which was more than 4 months beyond the events complained of in that amended charge. However, in addition to the above-quoted language complaining that the District was "ignoring [Mr. Filip's] CONTRACTUAL rights to have access to witness statements and an investigatory conference with his rating officer," in the same attachment and email exchange, the Union also attached the following:

> Herein lies the problem. By attempting to force [Mr. Filip] to discuss this incident without full access to the accusations being made against him and as you admit in this email, you will be deciding whether he violated policy, you are violating his due process rights. In addition, sending your findings to his supervisor is obviously just for show once you've already done the investigation that should be completed by his supervisor.

(Union Exhibit 7; Charge Attachment Exhibit B; F.F. 35)(emphasis added). Accordingly, in the December 15, 2020 specification of charges with supporting Exhibits, the PFT specifically complained of LRO Jenkins conducting the initial investigatory interview and determining policy violations instead of Mr. Filip's building supervisor, which was within four months that the Union learned of the use of LROs. Therefore, the PFT timely included in its initial charge a complaint of using an LRO instead of a building supervisor for the initial investigation into allegations of policy violations.

Accordingly, the Union's allegations, that the refusal to provide requested information prior to the first investigatory interview, constituted violations of contract and/or past practices were timely filed and preserved. Also, the Union's allegations, that the use of LROs or outside investigators

to conduct first level interviews violated a negotiated procedure and/or past practice, were timely filed and preserved.[2]

In the early 1990s, the District employed a 3-step due process procedure for investigating claims against instructional and non-instructional District employes. The first step in that process was a meeting with the building principal or supervisor. In 1992, the District signed an MOU with the PFT regarding the due process procedure for instructional employes reducing the number of investigatory interviews/hearings from 3 to 2. This negotiated agreement was to be experimental for one year unless both parties agreed to continue participating in that process. The process continued uninterrupted until 2020. In that year, the District injected another level of investigatory hearings by utilizing professional investigators to perform the first interviews in harassment and discrimination claims.

The District contends that the MOU does not require the building supervisor to conduct the first interview nor does it require the production of witness statements or documents. (District Brief at 17-18). However, since 2020, the District increased the number of steps in the process by utilizing an LRO investigator for harassment and discrimination claims, in violation of the MOU. The injection of the LRO places the building supervisor at the second step rather than the first and then to a third step with the Regional Superintendent or the OELR, resulting in 3 steps, instead of 2 steps, for the instructional employes. Moreover, the District cannot eliminate the level involving the building supervisor because that person is responsible for the initial designation of a particular disciplinary recommendation, not the LRO. In effect, the District must eliminate the LRO from the process for the instructional employes, even though the MOU only addresses the 2-step process, because the building principal/supervisor cannot be eliminated entirely and utilizing the LROs at the first investigatory step creates a 3-step process.

In 1998, the District entered into a negotiated agreement with the PFT concerning due process hearings for non-instructional employes. Based on the success of the 2-step process for instructional employes, the District and the Union agreed to a 2-step process for the non-instructional employes. This agreement was not conditional for one year. The 1998 agreement explicitly requires that a principal or building supervisor conduct the first-level due process interview/hearing for the non-instructional employes, and it does not differentiate between different types of claims. Accordingly, the District violated the negotiated 1998 Memorandum by injecting the professional investigator from outside the school building into the process for harassment and discrimination claims for non-instructional employes. This added a level of interviews/hearings and violated the 1998 Memo by using the investigator instead of the building supervisor.

The two negotiated side agreements were honored and applied for well over 20 years, thereby raising the expectations of employes and the Union that the 2-step process beginning with the building supervisor was part of members' terms and conditions of employment. This expectation was further

[2] The Union could file future charges, whenever the District uses LROs for initial hearings/interviews in harassment and discrimination cases, alleging a unilateral change in contractual procedures, as discrete contractual violations.

buttressed by the fact that the District negotiated a temporary deviation from the negotiated procedure for investigations pertaining to the cheating scandal. The historical fact that the District consistently applied the two side agreements through years of multiple and subsequent CBAs supports the conclusion that the parties understood those side agreements to be incorporated into those subsequent CBAs, even though the current CBA does not expressly incorporate the agreements and they involve a permissive subject. *See*, Teamsters, Local Union 249 v. City of Pittsburgh, 52 PPER 64 (Final Order, 2019).

