I.R. No. 2009-29

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY COLLEGE,

Respondent,

-and- Docket No. CO-2009-340

AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Designee denies an interim relief application seeking an Order restraining Burlington County College from denying an AFT organizer access to Laurel Hall for the purpose of soliciting and distributing authorization cards to (unrepresented) adjunct faculty. The College has a policy prohibiting solicitation and distribution by anyone who is not an employee or student of the College without "written permission from the appropriate College officials."

The AFT did not seek "permission" and did not provide any notice to the College of its intent to solicit and distribute cards. The Designee determined that the omission indicated that the AFT did not have a substantial likelihood of prevailing on its legal and factual allegations.

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Appearances:

For the Respondent, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel; John A. Boppert, on the brief)

For the Charging Party, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Merick H. Limsky, of counsel)

INTERLOCUTORY DECISION

On March 26, 2009, the American Federation of Teachers, AFL-CIO (AFT) filed an unfair practice charge against Burlington County College (College), together with an application for interim relief, a certification and a brief. The charge alleges that on March 10, 2009, AFT organizer Carol Berman spoke privately with adjunct professors and gave them authorization cards to sign in "a sitting area next to a soda and other vending machines" at the College's Laurel Hall on the Mount Laurel campus from about 4 p.m. to 9 p.m. The charge alleges that at about 8:45 p.m., a named security guard told Berman that she did not

have the right to speak with adjunct faculty without the College president's consent, citing Board Policy 907. The security guard allegedly asked Berman for and received her identifications; phoned an unidentified person and reported Berman's identity; and escorted Berman to her vehicle. The College's conduct allegedly violates 5.4a(1), (2) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The application seeks an order restraining the College from denying AFT representatives the right to solicit and to distribute literature related to working conditions ". . . during non-working time in non-working public access areas, such as Laurel Hall"; and an order restraining the College from discouraging members from exercising rights under the Act; and from interfering with the administration of the AFT.

On March 30, 2009, I issued an Order to Show Cause, specifying April 21, 2009 as the return date for argument at the Commission's Trenton offices. I also directed the College to file an answering brief, together with opposing certifications and proof of service upon the AFT. Following requests to reschedule the argument, I set the return date as May 4, 2009 and ordered the Respondent to file its reply, together with proof of service by April 27, 2009. On the return date, the parties appeared in person and argued their cases. On May 26, 2009, I learned that the parties were unable to informally resolve the underlying issues. The following facts appear.

Burlington County College is an accredited and publicly owned community college certified by the State. It has two main campuses, located at Pemberton and Mount Laurel, and several satellite locations. Its primary mission is to provide ". . . all individuals access to affordable and quality education."

The College employs an unspecified number of adjunct teaching faculty who are unrepresented for purposes of collective negotiations. Their individual employment contracts do not provide rights to solicitation by or communication with any person(s) during working hours.

The College maintains and enforces a policy against solicitation on campus by any individual, organization or entity without the College's consent. Policy 907 was approved in 1991 and provides:

> Burlington County College is committed to providing its students and employees with an academic and work environment that is free of unnecessary pressures and influences and that promotes the attainment of academic and work goals. Therefore, solicitation or distribution of literature of any kind by any means by individuals who are not employees or students of Burlington County College will not be permitted on the premises of the College at any time without the express written permission from the appropriate College officials.
>
> Distribution of literature of any kind by or to any employee is prohibited during working time, in work areas of the College. Distribution of literature of any kind (except course materials and evaluations) by

> or to students during class time or in classrooms is prohibited.
>
> Solicitation of any kind by or of any employee is prohibited in work areas during working time, unless specifically authorized by the College. Solicitation of any kind by or of any student is prohibited while a class is in session, unless specifically authorized by the College. Solicitation, for the purposes of raising funds, occurring other than during working or class time must have prior written approval from the appropriate College officials.
>
> For the purpose of this policy the definition of distribution shall include, but shall not be limited to, dissemination of any printed materials or graphics and the posting of any signage, banners, posters, fliers or any type of printed materials or graphics.

