

I.R. NO. 2000-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-2000-302

BERGEN COMMUNITY COLLEGE SUPPORTIVE STAFF
ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

Edward Novak, a member of the blue collar and clerical collective negotiations unit at the Bergen Community College and Bergen Community College Supportive Staff Association/NJEA supporter and activist, was told by the College that he was overpaid. The College advised Novak that his salary would be reduced and he would have to reimburse the College for alleged overpayments made to him over several years. The Association has recently been elected as the majority representative and, in light of the College's earlier refusal to consent to a representation election involving the Association for unit employees and the timing in which it sought to implement the changes in Novak's salary, the Association claims the College's actions tend to interfere with employee rights in violation of 5.4a(1) of the Act and should be enjoined. The Commission Designee found that at this early stage of the case, sufficient factual dispute exists so that the Association is unable to establish a likelihood of success on the merits. The Association's application for interim relief is denied.

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Appearances:

For the Respondent,
Schepisi & McLaughlin, attorneys
(John A. Schepisi, of counsel)

For the Charging Party,
Oxford Cohen, LLC, attorneys
(Gail Oxford Kanef, of counsel)

INTERLOCUTORY DECISION

On March 30, 2000, the Bergen Community College Supportive Staff Association/NJEA (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Bergen Community College (College) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by

violating N.J.S.A. 34:13A-5.4a(1) and (3).^{1/} The unfair practice charge was accompanied by an application for interim relief. On March 31, 2000, an order to show cause was executed and a return date was initially scheduled for April 28, and, subsequently, rescheduled to May 17, 2000. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules and argued orally on the return date. The following facts appear.

The IBEW represented blue collar and clerical employees in a collective negotiations unit at the College. The College and the IBEW tentatively agreed to terms for a successor collective agreement, subject to ratification. The unit's membership rejected the proposed agreement. A second proposed agreement was presented to unit members who again voted not to ratify the contract. At some point after the June 30, 1999 expiration of the collective agreement covering unit employees, the Association began an organizing campaign among unit employees. Unit employee Edward Novak supported the Association in its organizing campaign. The degree to which the College knew of Novak's work on behalf of the Association is unclear. On January 12, 2000, the Association filed a representation petition (Docket No. RO-2000-75) with the Commission seeking to represent unit employees.

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

On January 5, 2000, Novak spoke to the College's Board of Trustees. Novak told the Board that "I represent the support staff, for this evening anyway." (Transcribed minutes of the January 5, 2000 Board of Trustees meeting, public session.) Novak asked the Board to assist unit employees with the contract ratification vote process to ensure that a fair vote be conducted for the proposed successor agreement between the College and the IBEW. While the College was empathetic to the employees' concerns, it indicated that the ratification vote is conducted by the majority representative and that it would be inappropriate for it to interfere in that process. Novak then read a statement to the Board which he indicated represented the feelings of some unit employees. The statement indicated that many unit employees felt that the Board was in complicity with the IBEW to prevent a fair ratification vote. Novak concluded by stating that the statement did not come from him but rather from the body of unit employees. Representatives from the Board responded by indicating that the Board was not in complicity with the majority representative, nor was it even aware that the ratification vote was taking place. (Transcription of the January 5, 2000 Board of Trustees meeting.)

On February 3, 2000, a Commission staff agent conducted an investigatory conference regarding the Association's representation petition (Docket No. RO-2000-75). The College and the IBEW opposed the petition and refused to consent to an election. On February 25, 2000, the Director of Representation directed an election. See

Bergen Community College, D.R. No. 2000-8, 26 NJPER 154 (¶31059 2000). The Association won the election and succeeded the IBEW as majority representative for unit employees.

Prior to January 5, 2000, the College received an inquiry from a unit employee that Novak was receiving greater compensation than other, more senior maintenance personnel in the buildings and grounds department. The College contends that in response to that inquiry, it began a review of the salaries of its personnel and discovered that Novak, who was hired on September 4, 1990, was receiving compensation greater than that of other maintenance personnel with dates of hire as early as August 1976. The College contends that the investigation revealed that due to repeated data entry errors during the 1996-1997 and 1997-1998 school years, Novak was being overpaid and received overtime compensation based on his inflated salary. The error resulted in an overpayment to Novak in the amount of \$10,365.

On February 24, 2000, the College's Executive Vice President, Virginia Laughlin convened a meeting with Novak, his IBEW representative and the College's Director of Human Services, Gail Hanna. Laughlin advised Novak that he was being overpaid and that the College intended to immediately reduce his salary from the current \$37,359 to \$34,050 and recoup the overpayment through a cash remittance from him and additional prospective payroll deductions. By letter dated March 6, 2000 to Novak's union representative, Laughlin proposed a repayment schedule. Laughlin did not send a

copy of the proposed repayment schedule to Novak. The proposed repayment schedule provides for Novak to make an initial lump sum payment of \$2500 and for the College to deduct \$200 per pay thereafter until the full amount of the overpayment is recovered by the College.

