I.R. NO. 2019-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DELANCO BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-043

DELANCO TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based upon an unfair practice charge alleging that the public employer expressed its intention to distribute a letter (and later confirmed that distribution) to unit employees demanding from Association members signed authorizations for dues deductions payable to the Association and affiliated organizations. The charge alleges that the employer wrote in the letter that it was seeking authorizations in order to comply with a recent U.S. Supreme Court decision, Janus v. AFSCME, Council 31, 138 S.Ct 2448, 585 U.S. ___ (2018) and N.J.S.A. 52:14-15.9e. The charge alleges that the employer's conduct violates section 5.4a(1), including the Work Place Democracy Enhancement Act, and 5.4a(2) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee learned from the employer's responsive papers that the employer in fact had not issued the alleged letter to its employees. The Designee determined nevertheless, that the charging party had demonstrated the necessary standards for granting interim relief, including that it would suffer irreparable harm if the letter issued, (as he determined in Woodland Tp. Bd of Ed., I.R. No. 2019-3, 45 NJPER ____(¶____ 2018). The Designee ordered the employer to retract the letter and restrained the employer from issuing the alleged letter. The Designee also ordered the employer to continue deducting membership dues as it has, historically, unless it receives timely notification(s) from members expressing their desire to withdraw from membership.

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Appearances:

For the Respondent
Parker McKay, attorneys
(Victoria S. Beck, of counsel)

For the Charging Party
Selikoff & Cohen, PA
(Steven R. Cohen and Keith Waldman, of counsel;
Hop T. Wechsler, on the brief)

INTERLOCUTORY DECISION

On August 7, 2018, Delanco Township Education Association (Association) filed an unfair practice charge against Delanco Board of Education (Board), together with an application for interim relief, a proposed Order to Show Cause with Temporary Restraints, a proposed Order Granting a Preliminary Injunction, exhibits, certification and a brief. A cover letter proposed several "return dates," commencing August 20, 2018. The charge alleges that on or about July 18, 2018, Board Secretary James Heiser gave Association President Carol Lipinsky a copy of a

letter he claimed the Board would distribute to all its employees, including the Association's collective negotiations unit of certificated and non-certificated personnel, ". . . when classes started in September." A copy of the letter, on school district letterhead, attached to the charge, demands written authorization from individual employees, ". . . to make deductions from [employee] compensation for the purpose of paying dues/fees to the New Jersey Education Association." The letter advises that the Board is "required" to obtain such authorization, ". . . in accordance with Janus v. AFSCME, Council 31 [138 S.Ct. 2448, 585 U.S. ___ (2018)] (Janus) and N.J.S.A. 52:14-15.9e."[1/] The letter includes a form, to be completed by

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1/ The statute, "Deduction from compensation to pay dues to certain employee organizations," as amended on May 18, 2018, provides, in a pertinent part:

> Whenever any person holding employment, whose compensation is paid by this State or by any county, municipality, Board of education or authority in this State, or by any Board, body, agency or commission thereof shall indicate in writing, including by electronic communications, and which writing or communication may be evidenced by the electronic signature of the employee, as the term electronic signature is defined in section 2 of P.L. 2001, c.116 (C.12A:12-2), to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make

(continued...)

each employee and returned to the Board, ". . . authorizing deductions from my compensation for the purpose of paying dues/fees to the New Jersey Education Association."

The charge alleges that on July 21, 2018, Lipinsky emailed Board Superintendent Joseph Mersinger, insisting that if the Board did not cease its "reauthorization demand" and did not continue deducting membership dues as it historically has done [i.e., obtaining unit employee written authorization on or shortly after the employee's hiring date], the Association would proceed to legal remedies.

On August 6, 2018, the Board Superintendent allegedly wrote to Lipinsky, advising that the authorization demand letters had

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1/ (...continued)

> such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.
>
> Employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer during the 10 days following each anniversary date of their employment. Within five days of receipt of notice from an employee of revocation of authorization for the payroll deduction of fees, the public employer shall provide notice to the employee organization of an employee's revocation of such authorization. An employee's notice of revocation of authorization for the payroll deduction of employee organization fees shall be effective on the 30th day after the anniversary date of employment. . . .

been sent to Association members, consistent with, ". . . [the Board's] responsibility under Janus." The charge alleges that the Board's conduct violates section 5.4a(1) and (2)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), including its recent amendment at section 5.14(a)[3/] [Workplace Democracy Enhancement Act].

