I.R. NO. 2018-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CARTERET BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2018-079

CARTERET EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies the Association's request for an interim restraint of arbitration of tenure charges pending the outcome of an unfair practice charge before the Public Employment Relations Commission. The unfair practice charge alleges that the Board repudiated the grievance procedure set forth in the parties' collective negotiations agreement by referring tenure charges against a tenured custodian to the Commissioner of Education. The Designee found that the Association had failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its arguments that (1) the alternate statutory appeal procedure specified under N.J.S.A. 18A:6-10, et seq., is inapplicable to a tenured custodian who is subject to tenure charges filed by a local board of education and (2) that the Commission has jurisdiction to restrain, or set aside an award emanating from, arbitration of tenure charges. The Designee also found that the Association had failed to demonstrate irreparable harm, relative hardship, or that the public interest would be injured by granting interim relief.

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Appearances:

For the Respondent, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

For the Charging Party, DeCotiis, FitzPatrick, Cole & Giblin, LLP, attorneys (Arlene Quinones Perez, of counsel and on the brief)

INTERLOCUTORY DECISION

On September 15, 2017, the Carteret Education Association (Association) filed an unfair practice charge against the Carteret Board of Education (Board) alleging that the Board violated subsections 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act),[1/] by repudiating the grievance provision within

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard (continued...)

the parties' collective negotiations agreement (CNA) and filing tenure charges against a tenured custodian with the New Jersey Department of Education. On September 15, the Association also filed the instant application for interim relief seeking a temporary restraint of arbitration of the tenure charges scheduled for September 25 pending disposition of the underlying unfair practice charge.

PROCEDURAL HISTORY

On September 15, 2017, I signed an Order to Show Cause directing the Board to file any opposition by September 19, the Association to file any reply by September 20, and setting September 21 as the return date for oral argument. On September 20, I wrote a letter to the Board's counsel noting that no opposition had been filed and inquiring as to whether she would participate in oral argument. By email of even date, the Board's counsel indicated that she would file opposition and participate

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1/ (...continued)
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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement and, (7) Violating any of the rules and regulations established by the commission."

in oral argument.

On September 20, 2017, the Board filed opposition to the application for interim relief. On September 21, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, given that I had accepted the Board's late opposition papers, I offered the Association an opportunity to provide supplemental written argument by the close of business. The Association's counsel declined.

In support of the application for interim relief, the Association submitted a brief, exhibits, and the certification of Brian R. Furry (Furry), New Jersey Education Association UniServ Field Representative. In opposition, the Board submitted a brief, exhibits, and the certifications of its Business Administrator and President.

FINDINGS OF FACT

The Association represents teachers, nurses, guidance counselors, library assistants, supplemental instructors, social workers, learning disability teacher consultants, special education teachers, librarians/media specialists, teachers/coordinators, psychologists, custodians and maintenance personnel, 11-month secretaries, 12-month secretaries, system operators, stockroom clerks/attendance, computer technicians, certain paraprofessionals, and athletic trainers. The Association and the Board are parties to a CNA in effect from

July 1, 2016 through June 30, 2020. The grievance procedure ends in binding arbitration.

Article III of the parties' CNA, entitled "Grievance Procedure," Section A, entitled "Definitions," provides in pertinent part:

> A "grievance" shall mean a complaint by an employee(s) or by the Association based upon the interpretation or application of policies or administrative decisions and practices affecting an employee or a group of employees or an alleged violation of or violation from the provisions of this Agreement, or the interpretation or application thereof.
>
> The term "grievance" shall not be deemed applicable in the following instances:
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> 1. The failure or refusal of the Board to renew a contract of a non-tenure employee;
>
> 2. In matters where a method of review is prescribed by law, or by any rule, regulation, or by law of the State Commissioner of Education or the State Board of Education;
>
> 3. In matters where the Board is without authority to act;
>
> 4. In matters involving the sole and unlimited discretion of the Board;
>
> 5. In matters where the discretion of the Board may not be unlimited but where after the exercise of such discretion, a further review of the Board's action is prescribed under provisions of State Law.

