

I.R. NO. 2011-31

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-210

BRICK TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

Pursuant to the terms of the collective agreement between the Brick Township Board of Education and the Brick Township Education Association, the president of the Association was released full-time from all teaching and non-teaching duties. In October, 2011, the Board assigned teaching duties to the president. The Association filed an unfair practice charge seeking interim relief. The Board claimed (1) that N.J.S.A. 18A:66-14.2a preempted negotiation making the release provision in the collective agreement unenforceable, (2) the nature of the release violated 5.4a(2) of the New Jersey Employer-Employee Relations Act and (3) paying the salary and benefits of an employee on full-time release is contrary to public policy. The Commission Designee found that the Association satisfied all of the requisite elements for a grant of interim relief and issued an order directing the Board to grant full-time release to the Association President in accordance with the terms of the collective agreement.

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Appearances:

For the Respondent
Capehart & Scatchard, P.A.
(Alan R. Schmoll, of counsel)

For the Charging Party
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attys.
(Richard A. Friedman, of counsel)

INTERLOCUTORY DECISION

On November 19, 2010, the Brick Township Education Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Brick Township Board of Education (Board) violated 5.4a(1), (3), and (5)^{1/} of the New Jersey Employer-Employee

^{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
(continued...)

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleges that effective October 22, 2010, the Board unilaterally assigned the Association President to serve full-time in the teaching position of "math coach", in contravention of the parties' collective negotiations agreement which provided its president with a full-time release from teaching and non-teaching duties during the term of the contract.

On or about December 10, 2010, the Association filed an application for interim relief seeking to restrain the Board from requiring the Association President to return to the classroom. On December 15, 2010, I executed an Order to Show Cause scheduling a return date for January 20, 2011. The parties submitted briefs, affidavits and exhibits in support of their respective positions in accordance with Commission rules and argued orally on the return date.

The Association argues that the Board repudiated the express language contained in the collective negotiations agreement. The Board contends that the provision in the collective agreement is unenforceable since it is preempted by Title 18A which prohibits the use of Board funds in favor of a full-time release for the Association President. The Board also argues that by paying an

1/ (...continued)
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."

employee's salary while on full-time release to the Association constitutes illegal domination of the Association by the Board in violation of 5.4a(2). Additionally, the Board asserts that paying salary and other benefits to an employee performing no work for the Board is not a proper use of public funds and contrary to public policy.

The following facts appear:

The Board and the Association are parties to a collective negotiations agreement covering school years 2009/2010 through 2011/2012. The Association is the majority representative for all positions covered by the recognition clause of the agreement and includes the teacher at issue in this matter.

Article IV, Association Rights, Paragraph F, of the collective agreement provides the following:

The BTEA president or his/her designee shall be released from all teaching and non-teaching duties for the full year with NJEA paying one-half year's salary and the Board paying one-half year's salary and continuing all benefits.

Effective October 22, 2010, the Board unilaterally rescinded the full-time release provision and assigned the Association President to a math coach position with no Association leave time.

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).

The Commission has long held that employee release time for representational purposes is mandatorily negotiable. City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER 463 (¶30 2004); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987). Accordingly, I find Article IV, F. contained in the collective agreement to be negotiable and enforceable.

A plain reading of Article IV, F. leads to the conclusion that by unilaterally requiring the Association President to return mid-contract from his release from all teaching duties constitutes a breach of that contract provision. The Commission has addressed whether a breach of contract may rise to the level of a violation of the Act. In New Jersey Dept. of Human Services, 10 NJPER 419, P.E.R.C. No. 84-148 (¶15191 1984), the Commission stated that a breach of contract may also rise to the

level of a refusal to negotiate in good faith and violate the Act. The Commission stated:

To determine whether a charge is predominantly related to subsection 5.4a(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate any obligations and policies arising under our Act, it is necessary to look closely at the nature of the charge and all the attendant circumstances. While there can be no precise demarcation between the mere breach of contract claim and a refusal to negotiate in good faith claim which is interrelated with an alleged contractual violation, we give the following examples of situations in which we would entertain unfair practice proceedings under section 5.4a(5).

