I.R. NO. 2014-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BELLEVILLE SCHOOL DISTRICT,

Respondent,

-and- Docket No. CO-2014-149

BELLEVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging two distinct issues: first, that the Respondent violated the Act when it unilaterally implemented a camera/security system in all of its school facilities that had the ability to see individuals, record sound and track their location through the use of radio frequency identification cards. Second, that the Respondent retaliated against the Charging Party's President by taking disciplinary actions and filing tenure charges against him after he and his union objected to the installation of the camera/security system.

The Designee found that the Charging Party did not have a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations with respect to the camera/security system since the broad scope of the system had never been considered by the Commission before and, as a result, was a matter of first impression which is not appropriate for granting interim relief applications.

With respect to the disciplinary/tenure charges against the Charging Party's President, the Designee found that material facts were in dispute, based on the certifications and exhibits provided by the parties, as to the motivation of the Respondent to file the tenure charges.

As a result, regarding both aspects of the application, the Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

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Appearances:

For the Respondent, Schwartz Simon Edelstein & Celso, LLC, attorneys (Lawrence S. Schwartz, of counsel and on the brief; Stephen Edelstein, of counsel and on the brief; John E. Croot, on the brief)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Sanford R. Oxfeld, of counsel and on the brief; Samuel B. Wenocur, on the brief)

INTERLOCUTORY DECISION

On January 13, 2014, the Belleville Education Association ("BEA" or "Charging Party") filed an unfair practice charge against the Belleville School District ("District" or "Board"). The charge has two counts and alleges that the District violated sections 5.4a(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq ("Act").[1/] The

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 (continued...)

first count alleges that the District violated the Act when it unilaterally designed and planned the implementation of a new surveillance system in its school system, including cameras with the ability to record sound in every classroom, and almost all common areas, including but not limited to gymnasiums, auditoriums, cafeterias and hallways. The charge further alleges the following: the monitoring would also occur in the teachers' lounges/workrooms; the system also requires Association members, other employees and students to wear radio frequency identification cards (RFID) that show the location of the individual on the school premises; the RFID cards have a system similar to GPS tracking which would allow the District to monitor all staff members at all times; staff members will also have to swipe the RFID cards to enter the building and to both enter and leave the restroom; the District's high school has a surveillance room with a wall of TVs displaying the monitoring in real time; the District plans to record the monitoring; the District has not informed the Association either how the District plans to

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1/ (...continued)
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."

maintain the recordings or how long the District plans to keep the recordings; and, the Belleville Police Department will look at a live feeding of the monitoring and the ability to lock-down an entire school, classroom by classroom.

The second count alleges the BEA President, Michael Mignone, who had no prior disciplinary record, was suspended and had tenure charges brought against him based on his and the BEA's opposition to the District's surveillance system referenced in the first count above. The second count further alleges that in response to Mignone's stated and continued opposition to the surveillance system, the District has retaliated against him with disciplinary measures and has issued multiple letters of reprimand. Finally, the second count alleges that on December 18, 2013 the Association's legal representative sent correspondence to the Chairperson of the Belleville Education Foundation, to ask him to stop pressuring District teachers to buy tickets to the Foundation's events and to determine how the Chairperson came into possession of the District teachers' home mailing addresses. The second count states that the Chairperson is known to have a powerful voice with the District, and holds sway over matters such as determining whether to grant tenure to District teachers. The count essentially alleges that Mr. Mignone was retaliated against by the District as a result of the letter sent to the Chairperson.

The charge was filed on January 13, 2014, accompanied by an application for interim relief seeking temporary restraints, together with a brief and exhibits and affidavits from Alaina Chip, Vice President of the BEA, Michael Mignone, President of the BEA, Denise Policastro, a New Jersey Education Association, UniServ Field Representative, and a certification from Sanford R. Oxfeld, Esq. Mignone provided a supplemental affidavit on January 22.

The application seeks an Order stating that the District has violated the Act; an order requiring the District to cease and desist from violating the Act; an order requiring the District to post that it has violated the Act; a declaration that the District may not implement and use any new security systems without first negotiating over the usage of the system and how it will affect the terms and conditions of the BEA's members; a declaration that the District's disciplinary actions against BEA President Michael Mignone were in retaliation of Mr. Mignone exercising his collective bargaining rights and meant to discourage other BEA members from exercising their collective bargaining rights; an order enjoining the District from proceeding with the January 9, 2014 tenure charges against Association President Michael Mignone; and, all other relief and affirmative action appropriate under the Act.

On January 14, 2014, I issued an Order to Show Cause without temporary restraints originally specifying January 30, 2014 as the return date for oral argument via telephone conference call. The return date was rescheduled several times and ultimately set for an in-person oral argument in Trenton on February 24, 2014.

