I.R. NO. 2018-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSIDE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2017-235

HILLSIDE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an interim relief application filed by the Hillside Education Association. The relief sought by the Association was a temporary order enjoining the Hillside Township Public School's Superintendent from (1) stating that Association members would be "in peril or may face disciplinary charges for contacting" their union representatives and (2) referring to Association members as "you people" and asking its leadership, "why are you people doing this." The Designee found that the Association had not established a substantial likelihood of prevailing in a final Commission decision or irreparable harm. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Oxfeld Cohen, P.C., attorneys (Randi Doner April, on the brief)

For the Charging Party, Machado Law Group, attorneys (Jessika Kleen, on the brief)

INTERLOCUTORY ORDER
DISMISSING APPLICATION FOR INTERIM RELIEF

On April 28, 2017, the Hillside Education Association filed an unfair practice charge against the Hillside Board of Education. The charge asserts that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3), by virtue of the following alleged conduct:

- when a building principal sent an email on April 5, 2017 to a teacher chastising her for bringing a student disciplinary matter to the attention of her building representative;

- when the principal denied the teacher’s request to have a union representative present during a meeting regarding the matter;

- when the superintendent, after the Association president showed him the student discipline referral form relating to the disciplinary matter, responded, “Why do your people keep doing this” and told her that he did not want the Association involved.

The charge also alleges that the building representative was given a partially effective evaluation in retaliation for her union representation and involvement.

On July 17, the Board filed a statement of position, certifications of the principal and superintendent, and exhibits, including the principal’s April 5, 2017 email to the teacher. The email states that it was “in follow-up to a conversation [the principal] attempted to have with [the teacher] the day before yesterday” after learning from the superintendent that the Association president was in possession of the student disciplinary referral form prepared by the teacher. According to the email, the principal asked the teacher how the Association president came to possess the form, at which point the teacher asked for a union representative. The principal states in the email that “it is inappropriate to share with an HEA rep or association member student discipline matters,” and that “[i]t is not protocol or chain of command to do so.”

In the certifications, the superintendent states that when the Association president met with him, she “attempted to discuss confidential student information while questioning a decision” of the administration, which I infer to mean the principal’s

decision not to discipline the student despite the teacher's referral. The principal certifies that her meeting with the teacher ended when the teacher requested representation and that the partially effective evaluation of the building representative, a copy of which was appended to the certification, predates the events alleged in the charge.

On December 14, 2017, the Association filed an amended charge and an application for interim relief. The amendment adds a second count, which alleges that the Board again violated subsections 5.4(a)(1) and (3), this time when the superintendent issued letters of reprimand to two guidance counselors, one of whom served as a building representative.

More specifically, the amended charge alleges that in September 2017, the principal sent an email to a student's parents in which she referred to a named teacher (not the one involved in the student disciplinary matter) as a "poor teacher." The principal blind-copied the email to a counselor, who in turn showed it to the counselor who serves as a building representative. This second counselor took a screen shot of the part of the email naming the "poor teacher" and sent it to the Association president. The latter then contacted an NJEA representative about "the defamatory statement," ultimately leading to the filing of a Tort claim with the district by the NJEA attorney and NJEA authorization for the filing of lawsuit

for defamation against the principal "and possibly others." In November, the superintendent issued letters to the counselors accusing them of violating specified Board policies. By reprimanding the second counselor, the Board violated the Act because he "was acting in his capacity of building representative when he contacted the Association President."

The letters issued to the counselors assert that the screenshot was sent to the teacher named in the email and allegedly circulated around the district. It also states that the counselors violated a Board policy regarding inappropriate conduct by failing to report the incident to the superintendent and a Board policy regarding healthy workplace environment and, in the case of the second counselor, policies regarding employee use of electronic information systems and personal cell phones.

The application for interim relief is supported by a letter brief, the affidavit of the Association president, and a proposed order to show cause. The latter states that the Association is seeking an order enjoining the superintendent "from making any statements now or in the future to Association [members] that they are in peril or may face disciplinary charges for contacting" their representatives. The Association also seeks to enjoin the superintendent from referring to its members as "you people" and asking its leadership, "Why are you people doing this?"

On December 18, 2017, I executed an order to show cause giving the Board until December 27 to file any responsive papers and setting January 3, 2018 as the return date. On December 27, the Board filed a letter brief.