* * *

A claim of repudiation may . . . be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it. . . . [Id. at 423.]

The Board contends that N.J.S.A. 18A:66-14.2a prohibits the use of Board money to fund the full-time release of the Association President. N.J.S.A. 18A:66-14.2a states the following:

Any person who serves, while on an approved leave of absence from regular duties as a teacher, as an officer of a local, county or state labor organization which represents, or is affiliated with an organization which represents, teachers as defined in N.J.S. 18A:66-2, shall receive credit in the retirement system for the service. The person receiving the credit shall be liable, with respect to the service to be credited,

for payment to their retirement system of both the contributions that would have been required under N.J.S. 18A:66-29 and N.J.S. 18A:66-31 and the contributions that would have been required under N.J.S. 18A:66-33 if that service had been rendered as regular teaching service to the employer granting the leave of absence. The contributions shall be based upon the compensation that would have been received by the person under the locally negotiated salary guide had that person remained in regular teaching service.

The Board argues that N.J.S.A. 18A:66-14.2a mandates that if a teacher does not remain in regular teaching service to the Board, then the teacher is not entitled to compensation, including pension contributions and health benefits, at the Board's expense. The Board asserts that N.J.S.A. 18A:66-14.2a preempts negotiations regarding compensation to Association officers who have been granted full-time release. See Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed. 78 N.J. 144 (1978); Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). Consequently, the Board contends that it has not unilaterally repudiated Article IV, F. in the collective agreement since that provision can not be legally enforced. The Board asserts that the use of public funds to pay the Association President who performs no work for the school district and handled only Association matters, was never contemplated by the Legislature as reflected in N.J.S.A. 18A:66-14.2a and is not a proper use of public money. It reasons that since the Legislature has prohibited public money from being used for

pension contributions when an employee is on an approved leave of absence, then it follows that the Legislature never intended school boards to pay a teacher performing no teaching functions and working full-time only on behalf of the Association. Thus, the Board concludes that if the Association President is to be on full-time release from the Board, it is the Association, and not the Board, that must be responsible for providing the salary and all benefits, unless the employee on leave is also performing some work for the Board to justify the use of public money to pay his/her compensation.

I find that N.J.S.A. 18A:66-14.2a relates to pension contributions for teachers on approved leaves of absence and does not serve to preempt the negotiability of such leaves, even in circumstances where the Board agrees to compensate the employee during that leave of absence. I find that N.J.S.A. 18A:66-14.2a makes no reference to the compensation the Association official on full-time release may receive, and contains no language precluding a Board from entering into a negotiated agreement with the employee organization to provide some level of compensation during the course of the leave.

In the instant case, Article IV, F. in the collective agreement appears to clearly require the Board to release the Association President from all teaching and non-teaching duties during the school year and provide a certain level of

compensation. The Board's refusal to allow such release appears to repudiate the agreement and such repudiation rises to the level of a violation of 5.4a(5).

The Board argues that by paying part or all of the Association President's salary and benefits when such employee is performing only full-time Association work and having no teaching assignments, it may be in violation of 5.4a(2) of the Act. The Board contends that paying an Association officer while on full-time leave may provide the Board with an impermissible level of control over the Association and/or officer, since neither the Association nor officer may wish to interfere with such release arrangement and might prompt the Association to surrender to overreaching Board demands.

The standard for an a(2) violation is explained in Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979), aff'd. 174 N.J. Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980). This provision generally protects employee organizations from improper employer activity which threatens the formation, existence or administration of the organization. In Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764, 765 (¶17291 1986), the Commission explained that "[d]omination exists when the organization is directed by the employer, rather than by the employees. . . . Interference involves less severe conduct than domination . . . [but] goes beyond merely interfering with

an employee's section 5.3 rights; it must be aimed at the employee organization as an entity." Finally, the type of activity prohibited by 5.4a(2) must be pervasive employer control or manipulation of the employee organization itself. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980).