Article IV of the parties' CNA, entitled "Employee Rights," Section E, entitled "Just Cause," provides:

> No employee shall be disciplined without just

> cause. Any such action asserted by the Board or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

Article VIII of the parties' CNA, entitled "Employment Procedures," Section E, entitled "Tenure," provides:

> Tenure rights shall be acquired - for all employees after three (3) consecutive years of service and the commencement of the fourth year, or, the equivalent of more than three (3) years of service within a period of four (4) consecutive years.[2/]

On May 28, 2003, the Board appointed Christopher Luskey (Luskey) a daily substitute custodian for the 2002-2003 school year. Thereafter, the Board re-appointed Luskey as a custodian for the 2004-2005, 2005-2006, and 2006-2007 school years in a series of one-year employment contracts. On May 15, 2007, the Board appointed Luskey as a custodian "from July 1, 2007 through with tenure." According to the certifications of the Board's President and Business Administrator, the parties' CNA "outlines the tenure all employees are entitled to under statutory tenure." According to Furry, the Association's UniServ Rep, "Luskey attained 'contractual tenure' in 2007."

On or about July 19, 2017, the Board certified tenure charges against Luskey for unbecoming conduct and insubordination. On or about July 28, the Board filed the tenure

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2/ The parties' CNAs for 2002-2005, 2005-2008, and 2008-2009 contain the identical tenure provision.

charges against Luskey with the Commissioner of Education. On or about August 3, Luskey filed an answer to the tenure charges with affirmative defenses including an assertion that the Department of Education lacked jurisdiction. Upon review, the Commissioner of Education deemed the tenure charges sufficient to warrant dismissal or reduction in pay and referred Luskey's case (Dkt No. 169-7/17) to arbitration.

On August 16, 2017, the arbitrator held a prehearing conference call. At that time, Luskey reasserted his claim that the Department of Education lacked jurisdiction. The arbitrator treated Luskey's claim as a motion to dismiss for lack of jurisdiction and directed the parties to submit related briefs by September 1 with the understanding that a written decision would be issued in advance of the arbitration hearing scheduled for September 25-27.

On August 18, 2017, the Association filed a grievance on behalf of Luskey alleging that he was terminated without just cause. According to Furry, that grievance is being processed through the steps of the parties' contractual grievance procedure. On September 6, the arbitrator issued a written decision denying Luskey's motion, finding that the parties' "C[N]A [did] not preempt [his] subject matter jurisdiction of [the] dispute." The underlying unfair practice charge and instant application for interim relief ensued.

LEGAL ARGUMENTS

The Association argues that it has satisfied the standard for interim relief. Specifically, the Association argues that it has a substantial likelihood of prevailing in a final Commission decision because Luskey "does [not] enjoy . . . statutory protection under tenure or civil service laws" and therefore "the tenure proceedings outlined under Title 18A are inapplicable [to him]." Rather, given that "his tenure status derives from the parties' CNA (i.e. 'contractual tenure')," the Association contends that the "[Board's] attempt to terminate Luskey must be challenged through the parties' grievance [procedure]" because there is no "alternate statutory appeal procedure" as specified in N.J.S.A. 34:13A-5.3.[3/] The Association also maintains that Luskey will suffer irreparable harm if arbitration of the tenure charges proceeds because "the statutory appeal process outlined under Title 18A is inapplicable as Luskey's tenure status originates not via . . . N.J.S.A. 18A:17-3, but by virtue of the parties' [CNA]." Moreover, the Association asserts that the public interest "will actually be enhanced or otherwise promoted by compelling [the Board] to comply with the parties' CNA by litigating its attempt to terminate Luskey through the . . . grievance procedure." The Association also claims that "the

3/ In support of its position, the Association cites Wright v. Bd. of Educ., 99 N.J. 112 (1985) and Elizabeth Bd. of Ed., P.E.R.C. No. 97-50, 22 NJPER 405 (¶27221 1996).

balance of the relative hardship to the parties tip[s] decidedly in [its] favor" and that "no harm will come to [the Board] by being compelled to litigate its efforts to terminate Luskey through the . . . grievance procedure."

