

D.R. NO. 2018-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

ACADEMY URBAN LEADERSHIP CHARTER
HIGH SCHOOL,

Public Employer,

-and-

Docket No. RD-2018-001

ACADEMY URBAN LEADERSHIP
EDUCATION ASSOCIATION,

Intervenor,

-and-

KRYSTAL HARGRAVE, et al.,

Petitioner.

SYNOPSIS

The Director of Representation finds that a request to block a decertification election among all regularly employed non-supervisory Department of Education certified employees employed by the Academy Urban Leadership Charter High School is not supported by sufficient evidence to block the election while litigation of two unfair practice charges ensues. The Director found an absence of documentary evidence demonstrating a nexus between the Academy's decision to lengthen the 2015-2016 school year by two days and the conduct of a free and fair election in 2017. Further, the Director found an absence of facts to support the contention that the voters' freedom to choose a majority representative would be influenced by the allegedly hostile conduct of the Academy's representative at a negotiations sessions. As such, the Director orders that a secret mail ballot election be conducted.

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Appearances:

For the Public Employer,
Jackson Lewis, P.C., attorneys
(James Gillespie, of counsel)

For the Intervenor,
Oxford Cohen, P.C., attorneys
(Gail Oxford Kanef, of counsel)

For the Petitioner,
Krystal Hargrave

DECISION

On July 24, 2017, Krystal Hargrave (Petitioner) filed a representation petition (Docket No. RD-2018-001), seeking to decertify the Academy Urban Leadership Education Association (Association) as the majority representative of a collective negotiations unit of sixty-three (63) "regularly employed non-

supervisory Department of Education certified employees including teachers, nurses, guidance counselors, and child study team members employed by the Academy for Urban Leadership Charter School" (Academy). The petition is timely and accompanied by an adequate showing of interest among unit employees. N.J.A.C. 19:11-1.3; 2.8. The Association has intervened in this matter, based on its current status as the majority representative. N.J.A.C. 19:11-2.7. The Association was certified as majority representative on June 1, 2016 (Docket No. RO-2016-041). There is no dispute as to the unit description or the appropriateness of the petitioned-for unit.

The Association refuses to consent to an election, asserting that its pending unfair practice charges against the Academy, filed on October 25, 2016 (Docket No. CO-2017-090), and May 22, 2017 (Docket No. CO-2017-257) should block further processing of the petition.^{1/} The October 25, 2016 charge alleges that the Academy violated 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act (Act)^{2/} by making a "unilateral change" in

1/ The Association further asserts that its Petition of Appeal filed with the Commissioner of the State of New Jersey Department of Education (Docket No. EDU-005990-2017S) should also block further processing of the petition. As the Commission's jurisdiction does not extend to Department of Education matters, our review here will be limited to the two unfair practice charges filed with the Commission, Docket Nos. CO-2017-090 and CO-2017-257.

2/ These provisions prohibit public employers, their
(continued...)

"the school calendar such that staff members were scheduled to work until June 30, 2016" instead of the previously scheduled end date of June 28, 2016" in "retaliation against the school employees for having filed a representation petition."

The May 22, 2017 charge (Docket No. CO-2017-257) alleges that the Academy violated 5.4a(1), (3) and (5) of the Act^{3/} by engaging in threatening and intimidating behavior against Association representatives, and cutting negotiations short during collective negotiations on May 18, 2017.

We also take administrative notice of the pendency of a third charge filed by the Academy against the Association on October 3, 2017 (Docket No. CE-2018-005). In this charge, the Academy alleges that the Association violated 5.4b(2), (3) and (5)^{4/} of the Act due to the actions of NJEA UniServ Field

2/ (...continued)
representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . [and] (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."

3/ Section 5.4a(5) of the Act prohibits public employers, their representatives or agents from "[r]efusing 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."

4/ Section 5.4b(2), (3) and (5) of the Act prohibit employee organizations, their representatives or agents from
(continued...)