There is no evidence in this case of the Board violating 5.4a(2). The Board, obviously concerned that it may overreach the proper exercise of its authority, has sufficient opportunity at this juncture to exercise restraint and ensure that its actions not breach a(2) of the Act. Moreover, there is nothing to prevent the Association from filing an unfair practice charge against the Board should such circumstance arise. At this point, the Board's concern with an a(2) violation is merely speculative and requires no remedial action.

The Board claims that compensating the Association President who is on full-time release and performing no work for the Board is against public policy. While in today's fiscal environment Boards are increasingly reluctant to provide compensation to employees who have been granted full-time release, as is the case here, Commission precedent holds that such arrangements are negotiable, enforceable and not contrary to public policy. See City of Newark. In City of Newark, the employer argued, among other things, that agreeing to the paid release of employees

violates the common law rule of no work/no pay as well as the constitutional ban against using public monies for private purposes. Id. at 397. The Commission said:

N.J.S.A. 34:13A-5.3 authorizes and requires employers and employee representatives to negotiate over terms and conditions of employment. A viable negotiations process serves the public interest in improved morale, greater productivity, and smoother labor relations.

* * *

As we have explained, paid release time agreements can improve representation and promote the Act's public purposes. Such agreements are authorized by the Act and are not unconstitutional. [City of Newark, 16 NJPER at 397. Citations deleted.]

Accordingly, the Board's contention that the expenditure of the Board's funds in favor of an employee on full-time release is contrary to public policy appears to be without merit. Should the Board wish to modify its arrangement with the Association regarding release time for Association officials, it may address such change at the appropriate time in collective negotiations.

Consequently, I find that the issue of paid release time for union officers is mandatorily negotiable. In this case, the parties have mutually agreed to a provision reflected in Article IV, F. of the collective agreement which provides for the full-time release of the Association President, or his/her designee, inclusive of certain elements of compensation to be borne by the Board. I further find that N.J.S.A. 18A:66-14.2a does not

preempt the negotiability of paid release time for union officers. Additionally, it appears that the Board has repudiated Article IV, F. of the collective agreement in violation of the Act. Consequently, I find that the Association has established a likelihood of success in a final Commission decision on its legal and factual allegations.

Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case. See State of New Jersey, I.R. No. 2011-23, ___ NJPER ___ (¶____ 2010); Caldwell Tp., I.R. No. 2000-12, 26 NJPER 193 (¶31078 2000); Essex Cty., I.R. No. 99-23, 25 NJPER 317 (¶30136 1999). I find that denying the Association President the release time required pursuant to Article IV, F. of collective agreement would constitute irreparable harm, since at the end of this case, the Commission could not formulate an adequate remedy that would allow the Association President to get the release time back. See Trenton Bd. of Ed., I.R. No. 2009-12, 34 NJPER 418 (¶129 2008), [lv. to app. den. App. Div. Dkt. No. AM-262-08T3 (1/9/09)]; Borough of Roselle, I.R. No. 2009-9, 34 NJPER 317 (¶115 2008); City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002); Parsippany Troy-Hills Bd. of Ed., I.R. No. 98-26, 24 NJPER 255 (¶29122 1998).

In weighing the relative hardship to the parties, I find that the scale tips in favor of the Association President, since he will be irreparably harmed absent the granting of full-time release. The Board merely returns to the status quo ante with respect to the manner in which the Association president was allowed to operate previously.

The public interest is not injured by granting interim relief in this case. The public interest is fostered by requiring the Board to adhere to the terms of the collective agreement into which it entered and to adhere to the tenets of the Act.

The above-captioned matter will proceed through the normal unfair practice processing mechanism.

Based upon the above, I issue the following:

ORDER

The Board is restrained from denying full-time release to the Association President during the term of the collective agreement. This interim order will remain in effect pending a final Commission order in this matter.


Stuart Reichman
Commission Designee

DATED: January 28, 2011
Trenton, New Jersey