The application seeks an Order mandating the Board to cease and desist from interfering with, restraining or coercing employees in the exercise of rights protected by the Act; requiring the Board to immediately retract its letter issued to Association members demanding their re-authorization of membership dues deductions and notifying members in writing that no new "opt-in" authorizations are required; requiring the Board to continue voluntary dues deductions; restraining the Board from engaging in conduct that encourages members to revoke authorization dues deductions; and requiring the Board to make

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

3/ This provision directs public employers, "not [to] encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization."

whole the Association for losses incurred as a consequence of the Board's unlawful action.

On August 8, 2018, I issued an Order to Show Cause, without a Temporary Restraint, specifying August 29th as the return date for argument in a telephone conference call with the Board. I also directed the Board to file a response by August 22, 2018, together with proof of service upon the Association. Later the same day, the Association filed a letter (with a copy to the Board), requesting an earlier return date, advising that the issue posed in this matter has arisen in other school districts, too. It also requested that argument be conducted in-person and that it be transcribed.

On August 13, 2018, the Association wrote to us, with a copy to the Board, noting its previous request to reschedule an earlier return date, but acknowledging the unlikelihood of that occurrence, ". . . based on the time frame involved." The Association (again) applied for a Temporary Restraint. The Association attached a proposed Order, together with its brief.

On the same date, and in my temporary absence, Commission Acting General Counsel issued a Temporary Restraint, enjoining the Board from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act; failing to continue to treat Association members as members, including the continuation of voluntary dues deductions,

regardless of whether members have provided written reauthorization of dues deductions, pursuant to the Board's letter; engaging in any conduct that encourages unit members to resign or relinquish their membership in the Association; and engaging in any conduct that encourages negotiations unit members to revoke authorization of dues deductions to the Association. The Order and the cover letter further advises that argument on the application shall take place in-person on August 29th at 10:30 a.m. in the Commission's Trenton offices.

On August 22, 2018, the Board filed a Motion to Dissolve Temporary Restraints, together with a certification and brief. On the same date, I wrote to the parties, advising that I would hear argument on the motion on the return date -- August 29, 2018.

On the return date, the parties appeared and argued their cases on the record. The following facts appear.

The Board and Association signed a series of collective negotiations agreements, the most recent of which extends from July 1, 2014 through June 30, 2017. On November 29, 2017, the parties signed a Memorandum of Agreement for a successor collective agreement extending from July 1, 2017 through June 30, 2020. The parties separately ratified the memorandum but have not signed a successor agreement.

Article V (Association Rights and Privileges) provides in a pertinent part: "G. The Board agrees to deduct Association membership dues in accordance with present practice and State law relative to this matter."

The practice among the parties is that shortly after the hiring of a new Board (unit) employee, that individual is provided -- as part of a Board orientation package -- a membership application to join the Association and affiliated organizations. If the employee chooses to join the Association (as all unit members have so elected), he or she completes, signs and returns a membership application which provides written authorization to the Board to deduct from his or her compensation membership dues, payable to the Association. The Association sends the signed authorization to the New Jersey Education Association (NJEA), which sends the authorizations to the Board. The form, entitled in bold print, "NJEA-NEA ACTIVE MEMBERSHIP APPLICATION," solicits the employee's name and other personal information, and facts regarding employment location, position, length of workweek, salary, etc. It also provides in a pertinent part immediately above a "required" signature line and date:

> I hereby request and authorize the disbursing officer of the above school district to deduct from my earnings, until notified of termination, an amount required for current year membership dues and such amounts as may be required in each subsequent year . . . to be paid to such person as may from time to time be designated by the local association.

> The authorization may be terminated only by prior written notice from me effective January 1 or July 1 of any year. I waive all right and claim for monies so deducted and transmitted and relieve the board of education and its officers from any liability therefore.

The Board maintained the forwarded authorization forms in its "archived payroll records . . . set on a seven-year retention schedule." Many of the authorizations were destroyed in accordance with that schedule.

On July 12, 2018, Association President and unit employee Carol Lipinsky met with Board Business Administrator and Secretary James Heiser who advised her that Board Counsel had "claimed" that under the recent United States Supreme Court decision in Janus v. AFSCME [138 S.Ct. 2448, 585 U.S. ___ (2018)] (Janus), the Board needed to obtain written authorization from all employees in order to continue making membership dues deductions from unit employees' compensation. Lipinsky replied that employees had provided the authorizations and that the Board should have them. Heiser replied that Board Counsel advised that the "application form was not specific enough" and showed Lipinsky a draft letter from the Board to its employees requesting written authorization from each employee to continue making dues deductions. Lipinsky asked Heiser what in the Janus decision requires "reauthorization" and he, ". . . was unable to provide specifics." They discussed grammatical and syntactical

changes to the letter and Heiser informed Lipinsky that he would send the revised letter to her.

