

I.R. NO. 2014-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-2014-061

BERGEN COMMUNITY COLLEGE ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee grants an application for interim relief based upon an unfair practice charge filed by the Bergen Community College Administrators Association (BCCAA) against the Bergen Community College (BCC). The charge alleges that the BCC interfered with the processing of a Clarification of Unit Petition (CU Petition) after it promoted employees out of the BCCAA and subsequently did not allow the former BCCAA members to answer questionnaires and sign certifications based on their current job duties; the questionnaires were sent to them by the BCCAA in an effort to gather information so that the Commission could fully investigate the CU Petition.

The Designee found that the BCCAA had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and had established all the required elements to obtain interim relief.

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Appearances:

For the Charging Party, Selikoff & Cohen, PA, attorneys
(Keith Waldman, of counsel and on the brief, Kathleen
L. Kirvan, on the brief)

For the Respondent, Schepisi & McLaughlin, PA,
attorneys (John A. Schepisi, of counsel and on the
brief, R. Scott Fahrney, on the brief)

INTERLOCUTORY DECISION

On September 10, 2013, the Bergen Community College
Administrators Association ("BCCAA") filed an unfair practice
charge against the Bergen Community College ("BCC"), which was
accompanied by an application for interim relief, a
certification, a brief and exhibits. The charge alleges that the
BCC violated 5.4a(1), (2), (3), (4), (5) and (7) of the New
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.
("Act")^{1/} when it changed BCCAA member Director titles and later

^{1/} These provisions prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
(continued...)

"promoted" them out of the BCCAA. The charge further alleges that during the processing of a Clarification of Unit Petition ("CU Petition") before Public Employment Relations Commission ("Commission") regarding this issue, the BCC interfered with the process by not allowing the former BCCAA members to answer questionnaires and sign certifications forwarded to them by the BCCAA related to the processing of the CU Petition.

In pertinent part, the application seeks an Order directing that the BCC to allow the employees at issue ("employees") to voluntarily answer the questionnaires and sign certifications for use in the CU Petition and to not retaliate against any of the employees who comply with the BCCAA's request.

On September 12, 2013, I issued an Order to Show Cause specifying September 23 as the return date for argument via telephone conference call. The BCC filed a brief, a

1/ (...continued)
rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

certification of counsel and exhibits. The BCC responds that the employees in the CU Petition are managerial executives and confidential employees^{2/} and part of the BCC's "litigation control group." As a result, the BCCAA is not authorized to directly contact these employees since the CU Petition constitutes "litigation" between the parties. On the return date, the parties argued their cases in a telephone conference call.

FINDINGS OF FACT

The BCCAA is the exclusive majority representative of a bargaining unit consisting of mid-level managerial employees including the position of controller and approximately 20 different Director titles employed by the BCC. The parties'

^{2/} The Act covers all public employees except for elected officials, members of boards and commissions, managerial executives, and confidential employees. N.J.S.A. 34:13A-3(f) defines "managerial executives" as:

"[P]ersons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district."

N.J.S.A. 34:13A-3(g) defines "confidential employees" as:

"Employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties."

collective negotiation agreement ("CNA") expired on June 30, 2011; the parties are currently in negotiations for a successor agreement.

The BCC initially promoted certain BCCAA members to higher interim "Dean" and "Executive Assistant" titles and thereafter removed the interim status and informed the employees that they were no longer members of the BCCAA since they were now managerial executives and confidential employees and part of the BCC's litigation control group.

BCCAA filed a CU Petition on May 30, 2013, and an amended petition on June 20 which is pending before the Commission as Docket No. CU-2013-035.

After the CU Petition was filed, the assigned Commission representative requested a written statement of position from the parties.