Representative Brian Furry's conduct at the May 18, 2017 negotiations session. Specifically, the Academy alleges that Furry became "defensive and hostile," and used "derogatory, belligerent, ethnically offensive and demeaning terminology" directed towards Dr. Nestor Collazo, the Academy's representative at the negotiations session, leading to the termination of negotiations.^{5/}

On September 18, 2017, we advised all parties that the Association seeks to block processing of the petition until its charges can be fully litigated and invited the Association to submit its position statement, accompanied by documentary evidence, to support its allegations and to establish a nexus

4/ (...continued)
"[i]nterfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances," "[r]efusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit," and "[v]iolating any of the rules and regulations established by the commission."

5/ The Academy also notes that on October 24, 2016, "before a single negotiation session was held, and just thirteen work days after submitting its 66 pages of initial proposals," the Association filed a Notice of Impasse with the Commission (Docket No. I-2017-051). In response to the Notice of Impasse, we responded by stating that the Notice was premature, as "no issue has been resolved and that every single issue in [the initial] contract would need to be mediated."

between the alleged unfair practices and the preclusion of a free and fair election.

On September 25, 2017, the Association submitted a position statement together with a certification from Brian Furry, New Jersey Education Association UniServ Field Representative for the Association, in support of its request to block an election. On September 26, 2017, we advised all parties that we had received the Association's request to block processing of the petition until its charges can be fully litigated, as well as the Association's position statement, accompanied by documentary evidence, to support its allegations and to establish a nexus between the alleged unfair practices and the preclusion of a free and fair election. In the same letter, we invited responsive submissions from the Petitioner and the Academy to be submitted by October 4, 2017.

On October 3, 2017, the Petitioner filed a submission opposing the Association's blocking request. On October 4, 2017, the Academy filed a position statement together with certifications from James J. Gillespie, counsel to the Academy, and Johnny Rosa, Academy Business Administrator, denying the allegations as set forth in the charges and opposing the blocking request.

In its position statement, the Association asserts that because of the two unfair practice charges and "the numerous acts

to threaten and intimidate the Association members, the membership cannot have a fair election at this time and the charges and litigation must block the pending representation petition."

In support of the Association's blocking request, Furry certifies that he assisted the Association with the filing of a representation petition in March 2016 that led to the certification of the Association as majority representative on June 1, 2016 (Docket No. RO-2016-041, filed on April 4, 2016). Furry certifies that since the filing of the March 2016 representation petition, "there have been numerous instances in which the employer has engaged in unfair practice behavior," and as such, it is his opinion that "the members of the bargaining unit in question cannot have a fair and free election in connection with" the instant representation petition.

Furry certifies that the Association filed its October 2016 unfair practice charge, which alleged that the Academy "had changed the school calendar in retaliation for the Association having filed" its representation petition to be certified as majority representative. A Complaint was issued in this matter on March 28, 2017. Furry notes that although the Academy filed a motion for summary judgment on that charge, the Commission denied the motion on August 18, 2017. Furry also certifies that "comments made by administration to employees who asked about the

change in the calendar from June 28 to June 30" are "[p]articularly relevant to the issue of employee inability to have a fair and free election." Specifically, Furry certifies that "the Lead Person, essentially the Superintendent of the [Academy], told employees the calendar was changed, not for educational reasons, but essentially that the calendar was changed simply because the school could do so." Furry also certifies that "the Association believes the [Academy] falsified a school calendar purportedly voted upon in 2015 setting June 30 as the last day of school in 2016." Furry certifies that this "demonstrates the anti-union animus of this employer and the lengths to which it will go to oust the union." Thus, Furry certifies that "not only the conduct of changing the calendar, but the behavior of the administrator when confronted about it demonstrates the threatening and intimidating behavior" of the Academy and "the reason the Association cannot have a fair election unless and until" the October 25 charge is resolved.

With regard to the May 2017 charge, Furry certifies that on May 18, 2017, representatives of the Academy and the Association met to discuss negotiations. Furry certifies that he and Association President James O'Brien were present at that meeting on behalf of the Association, and that James Gillespie, counsel for the Academy, Nestor Collazo, Lead Person for the Academy, and

two members of the Academy's Board were present on behalf of the Academy.

