

I.R. NO. 87-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GARFIELD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-87-322

GARFIELD FEDERATION OF TEACHERS,
LOCAL 3977, NJSFT/AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Designee denies a request for an interim relief order to restrain the Garfield Board of Education from allowing the Garfield Education Association to conduct a meeting at the Garfield High School building. The Commission Designee found that the parties' collective negotiations agreement contained an exclusive access provision; however, the collective negotiations agreement had expired on June 30, 1986 and the parties had not executed a successor agreement. Accordingly, the Commission Designee determined that the parties were in an open period for the filing of representation petitions. In accordance with Union County Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50 (1976), during an open period, contractual clauses providing for exclusive access may not be effectuated. Thus, the Commission Designee concluded that the exclusive use provision in the parties' expired agreement was rendered inoperable, because the parties were then in an open period. The Commission Designee determined that the Charging Party had not demonstrated a substantial likelihood of success on the merits and, therefore, denied the Charging Party's requested interim relief.

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Appearances:

For the Respondent
Picinich, Rigolosi & Selser, Esqs.
(Paul S. Rotella, of counsel)

For the Charging Party
Dwyer & Canellis, Esqs.
(Michael E. Buckley, of counsel)

INTERLOCUTORY DECISION

On May 15, 1987, the Garfield Federation of Teachers, Local 3977, NJSFT/AFT, AFL-CIO ("Charging Party" or "Federation") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the Garfield Board of Education ("Respondent" or "Board") alleging that the Board had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, the Federation alleged that the Board had violated §§ 5.4(a)(1) and (5) of the Act when it allowed the Garfield Education Association to use the Garfield High School building to conduct meetings with teachers in derogation of the

collective negotiations agreement between the Federation and the Board.^{1/}

Also on May 15, 1987, the Federation submitted an Order to Show Cause with Temporary Restraints to the Commission, asking that the Board show cause why an order should not be immediately entered restraining the Board from allowing the Garfield Education Association to conduct meetings in school buildings on May 20 and May 27, 1987.

On May 19, 1987, a hearing was held before me concerning the Charging Party's request for the immediate issuance of temporary restraints against the Board pending a hearing on the Order to Show Cause. N.J.A.C. 19:14-9.1 et seq. At the conclusion of that hearing, I signed an Order to Show Cause but declined to issue a temporary restraining order against the Board enjoining it from allowing the Garfield Education Association to conduct meetings in school buildings. The Order to Show Cause was made returnable on May 21, 1987. On that date, I conducted an Order to Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The Charging

^{1/} These subsections 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; (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;."

Party submitted a brief and both parties argued orally at the hearing.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.^{2/}

The Charging Party, Garfield Federation of Teachers, is the majority representative of a negotiations unit of all teaching personnel employed by the Garfield Board of Education. There is an expired collective negotiations agreement between these parties covering the period from July 1, 1983 through June 30, 1986. This agreement contains a Federation rights article, Article V, which gives the Federation the right to use school buildings for meetings. This Article further states:

I. The rights granted in this Article shall be exclusively granted to the Federation, and to no other employee representative.

^{2/} Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); and Crowe v. DeGioia, 90 N.J. 126 (1982).

On May 13, 1987, the Charging Party learned that the Respondent intended to permit the Garfield Education Association to use the Garfield High School building to conduct workshop meetings on May 20 and May 27, 1987.

The Association argues that this action by the Board -- permitting the Garfield Education Association to use Garfield school buildings to conduct meetings -- is violative of the parties' collective negotiations agreement, constitutes a unilateral change in terms and conditions of employment, was done in bad faith by the Board of Education, and thus, is violative of §§ 5.4(a)(1) and (a)(5) of the Act. The Charging Party further argues that the Commission has found exclusive access provisions, such as the one in the instant matter, to be valid, outside of open periods for the filing of representation petitions. The Charging Party concludes that it has demonstrated a substantial likelihood of success on the merits and that irreparable harm will occur to its organizational status if the requested relief is not granted.

Charging Party seeks an interim relief order restraining the Board from allowing the Garfield Education Association to conduct a meeting on May 27, 1987 in the Garfield High School building.

The Board did not contest the Federation's allegations that the Federation is the majority representative of the unit of teaching employees or that there is an expired collective negotiations agreement with an exclusive access provision in it.

The Board further admits that it intends to allow the Garfield Education Association to conduct its workshop meeting in the Garfield High School building on May 27, 1987.

Citing Court Rule 4:28-1A, the Board argued that the Association should be mandatorily joined as a party to this proceeding, inasmuch as its rights of assembly and free speech are at stake. The Board also argues that the meeting at issue is an educational meeting; it is not an organizational meeting. The Board argues that Article V of the parties' agreement was not intended to prevent the occurrence of such meetings. Rather, the Board argues that the contractual exclusive use provision was aimed at prohibiting only organizational meetings. The Board contends that the cases cited by the Association relate to meetings conducted by minority organizations for organizational purposes. The Board argues that § 5.3 of the Act gives employees the right to "form, join and assist any employee organization..."; to preclude this meeting would interfere with that right. The Board contends that the Association has not demonstrated that irreparable harm would occur to it should the instant relief be denied.

The Federation counters that the Association was noticed and apparently chose not to participate in this proceeding; that constitutional rights are not infringed in this matter and that this meeting is organizational in nature, to the extent that it gives legitimacy to the Association. The Federation argues that the meetings give the Association a formal presence in the district and

that the employer lends assistance to the Association's organizational effort by allowing it to use Board facilities. The Federation argues that the terms of the parties' last expired agreement, including the exclusive access clause, should be followed and enforced, pursuant to the Commission's policy that the terms and conditions of employment set forth in an expired agreement continue in effect until the parties have executed a successor collective negotiations agreement.