The Board argues that Luskey is properly facing tenure charges before the Department of Education. The Board asserts that the parties' CNA "does not contain a provision granting janitors' tenure; rather, the tenure provision is applicable to all employees, including teachers, whose tenure is certainly not contractual but . . . statutor[y] . . . ." While conceding that "under N.J.S.A. 34:13A-5.3, a public employer may agree to submit a disciplinary dispute to binding arbitration if the . . . employee has no alternate statutory appeal procedure," the Board maintains that "Luskey obtained tenure through [N.J.S.A. 18A:17-3]" and argues that "an alternate statutory appeal procedure exists for contesting discharges of custodians with tenure."[4/]

4/ N.J.S.A. 18A:17-3, entitled "Tenure of janitorial employees," provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by

(continued...)

Moreover, the Board contends that the Association has failed to demonstrate irreparable harm or that the public interest will not be injured by an interim relief order.

STANDARD OF REVIEW

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[5/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. 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. See Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C.

4/ (...continued)
subarticle B of article 2 of chapter 6 of this title.

5/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

N.J.S.A. 34:13A-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding

> arbitration or disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c.303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S.53:1-10.
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> [emphasis added.]

Accordingly, the Commission has held that "grievance procedures must be used for any dispute covered by the terms of [a] collective negotiations agreement" and "N.J.S.A. 34:13A-5.4a(5) makes it an unfair practice for a public employer to refuse to process grievances presented by the majority representative." New Jersey State Judiciary, P.E.R.C. No. 2014-84, 41 NJPER 43 (¶11 2014). Further, while "[a] good faith dispute over the interpretation of a contractual waiver is not an unfair practice, . . . repudiation of a grievance procedure is." Id. (citing State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)).

However, the Commission has made clear that "[u]nder N.J.S.A. 34:13A-5.3, a public employer may [only] agree to submit a disciplinary dispute to binding arbitration if the disciplined employee has no alternate statutory appeal procedure." Edison Tp. Bd. of Ed., P.E.R.C. No. 92-41, 17 NJPER 483 (¶22234 1991) (citing CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 190 (1984); East Brunswick Bd. of Ed. and East Brunswick Ed. Ass'n, P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985),

certif. den. 101 N.J. 280 (1985)); accord City of Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1987) (holding that binding arbitration of a police officer's termination pursuant to the parties' CNA was preempted by N.J.S.A. 34:13A-5.3 given that there was a "statutory review procedure" before the New Jersey Department of Personnel).

Moreover, N.J.S.A. 34:13A-22 specifically excludes tenure charges from the definition of discipline:

> "Discipline" includes all forms of discipline, except tenure charges filed pursuant to the provisions of subarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14.

Accord Edison Tp. Bd. of Ed., P.E.R.C. No. 92-41, 17 NJPER 483 (¶22234 1991) (holding that "[N.J.S.A. 18A:6-10] provides an alternate appeal procedure for . . . tenure charges" against a "tenured teacher – audio/visual coordinator"); Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992) (holding that "[t]eaching staff members subject to tenure charges are protected by an alternate statutory appeal procedure" under N.J.S.A. 18A:6-10 et seq.).

ANALYSIS

At issue in this matter is whether the Board repudiated the grievance procedure set forth in the parties' CNA by referring tenure charges against Luskey to the Commissioner of Education

and, if so, whether the Public Employment Relations Commission has jurisdiction to restrain, or set aside an award emanating from, arbitration of tenure charges.

The Supreme Court of New Jersey has held that "N.J.S.A. 18A:17-3 grants an employing board discretion in determining whether to grant tenure to custodians" such that "negotiation of custodians' tenure rights must be permitted within the limits delineated in State Supervisory Employees, 78 N.J. at 81-82." Wright v. Bd. of Educ., 99 N.J. 112, 122 (1985). In Wright, the Court stated:

> It is clear from the statute that a janitor employed without a fixed term contract will gain tenure immediately upon beginning employment. On the other hand, the statute allows an employing board to deny tenure to all custodians, as an appointment for a fixed term is an appointment without statutory-mandated tenure.
>
> Yet even though the statute provides mechanisms for immediate tenure and complete denial of tenure, these are not the only alternatives contemplated by the statute. By using the word unless to modify the word shall, the legislature has signaled its intention to leave employing boards with some flexibility. Accordingly, boards may, without contravening the terms of the statute, permissibly pick and choose between the statutory minimum of no tenure for any custodial employee and the statutory maximum of instant tenure for all custodians.
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> [Id. at 119 (emphasis in original).]