The policy has been implicated in about one dozen instances over the past two years. Examples include an unauthorized solicitation of money at the Mount Laurel campus on July 24, 2008 (person departed before being counseled); an unauthorized recruitment of College employees as witnesses in a private civil action on October 11, 2006 (persons departed without incident); an unauthorized distribution of fliers recruiting "extras" for a movie on March 12, 2009 (person departed before being counseled); an unauthorized representative of a beverage company soliciting on the Mt. Laurel campus on April 2, 2009 (person informed of policy 907, asked to leave campus and did); and three unauthorized instances of AFT recruitment of adjunct faculty in March, 2009, specifically, two reported separate home visits and one e-mail communication, in addition to the March 10 incident.

Most College buildings open at 6 a.m. The College workday and workweek extend from 7 a.m. to 11 p.m., Monday through Friday and 7 a.m. to 7 p.m. on Saturday and Sunday. Classes are conducted at all times throughout those periods and whenever the College is in session during fall, spring and summer semesters.

The College maintains security procedures by which access to the campuses is monitored. A College policy provides that students and employees must exhibit College-issued identification cards on outer garments. Visitors to the College must present identification to security guards upon request. Visitors to the College library must sign a register.

Laurel Hall on the Mt. Laurel campus houses classrooms and offices. On March 10, 2009, AFT organizer Carol Berman spoke privately with and distributed authorization cards to adjunct faculty members in a sitting area outside classrooms from about 4 p.m. until about 9 p.m. Nearby are soda and other vending machines. The purpose of this area is mainly to accommodate students between classes or while waiting for classes to begin. The area may also be used to do school work. Berman's appearance was within normal working hours during the spring semester at the College, which was in session. The AFT neither sought nor acquired authorization from the College in advance of Berman's visit.

ANALYSIS

A charging party may obtain interim relief in certain cases. 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).

A public employer independently violates 5.4a(1) of the Act if its conduct tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ - Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); NJ Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

In Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983), the Commission found in part that a public employer did not violate 5.4a(1) and (2) of the Act by denying union organizers, who were not employees, access to its property for organizational purposes during an open period for filing a

representation petition. The Commission quoted liberally from a then-recent U.S. Supreme Court decision, Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 112 LRRM 2766 (1983), which concerned the validity of a contract clause granting an incumbent employee organization exclusive access as majority representative to a public school interschool mail system and teacher mailboxes before an open representation period. The Supreme Court wrote that the right to access to public property and standard by which limitations on the right must be evaluated depends upon ". . . the character of the property at issue." Perry at 112 LRRM 2769. The Court delineated three categories of public property; one is "devoted to assembly and debate" (streets and parks, for example); another is "opened for use by the public as a place for expressive activity;" and the third, public property which is not by tradition or designation ". . . a forum for public communication."

The Court wrote of the third category:

> In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. The State, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated. [112 LRRM 2769-70]

The Court found that the disputed mail system and teacher mailboxes fell within the third category and sustained the validity of the contract provision.

The Commission wrote:

> Perry stands for the proposition that some governmental property may be more 'public' than other governmental property and that constitutional claims of non-incumbent organizations and supporters may grow in validity as the 'public' nature of the property increases. 9 NJPER 456.

The Commission approvingly cited Montgomery Ward & Co. v. NLRB, 692 F2d. 1115, 111 LRRM 3021 (7th Cir. 1982), in which the Court held that the employer violated the federal Labor-Management Relations Act, 29 U.S.C. 151 et seq. when it prevented non-employee organizers from meeting with employees during non-work time in a department store cafeteria which was open to the public without restriction.