Fundamentally, when an employer negotiates away a permissive subject of bargaining, the employer may not unilaterally change it during the duration of the agreement. Scranton School Board v. Scranton Federation of Teachers, Local 1147, 365 A.2d 1339 (Pa. Cmwlth. 1976); District 1199C, National Union of Hospital & Health Care Employees v. Temple University, 23 PPER 23034 (Final Order, 1992). Also, the employer may not unilaterally change a permissive subject during contract hiatus before informing the Union during bargaining that it would not again agree to those provisions and before the parties have reached a new contract without the provision. Coatesville Area Sch. Dist. v. Coatesville Area Teachers' Ass'n, 978 A.2d 413 (Pa. Cmwlth. 2009)(adopted by the Board in Fraternal Order of Police Lodge 27 Delaware, v. Springfield Township, 42 PPER 20 (Final Order, 2011). In this case, the decades-old side agreements were consistently applied during the current CBA and multiple prior CBAs. In this regard, the Union properly referenced CBA violations in its exceptions and contractual violations in the attachments to the original charge.

In the summer of 2020, District officials believed that police misconduct led to civil unrest in the City of Philadelphia and the Country as a whole. Wanting to improve its own commitment to diversity, equity and inclusion, the District sought to improve its investigations of complaints of harassment and discrimination. The District hired 2 professional investigators who work for OELR because discrimination and harassment claims against employes are complex and building principals, as administrators of education, do not have training in complex investigations. However, while the District's reasons for changing the fact-finding and disciplinary process, which had been in place for decades, are laudable, those reasons do not justify repudiating the 2 negotiated agreements with the Union.

Moreover, utilizing the building supervisor in all types of cases to conduct initial investigations into alleged policy violations was a past practice. However, a change in a past practice that involves a managerial prerogative is not negotiable. South Park Township Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). In Fraternal Order of Police, Delaware County Lodge No. 27 v. Newtown Township, 24 PPER 24106 (PDO, 1993), the examiner concluded that the employer had a managerial prerogative to substitute its township manager for its board of supervisors to initially investigate and determine discipline for certain offenses, leaving the board of supervisors as a reviewing body on appeal, where the township did not change the reasons for, or severity of, discipline. *See also*, Rush Township Police Ass'n v. Rush Township, 35 PPER 131 (PDO, 2004)(concluding that a change in the level of management representative that administers and reviews discipline is not a mandatory subject of bargaining).

Pursuant to Board caselaw, the District did not have to bargain the change of management's representative (i.e., the use of LROs) to conduct initial interviews of employes accused of misconduct, as a matter of past

practice. However, as previously concluded herein, adding a layer of interviews and hearings to the disciplinary process, while not a past practice violation, did violate both negotiated side agreements with the Union. Also, changing the managerial representative for the first interview violated the 1998 Memorandum for the non-instructional personnel.

The record shows that LRO investigators in harassment and discrimination cases do not provide information to the investigated employes prior to their initial interview, which building supervisors had always done. The provision of witness statements and other requested information regarding the District's investigation by the building supervisor had been a practice in place for approximately 30 years. In Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Greene SCI (Greene), 34 PPER 52 (Final Order, 2003), corrections officers were investigated by management for misconduct toward an inmate at a state correctional facility. The Board in that case held that, prior to the imposition of discipline or the filing of a grievance, the Union was not entitled to the employer's investigative materials prior to or during the interview with the employes being investigated for the alleged misconduct.

