I.R. NO. 2011-28

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LIBERTY ACADEMY CHARTER SCHOOL,

Respondent,

-and- Docket No. CO-2011-203

LIBERTY ACADEMY CHARTER SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants in part and denies in part an application for interim relief based upon an unfair practice charge alleging that the president of the Association, who was employed as a teacher by the Respondent, was fired in retaliation for conduct protected by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and was denied access to the Respondent's facility for the purpose of collectively negotiating a first agreement.

The Designee denied that part of the application seeking the president's reinstatement as a teacher because a material factual dispute over the Respondent's motive for firing the teacher/president indicated that the Association did not demonstrate a substantial likelihood of success on the merits. The Designee granted the application seeking the teacher/president's access to the facility for the purpose of attending and participating in collective negotiations. In particular, the Designee found that the Association would be irreparably harmed if the alleged denial of access was not retrained.

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Appearances:

For the Respondent
Adams Stern Gutierrez & Lattiboudere, LLC
(Philip E. Stern, of counsel)

For the Charging Party
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On November 17, 2010, Liberty Academy Charter School Education Association (Association) filed an unfair practice charge against Liberty Academy Charter School (School), together with an application for interim relief, a proposed Order to Show Cause, exhibits, a certification and brief. The charge alleges that on July 28, 2010, teacher, unit employee and Association President Lynette Dortrait was fired from her job and prohibited from entering the school in retaliation for conduct protected by the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1, et seq. The charge alleges that on April 15, 2010, soon after Dortrait was elected as Association president, School CEO Dr. Anna Villafane asked Dortrait questions about the Association and then "switched the topic" to budget cuts. It alleges that Villafane asked Dortrait more questions about the Association on April 26 and then commented that she would soon be meeting with the Board to discuss which teachers would be renewed for the [2010-2011] school year. The charge alleges that in May, 2010, Dortrait received a [mutually signed] "renewal contract" for the [current] school year and received a year-end evaluation as an "outstanding teacher," which mirrored previous evaluations at the School. It alleges that in June, 2010, Dortrait met with Villafane and inquired about planned unpaid professional development days at the end of the school year, the requirement of which would violate individual teacher contracts. In the same meeting, Villafane denied having made "anti-union comments" to Association members. On July 21, 2010, the Association issued a list of collective negotiations demands to the Board. The

School's conduct allegedly violates 5.4a(1), (3) and (5)[1/] of the Act.

The application seeks an order reinstating Dortrait as a teacher and enjoining the School from prohibiting her from "participating in first contract negotiations" with the School.

On November 22, I issued an Order to Show Cause, specifying December 15, 2010 as the return date for argument in a telephone conference call (later changed to December 29 based upon the School's request and Association's consent). I also directed the School to file a response by December 8 (later changed to December 22), together with proof of service upon the Association. On the return date, the parties argued their cases. The following facts appear.

Lynette Dortrait was hired as a teacher by the School in August, 2007. Evaluations of her performance have consistently been deemed "proficient/exemplary" and the most recent one was rated "outstanding."

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. (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."

On or about November 25, 2009, the unorganized teachers learned that the School intended to increase deductions from their paychecks for health insurance benefits and provide a "watered-down level of benefits." In protest and on December 3, 2009, the entire faculty and certain other employees engaged in a "sit-in" in the school gymnasium. The School principal, Michael Derczo, entered the gymnasium and pointed at four teachers, including Dortrait, soliciting them for private conversation. The teachers expressed their interest in meeting with the School Board of Trustees about health insurance. The sit-in continued for the remainder of the day. On the next day, a normal teaching schedule resumed.

On December 8, 2009, the entire staff received a form letter from the School, reprimanding all for participating in the sit-in. In December, the staff retained an attorney, Michael Starvagi, Esq., who corresponded with the attorney law firm of Fogarty and Hara on behalf of the School.

On January 25, 2010, the Director of Representation issued a certification of representative based upon authorization cards for a negotiations unit of "all regularly employed non-supervisory professional employees" of the School (RO-2010-048).

On January 27 and 28, 2010, the School principal told Dortrait that he "envisioned" her as his assistant (to the

principal), and said that he wanted to speak to the Board about "freeing up" one-half of her workday for that purpose.

On April 15, 2010, Villafane met with Dortrait and asked numerous questions about the Association and then talked about budget cuts. Villafane also mentioned that she knew Dortrait had recently been elected president of the Association. On April 26, they met again, occasioned by Villafane's return of an envelope addressed to the Association but delivered to the School. Villafane said that she "wanted to let the entire staff know there is a union"; that "not everything is negotiable" and that "the Governor is cutting teachers in the kneecaps." Villafane also remarked upon budget cuts and non-renewals. Dortrait also received an "outstanding" end-of-year teacher evaluation.

