I.R. NO. 2021-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

QUEEN CITY ACADEMY CHARTER SCHOOL,

Respondent,

-and- Docket No. CO-2020-285

QUEEN CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee determines that the Charging Party has a substantial likelihood of succeeding on allegations that a public employer has refused to negotiate in good faith for an initial collective negotiations agreement, violating section 5.4a(5) of the Act. The negotiations have occurred for more than four years and have proceeded through mediation, fact finding and super conciliation.

The Designee orders the public employer to negotiate in good faith with the majority representative, in frequency and duration established by the super conciliator assigned to the matter by the Director of Conciliation.

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Appearances:

For the Respondent,
Scarinci Hollenbeck, LLC attorneys
(Ramon E. Rivera, of counsel)

For the Charging Party,
Bergman and Barrett, attorneys
(Michael T. Barrett, of counsel)

INTERLOCUTORY DECISION

On May 11, 2020, Queen City Education Association (Association) filed an unfair practice charge against Queen City Academy Charter School (Charter School). The charge alleges that the Charter School has failed to negotiate in good faith for a collective negotiations agreement. It alleges that the parties have been "negotiating" an agreement for almost five years; they proceeded to impasse, mediation, a fact-finder's report and to the assignment of a super conciliator in June, 2019. The charge alleges that since January, 2020 [under the auspices of the super conciliator], each time the parties, ". . . seemingly reach a resolution, the [Charter School] would dispute an issue

previously agreed to between the parties." It alleges that the parties agreed to accept the fact finder's recommendation ". . . on a number of issues and despite that agreement, the Charter School, ". . . objected to the agreed-upon item, even though it was [set forth] in the fact finding report." Finally, the Association alleges that a previous charge it filed against the Charter School (Dkt. No. CO-2020-038) was withdrawn, based on an agreement by the Charter School to provide certain information that hasn't been "fully provided." The charge alleges that the Charter School's conduct violates section 5.41(4) (5) and (7)[1/]. of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34: 13A-1, et seq. (Act).

On July 10, 2020, the Association filed an application for interim relief, a proposed Order to Show Cause, a certification and brief. The Association seeks an order compelling the Charter School to continue negotiations in good faith, ". . . and without delay," more specifically to return to negotiations within ten days.

1/ These provisions prohibit public employers, their representatives or agents from: (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

The Commission staff agent to whom the case was initially assigned engaged the parties in follow-up conferences and discussion on July 29, 2020, August 21 and 27, 2020 and September 30, 2020. Prearranged telephonic conferences for September 8, 2020 and October 7, 2020 were aborted.

On October 16, 2020, I issued an Order to Show Cause, specifying November 17, 2020 as the return date for argument in a telephone conference call. I also directed the Charter School to file a response by November 4, 2020, together with proof of service upon the Association. On the return date, the parties argued their cases. The following facts appear.

I take administrative notice of the Certification of Representative issued to the Association on June 15, 2015, for a collective negotiations unit of "all regularly employed non-supervisory certificated and non-certificated employees." Queen City Charter School, D.R. No. 2015-11, 42 NJPER 82 (¶22 2015). (Over Charter School's objection, Director determines that the Association submitted a sufficient number of valid authorization cards to certify it as the exclusive representative).

I take administrative notice of Queen City Academy Charter School, D.R. No. 2017-5 43 NJPER 164 (¶49 2016) (Director grants Association's request to block processing of a decertification petition, based on allegations in unfair practice charges that the Charter School, specifically Director Danielle West, sought

to interfere with the Association's relationship with its membership by acts of intimidation and humiliation (Dkt. No. CO-2016-200) and systematically intimidated and harassed specified Association officers; engaged in an unlawful captive audience address to unit employees; issued a strategic plan for 2015-2020 citing unionization as a threat; and directed guidance counselors to recruit Association members to join a decertification petition (Dkt No. CO-2017-007)).

I take administrative notice of Queen City Academy Charter School, H.E. No. 2017-6, 43 NJPER 380 (¶109 2017) (Hearing Examiner finds that Charter School unlawfully reprimanded the Association president; Director Danielle West unlawfully responded to an email sent to Association members by the Association president; unlawfully invited an organization opposed to the Association to address the staff during a mandatory professional development day; unlawfully excluded Association representatives from a PEOSHA inspection of school premises; tacitly and unlawfully approved and encouraged employees to support the decertification of the Association; and the Charter School Board of trustees unlawfully released a 2015-2020 strategic plan designating unionization as a threat to the objectives and goals of the Charter School, violating section

5.4a(1) and (3)[2/] of the Act. The Hearing Examiner recommended dismissing other allegations of unlawful reprimands of Association representatives and an unlawful denial of a merit bonus to an Association representative. As a remedy, the Hearing Examiner in part recommended the dismissal of the petition to decertify the Association as majority representative (Dkt. No. RD-2017-001)).

Collective negotiations among the parties began in May, 2016. In 2017 and for most of 2018, the parties, while at impasse, were engaged in mediation with the assistance of a Commission mediator. The matter proceeded to fact finding: in May, 2019, a fact finder's report issued that the parties "accepted." Despite such acceptance, the Charter School subsequently rejected unspecified provisions of the report. In June, 2019, a super conciliator was appointed. In January, 2020, a super conciliator salary guide and certain other contractual provisions were mutually agreed-upon by the parties (certification of Maryanne Rodriguez, NJEA representative and member of Association negotiating team since May, 2016).