There have been previous instances where the College has discovered that an employee has been overpaid. Other than Novak, no employee has owed more than approximately \$1400. In that instance, the employee's repayment schedule providing for the College to recoup \$700 in a lump sum initial payment and the balance repaid on the basis of \$50 per paycheck reduction until the full amount is recovered. The College has submitted no other examples of an employee who had been overpaid on a multi-year basis. As of the date of oral argument, the College has reduced Novak's annual salary to \$34,050 but has not initiated deductions to recoup the overpayment.

The Association contends that the timing of the College's actions to reduce Novak's salary in light of the Association's representation activity tends to interfere with statutory rights guaranteed by the Act in violation of 5.4a(1) of the Act. It argues that the College knew that Novak was a leader in its organizational campaign and engaged in protected, concerted activity when he appeared before the Board of Trustees on January 5, 2000. It asserts that on February 3, 2000, at a PERC conference, the College refused to enter into a consent agreement for the conduct of an

election sought by the Association.^{2/} The Association also argues that just a few weeks after the February 3 PERC conference, Novak met with the College's executive vice president, and others, and was advised that his salary would be reduced and approximately \$10,000 would be recouped as the result of a multi-year overpayment wrongly made to him by the College. The Association concludes that the timing of these events is suspect and has a chilling effect on the upcoming negotiations between the College and the Association. The Association urges a finding that the sequence and timing of the College's actions concerning Novak tend to interfere with unit employees' protected rights in violation of 5.4a(1) of the Act so as to warrant an order of interim relief.

The College contends that it initiated an investigation into Novak's salary as a result of a complaint filed by one of his co-workers earning less than Novak, yet having greater seniority. The College asserts that the investigation began prior to Novak's January 5 appearance before the Board of Trustees. The College also contends that Novak never held himself out as a representative or official of the Association, merely as a spokesperson for a group of fellow employees. The College claims that it has treated Novak in the same manner that it has treated other employees who were overpaid by correcting his salary prospectively and recouping unauthorized overpayments. The College asserts it is legally

^{2/} The Association does not claim that Novak attended the February 3 meeting.

obligated to recapture the overexpenditure of public funds which, pursuant to the collective agreement, were wrongfully paid.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

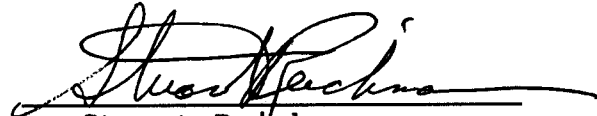
In Fairview Free Public Library, P.E.R.C. No. 99-47 , 25 NJPER 20, 21 (¶30007 1998), the Commission said:

Section 5.4a(1) prohibits public employers from interfering with, restraining or coercing employees in the exercise of their rights to seek representation and vote in a fair election. In determining whether an employer has violated 5.4a(1), we must first determine whether the disputed action tends to interfere with the statutory rights of employees. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). If the answer to that question is yes, we must then determine whether the employer has a legitimate operational justification. If the employer does have such a justification, we will then weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 97-145, 23 NJPER 388 (¶28176 1997). [footnote omitted.]

The Association contends that the crucial issue in determining a 5.4a(1) violation is timing. The Association asserts that actions which would otherwise be completely within the rights of a public employer can become illegal if timed in such a manner as to interfere with the exercise of rights under the Act. However, the test requires more than merely finding suspect timing; the employer's legitimate operational justification for its action must also be considered. Here, the employer contends that upon discovering that an overpayment of public funds was made to an employee, it is legally obligated to adjust the employee's salary and recoup the unauthorized expenditures. The employer asserts that it has treated Novak no differently than it has treated other employees in similar, albeit less severe, situations. I make no finding concerning whether the employer's action with respect to any alleged overpayment of Novak's salary constitutes a legitimate operational justification. However, at this early stage of the case, there exists a sufficient factual dispute as to whether the College has a legitimate operational justification for its actions and, if so, how the College's need to act should be weighed against the tendency of such action to interfere with employee rights. Such determinations are properly made after all of the facts are found in a hearing. Thus, I find that the Association has not carried its burden of establishing a substantial likelihood of success on the merits, a requisite element to obtain interim relief. Accordingly, this case will proceed through the normal unfair practice processing mechanism.

ORDER

The Association's application for interim relief is denied.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman
Commission Designee

DATED: May 24, 2000
Trenton, New Jersey