On May 28, 2010, Villafane and Dortrait signed an "employment contract for certificated personnel teachers" extending from August 25, 2010 through June 30, 2011. The agreement provides, among other things, that it ". . . may at any time be terminated by either party without cause giving to the other 30 days' notice in writing . . ."

On July 12, 2010, Dortrait received a Rice notice, advising that her employment would be discussed at the School's July 21 meeting. Dortrait attended the meeting but her employment was not discussed.

On July 30, the School issued a letter to Dortrait, terminating her employment, effective August 27, 2010. The letter provides in a pertinent part:

> The Chief Executive Officer and the Board are of the opinion that the Board should not have acted to renew your employment contract earlier this year, and thus subsequently decided to terminate your employment contract. Specifically, the Board believes that your actions of December 3, 2010, wherein you organized and participated in an illegal work stoppage, and the communicated in a rude and disrespectful manner to a Board member, the Business Administrator, and the Board's insurance consultant, reflect extremely poor judgment on your part. In particular, you constantly interrupted these individuals, essentially called the Business Administrator a liar, and used profanity and/or derogatory epithets towards them. The Board believes that this type of attitude is unprofessional, is inconsistent with the Board's expectations of its professional staff members, and contributes to a negative culture in the school. As such, both the Board and Dr. Villafane do not believe that it is in the school's best interests to continue to employ you as a teacher.
>
> Additionally, Dr. Villafane has explained to the Board that your willingness to volunteer has diminished, that your organizational skills are lacking (often organizing activities on very late notice), and that your Coordinator reports, while technically acceptable, were not indicative of the high standards expected by the Board. Finally, Dr. Villafane has also notified the Board that upon her return, both parents and staff members notified her that you have been condescending towards your students and have made comments to them that were inappropriate, embarrassing them in front of their peers. For all of these reasons, both Dr. Villafane and the Board do not believe

> that it is in the Board's best interests to continue your employment at Liberty Academy.

Dortrait certifies that she "did not organize the sit-in" and was perceived as the "leader of the group." She also certifies that she was "never rude or disrespectful of a Board member or anyone else." She also denied "using profanity" or diminishing her "willingness to volunteer." Finally, Dortrait certifies that she did not condescend to students or make "embarrassing comments" in the presence of her peers.

Dortrait certifies that the Association is negotiating the first collective negotiations agreement with the School and that she is the "only one who has been involved directly throughout . . ."

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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 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 material factual dispute in this case concerns the School's motive(s) for terminating teacher and Association President Dortrait's employment. Whether its action was taken for reason(s) unrelated to protected conduct (as set forth in the July 30 letter terminating Dortrait's employment) or in retaliation for the exercise of protected activity can be resolved only through a plenary hearing. See In re Bridgewater Tp., 95 N.J. 235 (1984). I find that the Association has not demonstrated a substantial likelihood of success on its allegations regarding Dortrait's firing.

The Association has a right to choose its own negotiations representative. Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304, 306 (¶22134 1991); Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986); No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980); see also N.J.S.A. 34:13A-5.3. A contrary holding would allow an employer to control or prevent the use of non-employee representatives. See Colfer, Inc. and UAW, 282 NLRB 1173, 124 LRRM 1204 (1987), enf'd 838 F.2d 164, 127 LRRM 2447 (6th Cir. 1988). Uncontested facts show that Dortrait represents the Association in collective negotiations for an initial collective agreement and has not been given access to the school premises in order to attend negotiations sessions. The

School asserts only that Dortrait "is not presently employed by [it] and cannot be Association president." The employer in Bogota Bd. of Ed. asserted a similar defense, to no avail. No facts suggest that Dortrait's presence would disrupt school operations or threaten the safety of other employees or students.

A denial of access to a union representative during negotiations has a chilling effect on the process. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1 (1978). The employees' representational interests are hampered by the School's refusal to give Dortrait access to its building for the purpose of attending negotiations sessions. Salem Cty.

I find that the Association has demonstrated a substantial likelihood of success and irreparable harm on the allegation that the School has unlawfully denied Dortrait access to the facility for the purpose of attending negotiations sessions for a first collective negotiations agreement. The Association has met the standard for granting interim relief.

ORDER

The Liberty Academy Charter School shall immediately grant access to Association President Lynette Dortrait to its facility for the purpose of attending and participating in collective negotiations sessions.

The application is denied on the request to reinstate Dortrait as a teacher.

This case shall be processed in the normal course. The Order shall remain in effect until the case is resolved.

Jonathan Roth
Commission Designee

DATED: December 30, 2010
Trenton, New Jersey