Furry certifies that during the meeting, the discussion became heated, and a member of the Board named Ernesto threatened to assault Furry by saying, "be lucky I don't smack you in the face." Furry also certifies that Nestor Collazo "threw a pen across the table at me and came across the table to my side of the table, standing too close to me and pointing his finger in my face using threatening language." Furry certifies that Collazo "called me a punk and kicked me out of the negotiations session." Furry further certifies that "[t]his behavior was clearly for the purposes of intimidating and harassing me and particularly the Association President, James O'Brien."^{6/}

As an exhibit to the Furry Certification, the Association includes a Certification of Anthony Massaro, who certifies that he was employed as an administrator by the Academy for part of the 2014-15 school year, and part of the 2015-16 school year. Massaro certifies that he "remember[s] that June 30 was not

^{6/} With regard to the matter pending before the Department of Education, Furry certifies that the Academy has overcharged the approximately 50 Association members a total of more than \$19,000 for health insurance benefits, that the Academy has "refused to sit down with the Association to discuss the numbers," and that the Academy "has forced the Association to proceed before the Commissioner of Education to recoup almost \$20,000 owed to its members." As the Commission does not have jurisdiction over Department of Education matters, these allegations will not be considered here.

listed as the last day for staff on the 2015-16 school year calendar that was hanging in my office," and that although he does "not recall the exact last day for staff for the 2015-16 school year," he knew it was "before June 30." Massaro certifies that he "had a personal scheduling commitment at the end of June 2016," and he "noted that [he] was available at the end of June after referring to the calendar." Massaro certifies that he severed his employment in March 2016, but that prior to resigning, he "was never informed that the calendar was being changed so that the last day for staff was June 30, 2016."

Also attached as an exhibit to the Furry Certification is the Certification of Christopher Tereshko, who certifies that he was employed as a teacher at the Academy from November 2011 to February 2017. Tereshko certifies that in the 2015-2016 school year, he was the "lead organizer" for the Association who "collected cards from other employees and communicated with other employees about the status of the campaign." Tereshko certifies that "the typical academic year calendar required teachers to come into work for approximately two days after the June graduation ceremony," and to his knowledge, "prior to the 2015-2016 school year, the last day for teachers was never as late as June 30." Tereshko also certifies that "[t]he calendar for the 2015-16 school year was available online on the [Academy's]

website at the beginning of the 2015-16 school year," and that it contained the following dates:

June 23	Last Day for All Students NHS inductions 5-6:30 pm Award Night 6:30pm-All Students
June 24	Tentative Graduation/Proj. Grad
June 28	Last Day for Staff
June 30	Final Year Grades Posted/SumSchlNotice

Tereshko further certifies that this calendar "contains the notation 'BOARD APPROVED 5/26/15,'" and Tereshko attaches a copy of this calendar including this information to his certification as Exhibit A.

Tereshko certifies that the "Association filed a petition seeking a card check representation election on or about March 31, 2016," and that "[o]n or about May 9, 2016, the Association was notified by a staff member that the calendar had been changed and that June 30 was now listed as the last day for staff." Tereshko also certifies that at a staff meeting on May 9, 2016, "the lead administrator Dr. Collazo" was asked "why the calendar had been changed and when was the staff going to be notified about the change," and "Dr. Collazo responded that the contracts stated that the staff members worked until June 30 and that we would be working until June 30."

Petitioner Krystal Hargraves submitted a document that sets forth no facts that are based upon her personal knowledge.

In its position statement, the Academy asserts that the Association's blocking request should be denied because the

Association has failed "to establish the required nexus between the alleged conduct underlying its two unfair practice charges" and its Department of Education appeal, and "the preclusion of a free and fair election."

In support of the Academy's opposition to the Association's blocking request, Academy counsel James Gillespie certifies that "[a] collective negotiations session between the [Academy] and Association was held on May 18, 2017," and during that meeting, "it was Furry who became defensive and hostile, particularly toward the Hispanic members of the negotiating committee." Thus, in response to "Furry's offensive behavior, on September 29, 2017, [the Academy] also filed its own unfair practice charge against the Association relating to Furry's conduct at the May 18, 2017 negotiations session." Gillespie further certifies that "[t]o date, and despite numerous negotiations sessions between the Association and [the Academy], the Association has not yet made a full set of proposals to the [Academy]" regarding "salary guide, extra service compensation guide, and health insurance benefit levels."