On July 18, 2018, Heiser provided Lipinsky a copy of a letter that the Board intended to send to its employees. The letter on Board letterhead addressed to each "Delanco Township School District Employee" provides:

> We do not have a written authorization from you regarding deductions from your compensation to pay fees to the New Jersey Education Association, or any other local, county, state or federal associations that you may belong to through the New Jersey Education Association.
>
> In accordance with the United States Supreme Court's decision in Janus v. AFSCME and the consent requirements of NJSA 52:14-15.9e, we are required to obtain your authorization, in writing (which includes electronic communications) which bears either your physical or electronic signature, if you desire to have deductions made from your compensation for the purpose of paying fees to the bona fide employee organization designated above.
>
> If you desire to have deductions made from your compensation for the purpose of paying dues and/or fees to the bona fide employee organization designated above, please sign and return this authorization, with your signature, to the Business Office by no later than September 10, 2018.

The letter also provides beneath the designation, "EMPLOYEE AUTHORIZATION" and above allocated spaces for signature and date the representation that the signator is "authorizing" the Board to

". . . make deductions from my compensation for the purpose of paying dues/fees to the NJEA."

On July 21, 2018, Lipinsky emailed Board Superintendent Joseph Mersinger and Business Administrator/Secretary Heiser, advising that unless the Board elects to "cease and desist" from sending "opt-in" letters to Association members, the Association intends to pursue its legal remedies. The email also disputes the applicability of Janus to ". . . existing dues-paying members."

On August 6, 2018, Superintendent Mersinger sent a letter to Lipinsky advising in a pertinent part:

> In order for the school district to carry out our responsibility under Janus, we must have written documentation from every employee consenting to have either union dues or agency fees deducted from their salary. The letter that was sent out was the school district's effort to verify future payroll deductions for either union dues or agency fees and was in full compliance with the Janus decision. I would encourage you to have your members return the letter as quickly as possible.

On August 22, 2018, Mersinger and Heiser separately certified (as part of the Board's response to the application) that the disputed letter was not sent.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate 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. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 36 (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).

A public employer violates 5.4a(1) of the Act if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (¶10285 1979). In Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20, 21 (¶3007 1998), the Commission explained:

> [W]e must first determine whether the disputed action tends to interfere with the statutory rights of employees. . . . 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.

The Commission need not determine whether an action actually interfered or was intended to interfere with employee rights.

Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

A public employer violates 5.4a(2) if its conduct dominates or interferes with the formation, existence or administration of an employee organization. In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), the Commission explained:

> Domination exists when the organization is directed by the employer, rather than the employees. . . . Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity. [12 NJPER at 765]

The Commission has also written that the type of activity prohibited by 5.4a(2) must be, ". . . pervasive employer control or manipulation of the employee organization itself." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980).

In State of New Jersey (Local 195), P.E.R.C. No. 85-72, 11 NJPER 53 (¶16028 1984), the Commission found that the State violated 5.4a(1) and (2) of the Act when it discontinued dues deductions of an employee transferred between two negotiations units who did not execute a revocation or withdrawal notice. The employee had signed a dues deduction authorization, ". . . making

known to [his employer] his desire to have deductions made from his compensation for the purpose of paying dues to [the union], a bona fide employee organization of which [the employee] is a member," pursuant to N.J.S.A. 52:14-15.9e. Id., 11 NJPER at 53-54. See also, Passaic Cty. and SEIU, Local No. 389, P.E.R.C. No. 88-64, 14 NJPER 125 (¶19047 1988) [app. dism. App. Div. Dkt. No. A-2911-87T1 (6/22/88)].

In this case, the legal right underpinning the Association's claim is the unfettered continuation of membership dues deductions that originated in the unit employees' initial written authorizations (soon after their hire dates) and were forwarded to the Board, pursuant to N.J.S.A. 52:14-15.9e. The only prescribed method of revocation under the statute is the employee's "notice of withdrawal" to the "disbursing officer" -- the Board Business Administrator/Secretary.

The Board initially threatened (since N.J.S.A. 52:14-15.9e mandates only a single authorization by each member -- in writing or electronically -- before revocation by employee notice) to seek members' reauthorizations and then represented, over the Association's objection -- and for more than two weeks -- that reauthorization forms had been sent to the membership. In its reported solicitation to the membership and in Superintendent Mersinger's August 6th reply to President Lipinsky justifying the

Board's solicitation, the Board mistakenly relied on both Janus and N.J.S.A. 52:14-15.9e.