As a result, the BCCAA requested that the employees complete a questionnaire regarding the changes to their job titles and duties since June 2013. Information provided in response to the questionnaires was to be used by counsel for the BCCAA to draft certifications that would be submitted to the Commission as part of the investigatory process in the CU Petition, which required both parties to submit written statements of their respective position concerning the proposed clarification of unit. The following questionnaire was sent to the employees:

1. Name:
2. Address:
3. Title before being told your position was changed to Interim.
4. Job duties before being told your position was changed to Interim.
5. Where you a supervisor before your position was changed to Interim?
6. If so, how many people did you supervise before your title was changed to Interim?
7. What are the names and job titles of the people you supervised before your title was changed to Interim?
8. Did the people you supervised before your title was changed to Interim belong to a bargaining unit? if so, what was the name of the bargaining unit?
9. In your position before you were given the title of Interim, were you allowed to discipline people outright, or were you only allowed to refer discipline issues to a superior?
10. What was the Interim title you were given?
11. Did your job duties change at all when you were given the Interim title? If so, how did your job duties change?
12. Did the people you supervised change after your title was changed to Interim? If so, explain the change.
13. If the people you supervised changed after you were given the title Interim, please provide the names and job titles of the people you supervised after your title was changed to Interim?
14. Did the people you supervised after your title was changed to Interim belong to a bargaining unit? If so, what was the name of the bargaining unit?
15. In your position after you were given the title of Interim, were you allowed to discipline people

- outright, or were you only allowed to refer discipline issues to a superior?
16. On June 27, 2013, were you notified that your Interim position was changed to permanent?
 17. If you were not notified on June 27, 2013, how did you find out your Interim position became permanent?
 18. Were you told that as a result of your new permanent title that the College considered you an "at will" employee?
 19. Did you receive a unilateral 2% per year raise as a result of your new permanent title?
 20. Were you asked by the College if you wanted to continue your union affiliation in your new permanent title?
 21. Did your job duties change when you were given your permanent title? If so, explain how they changes [sic].
 22. Do you still supervise people in your permanent title?
 23. What are the names and job titles of the people you supervise in your permanent title?
 24. In your permanent title, are you allowed to discipline people outright, or are you only allowed to refer discipline issues to a superior?

After the BCC discovered that the BCCAA was asking the employees to complete questionnaires, the BCC, through its Executive Director for Human Resources, Jim Miller, sent an email to the employees who had been contacted stating the following:

This information is directed to any member of the leadership forum who has received a questionnaire asking for your input on changes in your job responsibilities since your promotion. Please be advised that you are not to release any such information since there is pending litigation between BCC and BCC Administrators' Association and some of

you are part of the litigation control group. Please advise me immediately if you have replied to the questionnaire. Any such information should be returned forthwith. Thank you.

CONCLUSIONS OF LAW

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. DeGioia, 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).

The Commission's representation proceedings are designed to resolve disputes concerning the representational status of public employees. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). A CU Petition filing requires, among other information, that the petitioner provide a statement listing and explaining

fully the reasons for the proposed clarification.^{3/} CU Petitions are typically resolved by the Director of Representation based upon an administrative investigation.^{4/} Administrative hearings are only rarely conducted. Hunterdon Cty, P.E.R.C. No. 2010-36, 35 NJPER 433 (¶142 2009) (Commission has "a consistent policy of resolving representation questions after administrative investigations unless substantial and material facts are in dispute.").^{5/}

3/ N.J.S.A. 19:11-1.5 Petition for clarification of unit, provides in pertinent part:

"(b)3. A statement by petitioner listing and explaining fully the reasons for the proposed clarification. The reasons may include:

- i. Changed circumstances;
- ii. Creation of a new position or title;
- iii. Dispute over a title in a newly certified/recognized negotiations unit;
- iv. New operation or facility;
- v. Statutory exclusions;
- vi. Any other reasons why the petition is appropriate;"

4/ N.J.A.C. 19:11-2.2 Investigation of petition provides:

"(a) Upon the filing of any petition, the Director of Representation shall investigate the petition to determine the facts.

(b) The Director of Representation shall determine whether or not a valid question concerning the representation of employees exists in a prima facie appropriate unit."