Accord Emerson Bd. of Ed., P.E.R.C. No. 92-85, 18 NJPER 102, n.2 (¶23047 1992) (noting that a board's "statutory discretion"

regarding whether to "bestow tenure . . . upon a custodian . . . could be exercised through collective negotiations").

In a footnote, the Court went on to make clear that custodians who obtain tenure through a negotiated agreement are subject to tenure charges and dismissal for the reasons specified in N.J.S.A. 18A:6-10:

> Even the acquisition of tenure under a negotiated labor agreement is not a promise of continued employment. N.J.S.A. 18A:17-3 still safeguards the boards' right to dismiss custodians because of a reduction in force or due to misconduct, inefficiency, and other good cause.[6/]

6/ N.J.S.A. 18A:6-10, entitled "Dismissal and reduction in compensation of persons under tenure in public school system," provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state
> * * *
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons

(continued...)

[Id. at 122, n.3 (emphasis added).]

See also, N.J.S.A. 18A:6-9 ("[t]he commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws").

Given these legal precepts, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal allegations.[7/] This appears to be a matter of first impression. See City of Paterson, P.E.R.C. No. 2015-52, 41 NJPER 391 (¶122 2015) (holding that the moving party did not establish a substantial likelihood of success because there was a "legal issue of first impression for the Commission"). The Association has not cited any legal authority demonstrating that the alternate statutory appeal procedure specified under N.J.S.A. 18A:6-10 et seq. is inapplicable to a tenured custodian who is subject to tenure charges filed by a local board of education. Further, the Association has not cited any legal authority demonstrating that

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6/ (...continued)
holding such offices, positions or employment under the conditions and with the effect provided by law.

[emphasis added.]

7/ Whether Luskey was granted "statutory" or "contractual" tenure may be a distinction without a difference in this matter given that the Board has in fact acknowledged that Luskey is a tenured custodian and filed tenure charges against him.

the Commission has jurisdiction to restrain, or set aside an award emanating from, arbitration of tenure charges.

Further, the cases cited by the Association are distinguishable from the instant matter. In Wright, supra, 99 N.J. at 115, the Supreme Court of New Jersey held that a contractual provision "grant[ing] tenure to custodians after three years of employment [was] not barred by [N.J.S.A. 18A:17-3] and [was] within the scope of collective negotiations."[8/] In Elizabeth Bd. of Ed., P.E.R.C. No. 97-50, 22 NJPER 405 (¶27221 1996), the Commission declined to restrain binding arbitration of a grievance alleging that a custodian was terminated without just cause while noting that "no alternate statutory appeal procedure exists for contesting discharges of custodians without statutory tenure rights." In Rockaway Bor. Bd. of Ed., P.E.R.C. No. 2016-59, 42 NJPER 447 (¶121 2016), a case not cited by either party, the Commission also declined to restrain binding arbitration of a grievance alleging that a custodian was terminated without just cause while clarifying in a footnote that "[a] tenured custodian may be dismissed only by bringing tenure charges before the Commissioner of Education" pursuant to N.J.S.A. 18A:17-3 and

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8/ Applying Wright, "the Commission has consistently declined to restrain binding arbitration over terminations and non-renewals of school custodians and support staff employees" when no alternate statutory appeal procedure exists. Passaic Bd. of Ed., P.E.R.C. No. 2016-37, 42 NJPER 271 (¶78 2015).

N.J.S.A. 18A:6-9 to -25.

I also find that the Association has failed to demonstrate irreparable harm, relative hardship, or that the public interest will not be injured by granting interim relief. Regardless of the forum (i.e., grievance arbitration or arbitration of tenure charges), Luskey will be afforded due process and the Board will have the ultimate burden of proof before an arbitrator. Compare N.J.S.A. 34:13A-29 with N.J.S.A. 18A:6-17.2d. Similarly, the arbitrator's determination may be subject to judicial review and enforcement regardless of the forum. Compare N.J.S.A. 2A:24-1 thru -11 and N.J.S.A. 34:13A-19 with N.J.S.A. 18A:6-17.1e.

Accordingly, I find that the Association has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief pursuant to N.J.A.C. 19:14-9.5(b)(3). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Carteret Education Association's application for interim relief is denied.

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Joseph P. Blaney
Commission Designee

DATED: September 25, 2017

Trenton, New Jersey