The Board, in Greene, rejected the union's argument that it was entitled to all documents and investigative reports which were to be used in a Pre-Disciplinary Conference with an employe under investigation. The Board reiterated its precedent and concluded that the statutory obligation to furnish information was not properly "extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employe misconduct." Id.(*citing* Anheuser-Busch, Inc.,99 LRRM 1174, 1176, 237 N.L.R.B. 146 (1978)). The Board, in Greene, held that the union was not entitled to other officers' written statements, the inmate's statement, the statements of other witnesses in management's possession, which included the statements of a captain, a psychologist, the employe staffing the post where the alleged abuse of the inmate took place, and the statements of the other officers who transported the inmate. Accordingly, although the District here engaged in a past practice of providing investigative materials in its possession prior to the first interview of the employe, it did not engage in unfair practices when it changed that practice in discrimination and/or harassment cases. Moreover, neither of the two side agreements nor the CBA requires the District to provide investigatory information to the Union or the investigated employe prior to the first investigatory interview.

Additionally, the record shows that investigators from OIG at the District conduct initial investigatory interviews of employes regarding allegations of fraud, corruption, abuse of funds, and other policy violations. The Union did not complain in its specification of charges as amended about, or seek redress for, the use of these investigators or the fact that those investigators do not provide information to the employes prior to their interviews. This evidence was offered by the District to show that using a building supervisor who provided pre-interview information was not an exclusive past practice. However, I have already concluded herein that the change in the practice of utilizing certain employer representatives to investigate wrongdoing and the provision of pre-interview materials is a managerial prerogative and any such practices may be changed unilaterally, absent an agreement to the contrary.

However, to the extent that the OIG investigators may initially investigate non-instructional PFT bargaining unit members, such a practice is

violative of the 1998 Memorandum requiring a principal or supervisor to conduct the first-level investigatory interview/hearing. It is not clear from the record whether OIG investigations involve a 2-step or 3-step investigatory/disciplinary process that would violate the MOU for the instructional employes. Notwithstanding whether the use of OIG investigators violates either or both negotiated agreements, that procedure is not under consideration herein because it was not a subject of the charge, as amended.

Accordingly, the District did not violate any negotiated agreement requiring it to provide investigatory information before or during the first interview with employes. The District also had a managerial prerogative to change the practice of providing those materials. The District had a managerial prerogative to change the past practice of using building supervisors for first interviews to using LROs in discrimination and harassment cases. The District did violate two negotiated side agreements requiring a 2-step process and requiring building supervisors to conduct first-level interviews for non-instructional employes. Therefore, the District engaged in unfair practices by using LROs for first-level investigatory interviews but not by refusing to provide requested investigatory information in the District's possession at that point in time.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The District is a public employer within the meaning of Section 301(1) of PERA.

2. The Philadelphia Federation of Teachers is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District did not violate any negotiated agreement to provide investigatory information in its possession before or during the first interview in discrimination and harassment claims against employes.

5. The District did not violate a past practice that constituted a mandatory subject of bargaining by refusing to provide investigatory information in its possession before or during the first interview in discrimination and harassment claims against employes.

6. The District did not violate a past practice that constituted a mandatory subject of bargaining by designating and using LROs or other outside investigators instead of building supervisors to conduct first-level investigatory interviews.

7. The District violated the 1998 Memorandum by using outside investigators or LROs for first-level investigatory interviews instead of building supervisors, and it violated the MOU by using outside investigators or LROs for first-level investigatory interviews, which increased the levels of due process investigations against employes.

8. The District has committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative;

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately restore the status quo ante and cease using LROs or non-building-supervisor investigators to conduct first-level investigatory interviews of PFT members to make initial policy violation determinations, until bargained with the PFT (this directive does not apply to OIG investigators initially investigating bargaining unit members at this time);

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this nineteenth day of October 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PHILADELPHIA FEDERATION OF TEACHERS, AFT LOCAL 3, AFL-CIO	:	
v.	:	CASE NO. PERA-C-20-296-E
SCHOOL DISTRICT OF PHILADELPHIA	:	

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act; that it has ceased and desisted from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, under Section 1201(a)(1) and (5) of the Act; that it has restored the status quo ante and ceased using LROs or non-building supervisors (not including OIG investigators) to conduct first-level investigatory interviews of PFT members to make initial policy violation determinations; that it has posted a copy of this decision and order in the manner directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public