The seminal case in determining whether preliminary injunctive relief should be granted is Crowe v. De Gioia, 90 N.J. 126 (1982). Under Crowe, the applicant bears the burden of demonstrating: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief, and the public interest will not be injured if that relief is granted. Id. at 132-34. Although a preliminary showing of a reasonable probability of success on the merits must be made, "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." Id. at 133. Each element must be established by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013).

"[A] preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997) (citing Citizens Coach Co. v. Camden Horse

R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878)). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," which "may be inadequate due to the nature of the injury or the right affected." Crowe, supra, 90 N.J. at 132-33.

Recognizing these limitations, the Executive Director, acting on behalf of the Commission, stated in Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975):

> [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.

In its brief, the Association argues that it has a "substantial likelihood" of prevailing because the superintendent "has embarked on a pattern of anti-union behavior including anti-union comments, threats and discipline"; that he has "reprimanded multiple members for seeking Union assistance." The Association also argues that it will suffer irreparable harm because the "letters of reprimand and threats of meetings without

representation has a chilling effect" on an employee's right "to seek union assistance."[1]

Among the arguments made by the Board in its brief are that the Association cannot establish a substantial likelihood of ultimate success on the merits of its claims and has not demonstrated that the Association will suffer irreparable harm if the requested relief is denied. It maintains that the disciplinary referral form is an educational record under the Family Educational Rights and Privacy Act (FERPA), its implementing regulations, 34 CFR Part 99, and corresponding state law[2]; the teacher violated these laws by sharing the referral

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1/ In her affidavit, the Association president states that the Association is not seeking interim relief with regard to the principal's alleged denial of the teacher's request for representation and the building representative's receipt, for the first time, of a partially effective rating. Despite this, since the Association relies on the alleged Weingarten violation to establish the irreparable harm element, consideration of that allegation is necessary. As for the rating, the observation report provided by the district reflects that the observation and post-observation conference occurred, respectively, February 1 and 24, 2017 and that the report was created on February 1, last modified on the 24th, and signed by the principal on March 8. At this point, the Association does not appear to dispute this information. Based on the record at this point, the Association does not have a reasonable likelihood of prevailing on the rating/retaliation claim.

2/ FERPA, 20 U.S.C. § 1232g, is a Federal law that protects the privacy of student education records. Its implementing regulations, 34 CFR §99.3, define "education records" as records that are directly related to a student and maintained by an educational agency or institution, which includes the Board. Excluded are 6 types of records, none (continued...)

form with her representatives inasmuch as they do not have educational responsibility for the student who was the subject of the form[3/]; that the Association has cited no exception to these laws permitting the disclosure; and that while the teacher was not disciplined, it was entirely appropriate for the principal to remind her of her responsibilities under these laws with regard to student records. The Board also contends that it did not violate the teacher's Weingarten rights because the meeting with the principal ended when the teacher requested representation. As for the evaluation of the building representative, the Board argues that it could not have been retaliatory because it preceded the other alleged incidents.

With regard to the remaining allegations, the Board argues that the Association cannot establish a substantial likelihood of ultimate success or show that it will suffer irreparable harm absent interim relief. In particular, the Board maintains that

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2/ (...continued)
applicable here. New Jersey also regulates access to pupil records. See N.J.A.C. 6A:32-2.1 and N.J.A.C. 6A:32-7.1 to -7.8.

3/ N.J.A.C. 6A:32-7.5(e)(4) authorizes "certified school district personnel who are assigned educational responsibility for the student" to have access to the general student record but not to the student health record. See also, 34 CFR §99.31(a)(1)(i)(A), permitting disclosure to other school officials and teachers within the educational institution "determined to have legitimate educational interests."

the guidance counselors were disciplined for violating Board policies, not for having engaged in protected activity.

Lastly, the Board claims that the Association is attempting to prove a pattern of anti-union conduct by relying upon a series of incidents that are actually distinct and separate.

On January 3, 2018, the initial return date, Ms. Doner and Ms. Kleen presented oral argument during a telephone conference with the undersigned, essentially reiterating the arguments presented by way of the parties' respective briefs. After hearing from counsel, I advised that I would not be granting the application with regard to the superintendent's alleged remarks, that is, referring to "you people" or asking why "you people are doing this." Standing alone, such comments, while perhaps impolitic or inarticulate, would unlikely be considered retaliatory, and as the Board argued, the Association has presented no proof that they interfered with, restrained, or coerced employees from contacting their representatives. The Association has not cited any decision where the Commission has found that similar comments constitute an unfair practice.