The Board argues that under the circumstances of this case, provisions in the nature of the one in dispute herein -- an exclusive access provision -- should not be held in effect until the execution of a new contract.

It appears that the parties have a difference of opinion concerning whether Article V was intended to apply to circumstances as are presented here -- to preclude the use of Garfield school facilities to other employee organizations for what are argued to be non-organizational meetings.

In State of New Jersey, Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 198), the Commission stated:

We conclude that a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. We base this conclusion primarily on our interpretation of the Act and the legislative policy expressed therein favoring the use of negotiated grievance procedures for handling contractual disputes. Human Services, at 42.

Thus, it appears that the instant matter may be a contractual dispute whose resolution belongs before an arbitrator or the courts. The Charging Party did not demonstrate that this action was taken by the Board maliciously or in bad faith. The Board herein believes that the Association's May 27 workshop/meeting is non-organizational in nature and that Article V of the parties' expired contract would not apply to preclude such meetings. The Federation argues the intent of the contractual provision is clear on its face and that the action taken by the Board is a repudiation of the contract. Accordingly, the Federation argues that this dispute amounts to more than a mere contractual dispute.

However, even assuming *arguendo* that the instant matter was not a mere contractual dispute and would, if proven, amount to an unfair labor practice, under the circumstances of this case, I am unable to conclude that the Charging Party has demonstrated a substantial likelihood of success on the merits of the case in chief before the Commission.

N.J.A.C. 19:11-2.8(c) provides:

During the period of an existing written agreement containing substantive terms and conditions of employment...a petition for certification of public employee representative...will not be considered timely filed unless:

3. In a case involving employees of a school district, the petition is filed during the period between September 1, and October 15, inclusive, within the last twelve months of such agreement.

Outside the September 1 through October 15 "open period", the only other period when a timely petition may be filed is after the expiration of an agreement and prior to the execution of a successor agreement -- such as the period which occurred herein, after June 30, 1986.

In Union County Reg. Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50 (1976), the Commission held that an employer must treat labor organizations equally during the open period and/or after a timely petition has been filed. In considering the propriety of several exclusive use provisions, the Commission stated:

In upholding the legality of these provisions in the absence of any evidence of organizational abuse, the Commission is attempting to balance the competing needs of the various parties, as outlined earlier in this decision. ...the Commission's rules [provide] for periods of stable labor relations by insulating the incumbent organization against the filing of a representation petition challenging its majority status. See N.J.A.C. 19:11-1.15.

It cannot be denied, however, that the exclusive use provisions do grant the incumbent Associations an advantage over any challenging organization in the ability to keep the employees apprised of their activities. During the insulated period of a contract this limited advantage is consistent with the interests already discussed. However, once a timely representation petition is filed or during an open period when such a petition could be filed, the interests of the individual employees in being able to freely choose their representative will outweigh the need for stability. If an incumbent is permitted the use of the employer's facilities for communication with the employees, the employer will have to make provisions to allow the challenging group access to the

facilities. The potential for abuse in the exclusive use of facilities is obviously enhanced during such periods. Additionally, the requirement of strict neutrality by the employer during such periods shifts the balance against exclusivity.

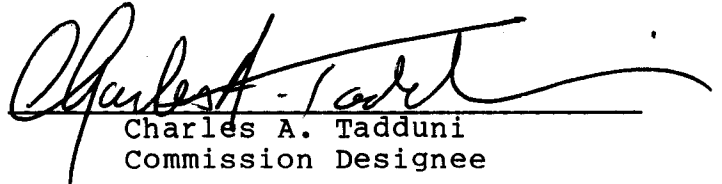
Union County, supra, at 52-53. (emphasis added).

Thus, it is well established that an employer must treat labor organizations equally during the open period and/or after a timely petition has been filed. During the open period or at other times when a timely petition may be filed, or after a timely petition has been filed, if the incumbent is permitted to use the employer's facilities for communication with the employees, then any minority organizations must be afforded the same access to the facilities. During these periods, exclusive use of the employer's facilities cannot be permitted and, therefore, such exclusive access clauses as appear in the contract in the instant matter are rendered temporarily inoperable.

In the instant matter, the most recent agreement between the parties expired on June 30, 1986. The parties have been involved in protracted negotiations for a successor agreement. Several disputes have arisen concerning these negotiations and these same parties are now before the Commission in another unfair practice matter concerning the parties successor negotiations. Thus, the parties have no present collective negotiations agreement and are in an open period for the filing of representation petitions.

Accordingly, in such circumstances as are present herein -- during an open period for the filing of representation petitions -- the exclusive use provisions contained in the parties' expired 1983-86 agreement are inoperable. If the exclusive use provisions of the parties' agreement are thus rendered inoperable, the Board's decision to allow the Association to conduct meetings on school premises is neither a violation nor a repudiation of the parties' agreement; nor is such action by the Board a violation of §§ 5.4(a)(1) and (a)(5) of this Act.

Accordingly, based on the record in this matter and the foregoing analysis, the Charging Party has not demonstrated a substantial likelihood of success on the merits. Accordingly, the Charging Party's application for interim relief is hereby denied.



Charles A. Tadduni
Commission Designee

DATED: May 26, 1987
Trenton, New Jersey