On February 12, 2014, the District filed a motion to dismiss the charge, an opposition brief, exhibits and certifications from John Rivera, President of the Board, Helene A. Feldman, the Board's Superintendent, Bruce Kreeger, Security Consultant for the District and two certifications from Stephen Edelstein, Esq.

The District responds, in pertinent part, to the first count that it had a non-negotiable managerial prerogative to implement the security system based on Commission decisions and on safety reasons especially after numerous school shooting incidents including the incident at the Sandy Hook Elementary School in Newtown, Connecticut in December 2012; that it attempted to schedule meetings to discuss the security system but was "stonewalled" by the BEA, and as a result, even if the BEA had a right to negotiate over the security system, the BEA forfeited that right. With respect to the second count, the District responds that the count is "moot" since the tenure charges against Mignone had been withdrawn[2/] and that the Commission does

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2/ The District did withdraw the tenure charges against Mignone but maintained the right to reinstate them. Even after the (continued...)

not have the jurisdiction or the authority to restrain tenure charges.

The BEA filed a reply brief on February 18, 2014 and asserted that the tenure charges were not moot since Mignone had received disciplinary letters, was still suspended and banned from District school properties.

The District requested that the Kreeger certification be considered confidential and "shall be filed and maintained under seal in accordance with the public policy in favor of maintaining the confidentiality of security measures and surveillance techniques." The BEA agreed to sign a consent order with the District. The parties filed the signed Consent Order on March 26, 2014 and I signed the Consent Order on the next day.[3/]

The parties presented oral argument in person in the Commission's Trenton Office on February 24, 2014.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

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2/ (...continued)
withdrawal of the tenure charges, Mignone remained suspended with pay and was not authorized to enter District's schools' grounds. New tenure charges were filed against Mignone on February 28, 2014 but have not been provided as part of the record.

3/ The Kreeger certification was not used to set forth the facts in this decision regarding the security system.

final Commission decision on its legal and factual allegations[4/] 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); 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. 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 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.

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

An interim relief decision is based on the facts in evidence which is provided by the affidavits/certifications and exhibits filed by the parties.

First, with respect to the surveillance/security system, as cited by the parties, the Commission has issued two decisions where the use of "overt" (visible as opposed to hidden - so people can see the cameras and theoretically know that they may be seen/filmed) cameras in a public building for the purpose of protecting people and property was a managerial prerogative and, as a result, not a mandatory subject of negotiations. City of Paterson, P.E.R.C. No. 2011-5, 36 NJPER 300 (¶114 2010); City of Paterson, P.E.R.C. No. 2007-62, 33 NJPER 143 (¶50 2007). In this matter, the facts show that the cameras are also overt. However, the facts also show that this security/surveillance system in this District is far more extensive than the cameras installed in the Paterson decisions, supra. The cameras would monitor far more locations, there is the potential for sound recording, there is the planned use of the RFID cards that can track the location of BEA members and presumably determine which members approach BEA officers to speak with them. This more pervasive type of system, with newer technology, has never been considered by the Commission. An interim relief proceeding is not the appropriate application for creating new law as set forth above. Given the heavy burden required for interim relief and based on the facts

of this case and the legal authority cited by the parties, I believe this is a matter of first impression that requires consideration by the full Commission. See, City of Paterson, P.E.R.C. No. 2006-50, 32 NJPER 11 (¶5 2006); City of Newark, I.R. No. 2002-2, 27 NJPER 393 (¶32145 2001). As a result, I cannot conclude that the BEA has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations with respect to the security/surveillance system. Additionally, as set forth in Crowe, interim relief "[S]hould be withheld when the legal right underlying plaintiff's claim is unsettled." Id. at 134.

With respect to the second count, involving the tenure/disciplinary charges against Mr. Mignone, to summerize, the facts from both sides are polar opposites. Mr. Mignone essentially claims that he has been subject to disciplinary actions and ultimately the tenure charges based on his, and the BEA's, opposition to the security/surveillance system. The certified tenure charges from Ms. Feldmen, however, involve a dispute regarding a parent of a student in Mr. Mignone's math class and his interaction with the student. Mr. Mignone does not deny that there was an issue with the parent, but he denies any wrongdoing and thought that the matter had been resolved when he spoke to the parent with a guidance counselor from the District. Although tenure charges are decided by the Commissioner of

Education, the Commission has authority to decide whether the charges were brought against the individual for an inappropriate reason that may constitute a violation of the Act. See, e.g., Manchester Reg. Bd. of Ed., P.E.R.C. No. 2000-11, 25 NJPER 389 (¶30166 1999). Regarding this count, material facts are in dispute and potentially require a hearing to develop the facts . This count cannot be decided on the limited record before me.

Based on the above, and since this is a case of first impression and material facts are in dispute, I find that the BEA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.[5/] This is a fact-intensive exploration that does not readily lend itself to a grant of interim relief. The application for interim relief must be denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

5/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

David N. Gambert
Commission Designee

DATED: April 10, 2014

Trenton, New Jersey