In Hillsborough Bd. of Ed., H.E. No. 84-14, 9 NJPER 564 (¶14236 1983), adopted, P.E.R.C. No. 84-54, 9 NJPER 680 (¶14298 1983) the Hearing Examiner held that name calling, specifically, referring to the union president as a trouble maker and using profanity in dealing with her as well as other employees, was not

an unfair practice. Such comments, in and of themselves, contain no threat of reprisal or force or promise of benefit, and therefore fall within the speech protected by Black Horse Pike Reg'l Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502, 503 (¶12223 1981), where the Commission stated:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.

Although an employee's subjective feelings about the comments at issue here are immaterial under Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983), the Association has not submitted a certification or affidavit of any members asserting that the comments deterred them from bringing their concerns to the attention of their representatives. Accordingly, the Association has not established by clear and convincing evidence that absent injunctive relief, it will suffer immediate and irreparable harm on account of the superintendent's comments.[4/]

4/ Also, material facts regarding the comments have not been presented, precluding me from determining whether such facts are disputed. The charge does not state the date or place the comments were made, information required by N.J.A.C. 19:14-1.3(a)3. This information is also lacking from the affidavit of the Association's president.

I also advised counsel that I would not be granting interim relief with regard to the alleged chastising or disciplining of the teacher. Disciplinary referral forms pertaining to elementary or secondary grade students are educational records for purposes of FERPA and its New Jersey counterpart, and neither law authorizes the disclosure of such records to employee representatives generally. At the very least, there are contested factual issues, including whether adverse action was taken against the teacher for disclosing the form or because she communicated her concerns to her majority representatives.

I will also deny the request for an order enjoining the superintendent "from making any statements now or in the future to Association [members] that they are in peril or may face disciplinary charges for contacting" their representatives. The Association does not allege in the amended charge, nor does its president aver in her affidavit, that the superintendent ever made this statement. Given that omission, any harm is merely speculative, not imminent.

Nevertheless, I advised the parties' counsel on the return date that I was prepared to issue an order restraining the district from disciplining unit members for communicating non-confidential information to their representatives,[5/] but that

5/ By non-confidential, I meant information not protected from disclosure under FERPA.

since the Association had not submitted with its papers a copy of the reprimands to the counselors, I was unable to determine the basis for their issuance. Counsel agreed to provide the reprimands as well as the screenshot taken by the counselor, and the return date was continued to January 9.[6/][7/]

On the continued return date, Ms. Winters argued on the Board's behalf that the Association failed to establish that the counselors were reprimanded for going to the Association, as opposed to violating a Board policy, or that irreparable harm had occurred or was imminent.

A public employer violates the subsections 5.4(a)(1) by telling employees that they should or may not discuss employment matters, whether or not mandatorily negotiable, with their union representatives. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987)(telling local union president that it was inappropriate for him to discuss reorganization with faculty). Thus, the Board would have violated this subsection, and most likely subsection 5.4(a)(3) as well, if the superintendent disciplined the counselors, or either of them, because the counselor told Association representatives

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6/ The continuation date was later extended to January 16 to accommodate everyone's schedule.

7/ The screenshot does refer to a "poor teacher" and then names him, but it does not show enough of the communication, assuming that it shows a communication, to enable me to determine what it depicts.

that the principal said to a parent that another employee was a poor teacher. But the superintendent's letters do not mention reporting information to the Association. The letters allege violations of Board policies and not reporting the incident to the superintendent. Nor does viewing the letters in the context of the other alleged incidents, most of which are likewise disputed and unrelated in nature and time,[8/] suggest that the reasons stated in the letters are pretextual. Given the facts at this point, the Association has not shown a reasonable likelihood of success on the merits.

There is also no basis to conclude that interim relief is necessary to prevent immediate and irreparable harm. There is no proof that employees have refrained from communicating with their representatives on account of the letters and no basis to conclude that the letters, by themselves, would have that tendency.

Accordingly, I am dismissing this application. This case will be transferred to the Director of Unfair Practices for further processing in accordance with the Commission's Rules.

8/ However, the Association does not contest that the partially effective rating of the building representative was given prior to the alleged incidents.

ORDER

The application for interim relief filed by the Hillside Education Association is denied.

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Robin T. McMahon
Commission Designee

DATED: February 2, 2018

Trenton, New Jersey