The Commission specifically refused to articulate any rule ". . . concerning the rights or lack of rights of non-unit employees and non-employees to solicit for organizational purposes before the open period . . ." Bergen Cty. at 9 NJPER 456. It wrote:

> . . . [W]e emphasize that claimed rights of access to the premises of the public employer must be determined on a case-by-case and fact-by-fact basis. The range of potentially relevant factors is wide and complex and may include such circumstances as who was attempting to organize whom, where, by what means and when, what other methods of communication, access and organization were

> available, what was the employer's stated policy concerning access to its premises and how had it been applied to different groups, and what is the employers specific interest - for example, maintaining safety, preventing disruption of operations, or preserving property - in not allowing access to a particular location. [9 NJPER 456]

The uncontested facts show that the AFT organizer spoke "privately" with an unspecified number of adjunct faculty in a "sitting area" of Laurel Hall from 4 p.m. to 9 p.m. on a weekday during the spring semester when the College was in session. No facts suggest that the campus in general and Laurel Hall in particular are not accessible by the general public (subject to a possible security request for identification). Although the sitting area functions "mainly" to accommodate students, no facts suggest that adjunct faculty or members of the general public are prohibited or discouraged from sitting, talking, working, eating or drinking within its boundaries. Nor is there any delineation of when any of those activities can or cannot occur, subject to the hours that the building is open.

Two adjunct faculty members were visited at their homes by one or more AFT representatives and one adjunct faculty member received an e-mail from an AFT representative. The record does not indicate how many adjunct faculty are employed by the College. Nor does it reveal how the AFT secured the home or e-mail addresses of three unnamed adjunct faculty members. These

facts do not demonstrate that the AFT possesses alternate means of access to a substantive number of adjunct faculty members.

Policy 907 prohibits all solicitation and distribution of literature "on the premises" by anyone who is not an employee or student without "the express written permission from the appropriate College officials." The uncontested examples of the College's application of the policy over the past several years are consistent with the policy.

In Lechmere, Inc. v. NLRB, 502 U.S. 527, 139 LRRM 2225 (1992), the U.S. Supreme Court, affirming and extending an earlier decision (NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)), wrote: "So long as non-employee organizers have reasonable access to employees outside of the employer's private property (i.e., a shopping mall), the requisite accommodation [of employees' and employers' rights] has taken place." 137 LRRM 2230.

In New Jersey, our Supreme Court has found a right to access to shopping centers because the State Constitution protects leafletting and solicitation on private property substantially open to the public. N.J. Coalition Against War in the Middle East v. JMB Realty Co., 138 N.J. 326 (1994). In State v. Schmid, 84 N.J. 535, 563 (1980), our Supreme Court held that our State Constitution protects a citizen's right to enter a privately owned university campus in order to distribute leaflets and sell political materials, subject to reasonable restrictions upon

time, place and manner. It is axiomatic that public colleges and universities, as instrumentalities of state government are not beyond the reach of the First Amendment. Id. at 84 N.J. 543.

I deny the application because the AFT failed to demonstrate a substantial likelihood of success on the factual merits of its case. The AFT neither complied with policy 907 - by seeking permission - nor (for our own State's constitutional limitations upon time, place and manner of solicitation) provided reasonable (or any) notice to the College of its representative's intended visit(s) to any specific campus location(s). The latter seems to me a minimal requirement, considering recently heightened security concerns.

One could find that the "sitting area" in Laurel Hall falls within the third category of public property described in Perry; that is, an area ". . . which is not by tradition or designation a forum for public communication." It appears that the College may reserve the area for its intended purpose - "mainly to accommodate students" - and not violate the First Amendment or a "principle . . . of labor relations law." Bergen Cty. at 9 NJPER 456.

The College however, in its expansive definitions of "workday" and "workplace" (for example, how is it that a sitting area with nearby vending machines is a "workplace" for anyone except students "working" on their class assignments?) has effectively rendered the entire publicly-owned campus off-limits

to union solicitation and distribution of materials without prior written consent. Except for concerns pertaining to time, place and manner, I do not believe that the College's policy falls within our Supreme Court's pronouncements in Schmid or N.J. Coalition Against War.

The College has not asserted that the AFT organizer was disruptive or that any solicitation or distribution in the sitting area would be disruptive to students. Assuming that it is disruptive, I must believe that other locations on the campuses will reasonably accommodate both the College's policy and the AFT's desire to solicit and to distribute literature to adjunct faculty. Recognizing that the result of this litigation may have been different with facts establishing notice and a request for access at reasonable times and locations, I issue the following:

ORDER

The application for interim relief is denied.

Jonathan Roth
Commission Designee

Dated: June 1, 2009
Trenton, New Jersey