5/ N.J.A.C. 19:11-2.6(f) provides that a hearing shall be conducted:

(continued...)

Although the BCC argues that the employees are exempted from the Act because the BCC believes that they are managerial executives and confidential employees, that issue is the final determination that will be made by the Director of Representation after the administrative investigation is concluded or after a hearing if necessary as set forth above. It should be noted that the BCC has the right to make those assertions and to provide any evidence that it deems relevant to its position during the administrative investigation or hearing.

With respect to the BCC argument that the employees are members of its litigation control group,^{5/} I find that the Legislature specifically empowered the Commission to conduct representation proceedings,^{2/} that the administrative proceedings in this matter do not constitute litigation or potential

^{5/} (...continued)

"1. If it appears to the Director of Representation that substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing; or
2. If it appears to the Director of Representation that the particular circumstances of the case are such that, in the exercise of reasonable discretion, the Director determines that a hearing will best serve the interests of administrative convenience and efficiency."

^{6/} In support of its position, the BCC cites Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 90 (App. Div. 2001) (civil case involving personal injury litigation); R.P.C. 1.13 Organization as the client; and R.P.C. 4.2 Communication with Person Represented by Counsel.

^{7/} See N.J.S.A. 34:13A-5.1 and 5.2.

litigation^{8/} as contemplated by the case law cited by the BCC or by R.P.C. 1.13 or R.P.C. 4.2, and that the Commission relies on the information supplied by the parties in order to begin the administrative investigation as set forth above.

I find that the questionnaires sent by the BCCAA to the employees (in order to file its written statement of position) was an effort to obtain the type of information that the Director of Representation requires in order to adequately investigate and ultimately decide the CU Petition.

Based on the foregoing, I find that the BCCAA has demonstrated a substantial likelihood of success in a final Commission decision. The BCCAA has also established irreparable harm. As a result of the BCC's actions in not allowing the employees to answer the questionnaires, the Commission's ability to efficiently begin the administrative investigation and to carry out its mandate from the Legislature has been thwarted and the status of the employees has been placed in limbo.

Next, in deciding whether to grant interim relief, the relative hardship to the parties must be considered and a determination made that the public interest will not be injured by the interim order. Crowe. I find that the relative hardship

^{8/} The BCC has also cited the Official Comment to R.P.C. 4.2 by the New Jersey Supreme Court (November 17, 2003), which states in part, "The term "litigation control group" is not intended to limit the application of the rule to matters in litigation."

to the parties weighs in favor of the BCCAA as they cannot provide the required information to the Commission in furtherance of the CU Petition and the information requested by the BCCAA could be obtained in the end by the Commission in any event through its investigative powers.^{2/}

Finally, in considering the public interest, as set forth above, the Legislature has specifically empowered the Commission to resolve representation issues, and as a result, I find that it is in the public interest to allow the parties to furnish required information to the Commission so that representation matters can be resolved as quickly and efficiently as possible; labor stability between the parties promotes the public interest.

Based on the above, I find that the BCCAA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The application for interim relief is granted as set forth in the Order. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

^{2/} The BCC acknowledges in its brief that the Commission could obtain the required information to decide the CU Petition through its subpoena power.

ORDER

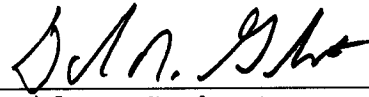
The application for interim relief is granted as set forth below:

1. The BCCAA is authorized to resubmit the above referenced questionnaire to the employees in furtherance of the CU Petition administrative investigation;

2. The employees will have the ability to voluntarily answer the questionnaire and/or provide a certification; and,

3. The BCC shall not interfere with the employees' ability to receive and answer the questionnaire and/or provide a certification and will not retaliate against any of the employees who comply or do not comply with the BCCAA's request.

The unfair practice charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.



David N. Gambert
Commission Designee

DATED: October 11, 2013

Trenton, New Jersey