

D.R. No. 2006-17

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL
BOARD OF TRUSTEES,

Public Employer-Respondent,

-and-

LEAP TEACHERS ASSOCIATION,
(INDEPENDENT)

Docket Nos. RO-2006-70;
CO-2005-60

Petitioner,

-and-

LEAP ACADEMY TEACHERS ASSOCIATION/NJEA

Intervenor-Charging Party.

SYNOPSIS

The Acting Director of Representation finds that the certified representative's unfair practice charges must block further processing of a representation petition filed by a rival organization. The charges, together with supporting documentary evidence, demonstrate that the conduct alleged in the charge would prevent employees from voting in a free and fair election. Accordingly, the petition will be held in abeyance while the charge is being litigated.

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Appearances:

For the Public Employer-Respondent,
Genova, Burns & Vernoia, attorneys
(Andrew P. Oddo, of counsel)

For the Petitioner,
Peter J. Law, pro se,

For the Intervenor-Charging Party,
Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel)

DECISION

On March 21, 2006, the LEAP Teachers Association (LTA), an independent organization, filed a Petition for Certification with the Public Employment Relations Commission. By its Petition, LTA seeks to represent the negotiations unit of approximately 62 certified teaching personnel employed by LEAP Academy University

Charter School (Academy). The Petition is supported by an adequate showing of interest from among the unit employees. The LEAP Academy Teachers Association, affiliated with NJEA, (LATA) was granted intervention in this matter based upon its status as the current certified representative of the Academy's certified staff. N.J.A.C. 19:11-2.7.

The Petitioner seeks an election among the unit employees. The Academy requests that the representation question be resolved quickly through a secret ballot election. LATA/NJEA, however, will not consent to an election, and asserts that its pending unfair practice charge AND amended charge against the Academy (CO-2005-60) should block further processing of the petition.

On April 6, 2006, we advised all parties that LATA/NJEA seeks to block processing of the Petition until its charge can be fully litigated. The LTA and the Academy objects to any blocking effect of the charge, and asks that the petition move forward to a secret ballot election.

The background of this matter is that LATA/NJEA filed a Petition for Certification on February 20, 2004, seeking to represent the Academy's staff, which were then not formally organized. Following a secret ballot election conducted by the Commission in April, 2004, the Academy filed objections to the election. The Director found that the objections were insufficient to overturn the election and on July 14, 2004, the

Director certified LATA/NJEA as the exclusive representative of the Academy's certified staff.

On September 8, 2004, LATA/NJEA filed an unfair practice charge with the Commission, and subsequently amended its charges on September 8, October 26, and November 16, 2004; and on August 11, 2005 and May 1, 2006. The charges, as amended allege that the Academy violated N.J.S.A. 34:13A-5.4a(1), (2), (3) and (5)^{1/} of the Act by the following conduct:

1. Academy Superintendent Stephanie Branch issued a written reprimand on April 28, 2004 to Tammy McGinley, the teacher leading LATA/NJEA's organizing drive, charging her with insubordination for speaking to representatives of the media concerning the organizing drive;

2. In May 2004, Director of Operations Neirida Cintron refused to present McGinley's grant proposal from an art foundation to the Board of Trustees; thereafter, the Academy

^{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 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. (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."

reassigned McGinley from her position as an elementary art teacher to a position as basic skills teacher, in retaliation for McGinley's organizing activities.

3. On March 29, 2004, prior to the representation election, the Academy Board passed a resolution to increase employees salaries and double pay-for-performance increments. After the Association won the representation election, the Board withdrew the announced salary and performance pay increases.

4. Superintendent Branch issued a written reprimand on October 7, 2004 to McGinley for "harassing the faculty and staff . . . regarding union issues during instructional time" after McGinley raised employees' safety concerns to Branch in a series of e-mail exchanges.

5. After some faculty members signed authorizations for Association membership and dues deduction, the Academy Board issued a memorandum to all staff on October 24, 2004, reminding employees that non-members would not pay any dues or agency fees until the parties agreed in a written contract to permit agency fees, and thereby discouraging employees from voluntary membership and dues payment to the Association.

6. In February, 2005, Academy Board Chair Gloria Bonilla-Santiago attempted to discourage McGinley from representing an Association member in a meeting with Bonilla-Santiago and Branch, and was openly hostile to McGinley. By June, 2005, the Academy

Board advised McGinley that her teaching contract was not being renewed for the following school year.

7. From July 2004, when the Association was first certified by the Commission, until May 2005, the Board used stalling tactics to delay the commencement of negotiations, and has since not negotiated in good faith with the Association to reach a collective agreement. The Board, through Board Chair Bonilla-Santiago, instead has engaged in conversation with the Petitioner in this matter, Peter Law, concerning negotiations issues in December 2005.

It appearing that the allegations in the amended charges, if true, may constitute unfair practices on the part of the Respondent, I issued a Complaint on the charges on April 7, 2006. N.J.A.C. 19: 14-2.1(a).

The assigned hearing examiner has scheduled hearings on the charges to commence June 20, 2006.