2/ 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 the act.

In January, 2020, the Association believed that the only remaining issues to be negotiated were "staff bonuses" and the status of paraprofessional positions. In March, 2020, the Charter School requested a "written clarification" of unspecified issues in the fact-finding report. In April, 2020, the Charter School eliminated paraprofessional positions. In May, 2020, Charter School Counsel advised the super conciliator that the Charter School Board of Trustees will not sign a collective negotiations agreement. In June, 2020, the Charter School's chief school administrator sought to resolve the outstanding "bonuses" issue outside the context of formal collective negotiations, an effort that the Association refused. In the same month, the Charter School again refused to sign a collective negotiations agreement and refused to pay unit employee salaries it had agreed to pay. On June 25, 2020, the Charter School Administrator advised the Charter School Board of Trustees in a Board meeting that she will not negotiate with the Association, nor permit the Charter School negotiations team to negotiate until September, 2020 (Rodriguez certification).

During argument in the OSC conference call, the Association Counsel represented that no negotiations sessions among the parties have occurred from September through November, 2020. Also during argument, both Counsel concurred on a discrepancy of about $87,000 on the scattergram to which the parties agreed

during fact-finding in 2018. Stated another way by Counsel, the parties continue to dispute whether the proposed agreement includes $1,700,000 or $1,800,000 for its duration and whether paraprofessionals (rehired, apparently) are included in the collective negotiations unit.

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. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer 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).

In State of New Jersey, E.D. No. 79, NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976), the Commission wrote:

> . . . A determination that a party has refused to negotiate in good faith will depend on an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the Respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an

> agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [1 NJPER 40]

It also recognized that the duty to negotiate in good faith is not inconsistent, ". . . with a firm position on a given subject." Hard bargaining is not necessarily inconsistent with a desire to reach an agreement," An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith." Id., 1 NJPER at 40.

It appears that the Association has a substantial likelihood of prevailing in a final Commission decision on its 5.4a(5) allegations. The sheer length of time the parties have been in negotiations for an initial agreement, together with the Charter School's changing negotiations positions, despite the serial assistance of three professional neutrals (providing mediation, fact-finding and super conciliation services over four years) connotes intentional delay. See N.J.S.A. 34:13A-34, 35, 36; N.J.A.C. 19:12-3.1-4.4. During this period, the Charter School hasn't apparently designated agents with sufficient negotiating authority; it withdrew from provisions to which it had agreed or raised hyper-technical concerns to the same effect; and arbitrarily determined its willingness to schedule negotiations sessions. These are indices of unlawful "surface bargaining." Atlanta Hilton and Tower, 271 NLRB 1600, 171 LRRM 1224 (1984).

Also, the uncontested certification reveals that the Charter School has refused to negotiate in fact. It also appears from Charter School Counsel statement(s) during argument in this matter that the Charter School contests whether paraprofessionals are included in the unit. The Commission has so certified their inclusion for purposes of representation. All these circumstances demonstrate ". . . a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement." State of New Jersey.

I also find that the Charter School's avoidance causes irreparable harm to the Association and to the negotiations process. "Harm becomes irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-133. In New Jersey Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425 (¶13197 1982), a Commission Designee observed that an employer's apparent dealing with a minority organization over terms and conditions of employment unlawfully undermined the majority representative, and caused irreparable harm:

> . . .[R]elief provided at the terminal point of an unfair practice charge proceeding cannot remedy the loss of prestige and power the exclusive representative suffers during the time another organization is permitted to act on behalf of unit employees concerning terms and conditions of employment. [8 NJPER at 428]

In this matter, the Charter School's sustained and apparently unlawful refusal to negotiate in good faith also negatively

implicates the Association's power and prestige as the majority representative to achieve a collective negotiations agreement. Awaiting the terminal point of this unfair practice proceeding shall only exacerbate the Association's sufferance.

The parties have also proceeded through all regulatory phases of the Commission's negotiations impasse process without achieving an agreement. N.J.A.C. 19:12-3.1, et al. Allowing the Charter School to await a final determination on the charge shall further undermine that process, unduly delay current negotiations, unjustifiably delay the attainment of negotiated terms and conditions and have an adverse impact on the parties' ability to negotiate future agreements. It is apparent that the Charter School's conduct has a chilling effect on employee rights guaranteed by the Act. See Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978).

In considering the public interest and relative hardship to the parties, I find that the public interest is furthered by adherence to the tenets of the Act mandating parties to negotiate in good faith to reach and sign a collective negotiations agreement. Maintaining collective negotiations in good faith results in labor stability, thereby promoting the public interest. In assessing relative hardships, I find that the Charter School experiences no hardship by complying with its obligation to negotiate in good faith under the Act. Association

unit employees experience hardship when their collective interest cannot be lawfully advanced in negotiations.

ORDER

Queen City Academy Charter School is ordered to prospectively negotiate in good faith with the Queen City Education Association at such intervals, pursuant to the guidance and/or authority of the assigned super conciliator with the goal of achieving a collective negotiations agreement with the Association for a stated term. Negotiators on behalf of the Charter School shall have sufficient authority to reach an agreement on outstanding negotiable issues, subject to any required ratification by the Charter School Board of Trustees. The parties shall continue good faith negotiations at such times and durations as directed by the super conciliator until an agreement is achieved.

The case shall be returned to normal processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: November 25, 2020
Trenton, New Jersey