My recently-expressed understanding of Janus in Woodland Tp. Bd. of Ed., I.R. No. 2019-3, 45 NJPER ___ (¶_____ 2018), is that deductions of representation or agency fees only are unlawful. Janus does not mandate that members, having authorized membership dues deductions, need to reauthorize them (particularly in New Jersey, in the absence of a revocation, pursuant to N.J.S.A. 52:14-15.9e). (Slip op. at 14-15). Without any indication of Board rescission or error in seeking reauthorizations (especially regarding previous authorizations the Board tacitly admits retaining) or in its false, more-than-two-weeks-long representation of having sent the letter to members,[4/] I find that the Board's actions would tend to interfere with section 5.4a(1) employee rights to join or assist an employee organization, including the right to be free (under the Workplace Democracy Enhancement Act, N.J.S.A. 13:13A-5.14) from "encouragement . . . to resign or relinquish membership in an exclusive representative employee organization and to revoke authorization of the deduction of 'fees' to an exclusive representative employee organization." Section 5.14(a). See,

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4/ This fact distinguishes this matter from instances of non-coercive statements of opinion. See Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981).

e.g., Commercial Tp. Bd. of Ed. (It is not necessary that threats have been carried out or that employees were in fact coerced to find a violation of section 5.4a(1)).

The Board has not demonstrated a legitimate operational justification for its actions. It does not contend that any employee has challenged a dues deduction. It does not contest its receipt of member authorizations, nor its possession of them, electively stored in "payroll records" for at least seven years. "Many" authorizations were then "destroyed" at the end of a "retention cycle," leaving one to guess how many original authorizations the Board still possesses; and what legally obligated the Board to "destroy" the authorizations, let alone maintain them in payroll records, exclusively (since N.J.S.A. 52:14-15.9e mandates only one authorization -- in writing or electronically -- before a revocation by employee written notice. See Local 195, IFPTE v. State, 88 N.J. 33 (1982); City of Jersey City, I.R. No. 97-20, 23 NJPER 354 (¶28167 1997)). For all of these reasons, I find that the Association has a substantial likelihood of success in proving a violation of 5.4a(1) of the Act in a final Commission decision.

I also find that the Association suffers harm for which interim relief is appropriate. In Woodland Tp. Bd. of Ed., where the public employer board in fact issued letters to union members seeking reauthorization of dues deductions under comparably

unlawful justifications to those proffered in this matter, I found irreparable harm to that exclusive employee representative's power and prestige if rescission and retraction of the letters were to await completed litigation of that case.

I see no gain or merit in an Order denying relief that technically permits the Board to issue a reauthorization letter to members that would tend to interfere with employee rights protected by section 5.4a(1) of the Act. Nor do I see the efficacy in likely consequential and substantially duplicative litigation, if the Association elects to file a new unfair practice charge and application for interim relief. For these reasons, an Order restraining the Board from issuing a dues reauthorization letter is appropriate. As the Court in Crowe v. DeGioia wrote: "Indeed, the point of temporary relief is to maintain the parties in substantially the same condition 'when the final decree is entered as they were when litigation began.'" Id., 90 N.J. at 134. See also, Naylor v. Harkins, 11 N.J. 435 (1953).

I also find that hardship to the Association if interim relief is not granted outweighs hardship to the Board in granting such relief. A decision that does not prohibit the Board from seeking reauthorization from members, technically permitting issuance of such letters, will likely discourage membership and encourage revocation of authorizations, the effects of which are

burdensome to the Association. By contrast, no hardship inures to the Board in a grant of relief; it merely needs to continue dues deductions as it has, historically, until it receives appropriate revocation(s), pursuant to N.J.S.A. 52:14-15.9e. Any concern for dues deduction liability is unwarranted because members have relieved the Board of that duty when they signed the authorization form.

Finally, I find that the public interest in granting interim relief will not be injured. Our statute guarantees that public employees have the right to form, join and assist any employee organization. Section 5.3. Our Legislature's most recent amendment, the WDEA, further protects employees against employer discouragement of those rights. Granting interim relief, as I do, promotes the legislated public interest.

ORDER

The Board shall retract its drafted letter to its employees seeking authorization for membership dues deductions from compensation for the purpose of paying such dues to the Association, NJEA or affiliated organizations.

The Board shall not issue any letter or communication to Association members soliciting or requiring them to reauthorize membership dues deductions to the Association, NJEA or affiliated organizations.

The Board shall continue to treat members as members in all respects including the continuation of voluntary dues deductions.

The Board shall cease and desist from engaging in any conduct to encourage negotiations unit members to revoke authorization of dues deductions to the Association and affiliated organizations.

The Board shall cease and desist from encouraging or discouraging employees from joining, forming or assisting the Association.

This Order shall remain in effect until the resolution of this case.

/s/Jonathan Roth
Jonathan Roth
Commission Designee

DATED: September 6, 2018
Trenton, New Jersey