Johnny Rosa certifies that he has been the Business Administrator for the Academy since August 24, 2016. Rosa certifies that former Association President James O'Brien "resigned from [the Academy] and moved overseas shortly after the May 18, 2017 negotiations session."

ANALYSIS

The Commission's policy is to expedite the processing of representation disputes so that the question of whether employees will be represented by either competing organizations, or no organization, can be resolved by the Commission's secret ballot election mechanism. Berkeley Tp., D.R. No. 2009-6, 34 NJPER 422, 423 (¶131 2008).

The filing of an unfair practice charge or issuance of an unfair practice complaint will not automatically block the processing of a representation petition. A blocking charge procedure is not required by the Act nor by the Commission's rules. The decision whether an unfair practice charge will block the processing of a representation petition lies within the Commission's discretion. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981).

The legal standard for determining whether an unfair practice charge should block the processing of a representation petition was set forth in State of New Jersey, and reaffirmed in Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1988). The charging party must first request that the charge block the representation proceeding. It must also submit documents showing that the conduct underlying the unfair practice prevents a free and fair election. The Director of Representation will exercise discretion to block if under all of

the circumstances, the employees could not exercise their free choice in an election. See Atlantic City Convention & Visitors Authority, D.R. No. 2002-9, 28 NJPER 170 (¶33061 2002); Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following substantive factors in evaluating whether a fair election can be conducted during the pendency of an unfair practice charge:

The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; a showing of interest, if any, presented in the [representation] case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5] [7 NJPER at 109.]

In applying these factors to a blocking request, we carefully evaluate the certifications and documentary evidence presented in support of a blocking request to determine whether the evidence is competent and based on the affiant's personal knowledge.

River Vale Bd. of Ed., D.R. No. 2014-3, 40 NJPER 133 (¶50 2013); County of Monmouth, D.R. No. 92-11, 18 NJPER 79 (¶23034 1992); Leap Academy Charter School, D.R. No. 2006-17, 32 NJPER 142 (¶65 2006); Atlantic City Convention and Visitors Auth, supra.

Additionally, timely representation petitions filed when no current contract is in place, effectively prevents the employer from lawfully continuing negotiations with the incumbent organization until the representation dispute is resolved. Leap Academy Charter School, D.R. No. 2006-17, 32 NJPER 142 (¶65 2006); County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). Therefore, we are cautious about permitting an unfair practice charge to block a representation petition. Ridgefield Board of Education, D.R. No. 2012-6, 38 NJPER 246 (¶82 2012).

Furthermore, N.J.A.C. 19:11-2.8(b) provides:

Where there is a certified or recognized representative, a petition for certification or decertification will not be considered timely filed if during the preceding 12 months an employee organization has been certified by the Commission as the exclusive representative of employees in an appropriate unit . . .

On June 1, 2016, the Association was certified as the majority representative of the petitioned-for unit. Thus, all of the conduct set forth in the charges have allegedly occurred during the "certification year," a period of time intended to permit a "new" majority representative and public employer to negotiate collectively without diversion from that goal. See, e.g., NLRB v. Lexington Cartage Co., 113 LRRM 3778 (6th Cir. 1983). Also, for purposes of deciding the blocking effect of the charge, we assume the veracity of the statements within the certifications

submitted by both parties. Ridgefield Board of Education, D.R. No. 2012-6, 38 NJPER 246 (¶82 2012).

Applying these legal standards, I cannot conclude that the conduct alleged in the Association's charges will interfere with a free and fair election. The Association's contention that the Academy engaged in improper activities in an attempt to retaliate against Association members, and to threaten and intimidate employees from supporting the Association, demonstrating a pattern of anti-union behavior by the Academy that would affect voter free choice is not supported by evidence.