* * *

The Association alleges that the totality of the Board's conduct has had a chilling effect on the rights of the employees to support the Association. It argues that having an election at this time without giving the Association a legitimate opportunity, without tainted conditions outlined in its charge, to negotiate a contract with the Academy would only serve to thwart employees' rights. It asks that we permit the Association

charge to be litigated so that the violations of the Act can be remedied before conducting any election on LTA's petition. In support of its request for blocking effect of its charge, it relies on documents appended to its charges, and affidavits from NJEA Representative Sharon Allen and former LEAP Teacher McGinley.

The filing of an unfair practice charge or issuance of an unfair practice Complaint will not automatically block the processing of a representation petition. A blocking charge procedure is not required by the Act or the Commission's Rules. The decision on whether an unfair practice charge should block a representation petition is a matter within the Commission's discretion. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981).

The legal standard for determining whether an unfair practice charge will block a representation election is set forth in State of New Jersey. Procedurally, the charging party must first request that the charge block the representation proceedings. It must then submit documentary evidence establishing the basis for the claim that the conduct underlying the unfair practice prevents a free and fair election. Where the charging party proffers such evidence, the Director of Representation will exercise his discretion to block if, under all of the circumstances presented, the employees could not

exercise their free choice in an election. See Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following factors in evaluating whether a fair election can be conducted during the pendency of the unfair practice charge:

The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; a showing of interest, if any, presented in the R case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5]

The Commission's long-standing policy is to expedite the process in representation disputes so that issue of whether employees will be represented by either of the competing organizations can be brought to a prompt resolution through the Commission's secret ballot election mechanism. Additionally, representation petitions filed when there is no current contract in effect, prevent the employer from lawfully continuing negotiations with the incumbent organization until the representation dispute is resolved. County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). Therefore, we are cautious about permitting an unfair practice charge to block an election petition from going forward. However, for the reasons stated below, I find that the totality of

conduct alleged by LATA/NJEA's unfair practice charges, if proven, so taints the election process that a free and fair election cannot be held until the charge is remedied.

First, LATA/NJEA charges that the Academy violated 5.4 a(3) of the Act by retaliating against its primary union organizer Tammy McGinley when it reprimanded her, reassigned her to a different teaching position, and finally released her from employment with the Academy. McGinley's activities as a representative of the Association, as detailed in the charge and supported by an affidavit from McGinley, are activities protected by the Act. For purposes of deciding blocking effect of the charge, we assume the veracity of the affidavit's statements. The Academy's alleged retaliatory conduct, if proven in hearing, has a chilling affect on employees' rights to support an organization of their choice, and therefore, creates an atmosphere in which a free and fair election cannot be conducted.

Second, the Association contends that the Academy stalled the commencement of negotiations from July 2004 through May 2005 when it declined to set meeting dates, and that it thereafter "stonewalled" negotiations by not responding to Association proposals. A failure to negotiate in good faith with the majority representative violates 5.4a(5) of the Act and undermines unit members' confidence in its majority representative, thus also impeding the ability to conduct a free and fair election. The

Commission has previously remedied such a violation with an order to bargain in good faith with the incumbent organization for a stated time period, notwithstanding the pendency of the representation petition. Matawan-Aberdeen Reg. Bd. Of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989).

The Association further alleges, with supporting documents, that the Academy Board passed a resolution announcing unilateral increases in salary and doubling the amount of employee performance increments prior to its certification election, and then withdrew the increases just after the Association was certified. An employer which unilaterally grants favorable benefits may not unilaterally terminate such benefits absent agreement from the majority representative. Hunterdon Cty. P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), recon. den. P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd NJPER Supp.2d, 189 (¶168 1988), 116 N.J. 322 (1989). This violation of the employer's duty to negotiate with the majority representative undermines the Association's ability to represent its unit employees.

Finally, LATA/NJEA alleges that Academy Board Chair Bonilla-Santiago engaged in a dialogue with Petitioner's Representative, Teacher Peter Law, concerning the substance of negotiations issues, including salary, shortly before the Petition was filed. The documents, including an e-mail from Law to Association President Jack Smulktis, tend to support that assertion. The Act prohibits

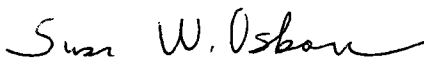
negotiation over terms and conditions of employment with individuals, groups or organizations other than the exclusive representative. N.J.S.A. 34:13A-5.3. Such conduct undermines the doctrine of exclusivity, tends to undermine the status of the majority representative in the eyes of the unit employees, and may give the Petitioner an unfair advantage in an election.

Based upon the totality of the conduct alleged in the charge, together with LATA/NJEA's supporting affidavits and documents, I find that a free and fair election cannot be conducted at this time. Accordingly, we will pend further processing of the independent Association's representation petition until the charges can be adjudicated.

ORDER

Further processing of the Petition RO-2006-70, is blocked pending litigation of the Complaint issued in CO-2005-60.

BY ORDER OF THE DIRECTOR OF
REPRESENTATION



Susan Wood Osborn
Acting Director

DATED: May 12, 2006
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by May 25, 2006.