With regard to the October 25, 2016 charge (Docket No. CO-2017-090), in which the Association alleges that the Academy extended the 2015-2016 school year by two days, Tereshko certified that the calendar was changed on or about May 9, 2016. Therefore, this calendar change allegedly occurred after the filing of the Association's representation petition seeking certification on April 4, 2016 (Docket No. RO-2016-041), but before the Association was certified as the majority representative on June 1, 2016. Although the Academy has not provided a business justification for this calendar change, the Association has not alleged facts demonstrating a nexus between the previously unannounced and unilateral May, 2016 decision to lengthen the 2015-2016 school year by two days and the conduct of a free and fair election in the summer of 2017. Furry's

conclusory statements, which are not based upon his personal knowledge cannot provide that nexus. See Berlin Tp., D.R. No. 2011-3, 36 NJPER 379 (¶148 2010)(Director refused to consider evidence from individuals who lacked personal knowledge of events.)

The Association's May 22, 2017 charge (Docket No. CO-2017-257), arises out of the alleged conduct of Academy representatives at the May 18, 2017 negotiations session. The Academy has filed its own unfair practice charge (Docket No. CE-2018-005) alleging violations of the Act by Furry, an Association representative, in the same negotiations session.

The parties met on January 26, 2017. No facts indicate what progress, if any, was achieved in that session. The Commission has held that in negotiations sessions, ". . . passions run high and epithets and accusations may ensue so courts have refused to impose a 'rigid standard of proper and civilized behavior' on participants and have allowed leeway for adversarial and impulsive behavior." State of New Jersey (Dept. of Treasury) and CWA, P.E.R.C. No. 2001-51, 27 NJPER 167, 173 (¶32056 2001); Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970).

I do not find that the Association has submitted facts indicating that the actions of the Academy's representative at the May 18, 2017 negotiations session would interfere with or

would reasonably tend to interfere with the free choice of voters in an election. For example, no facts indicate the number of negotiations sessions conducted or whether any were conducted, scheduled or cancelled before or after the May 18, 2017 session, other than the January 26, 2017 session. No facts have been alleged suggesting that the membership was informed of the verbal altercation at the May 18, 2017 session. In the absence of any facts indicating that the Academy representative's conduct at the May session threatened the parties' ability or willingness to continue negotiations on a future date, I would have to blindly infer that the spoken threats and epithets reasonably tended to interfere with the voters' free choice in an election. I decline to do so.

Thus, no facts were submitted showing how the voters' freedom to choose a majority representative would be influenced by the addition of two days to the 2015-2016 school calendar, or by allegedly hostile behavior at the May 18, 2017 negotiations session.

For these reasons, I cannot conclude that the charges filed by the Association warrant a delay in conducting a secret ballot election. The right of unit employees to elect a majority representative of their choosing, or no representative at all, is paramount. Delaying the election for a significant period of time while the charges are litigated would not serve the

representational interests of the employees. I have determined that the unfair practice charges filed by the Association should not block the conduct of an election in this case. The charges will otherwise be processed in accordance with N.J.A.C. 19:14-1.6.

ORDER

An election is hereby directed among the employees in the following unit:

Included: All regularly employed non-supervisory Department of Education certified employees including teachers, nurses, guidance counselors, and child study team members employed by the Academy for Urban Leadership Charter High School.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft, police, casual employees, and all other employees employed by the Academy for Urban Leadership Charter High School.

Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, and including those in the military service. Employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date are ineligible to vote. Employees in the unit described above shall vote to determine whether they want to continue to be represented by Academy Urban Leadership Education Association.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the name and address of each eligible voter and his or her job title. The eligibility list must be received by us **no later than November 30, 2017**. A copy of the eligibility list shall be simultaneously provided to both the Association and the Petitioner with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Ballots will be mailed by the Commission to eligible voters in the unit on **December 12, 2017**. Any employee who believes he or she is eligible to vote in this election and does not receive a ballot in the mail by **December 19, 2017** should contact the Commission at (609) 292-6780 immediately if they wish to participate in this election. Ballots must be returned to the Commission's Post Office Box by 9:00 a.m. on **January 12, 2018**. The ballots will be counted at 10:00 a.m. on **January 12, 2018** at the Commission's Trenton Office, 495 West State Street, Trenton, New Jersey. The election shall be conducted in accordance with the Commission's rules.

/s/ Daisy B. Barreto
Acting Director of
Representation

DATED: November 21, 2017
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by December 4, 2017.