P.E.R.C. No. 78-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-284

MARK PRESS and RIDGEFIELD PARK
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In an Interlocutory Decision following a Show Cause hearing the Special Assistant to the Chairman, on behalf of the Commission, denies a request for interim relief during the pendency of an unfair practice case. The Association and Mark Press had sought to enjoin the Board from proceeding to litigate tenure charges involving Press presently before the Commissioner of Education, pending P.E.R.C.'s determination of the propriety of Press' conduct and the protected nature of the activities complained of in the Board's certification of charges against Press. After applying the two standards that have been developed by the Commission for evaluating the appropriateness of interim relief -- the substantial likelihood of ultimate success on the legal and factual allegations and the irreparable nature of the harm that will result if interim relief is not granted -- the Special Assistant concluded that the facts of this case did not warrant such extraordinary relief. Since the Commission has not yet determined in any comprehensive fashion what the parameters of "protected activity" under the New Jersey Employer-Employee Relations Act are it would not be appropriate to predict the outcome of such a significant policy question in an interim proceeding. The Special Assistant also determined that there were substantial and material disputed factual issues relating to whether Press did improperly invade confidential student records maintained by the Board, relating to a Board Trustee, or whether any information set forth in these records was made known to Press.

Additionally, the Special Assistant concluded that, even assuming _arguendo_ that the Charging Party had satisfied the "substantial likelihood of success" aspect of the standards enunciated by the Commission relating to requests for interim relief, any harm suffered by the Charging Parties as a result of the Board's actions in filing tenure charges against Press would not be irreparable.

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Appearances:

For the Petitioner, Goldberg, Simon & Selikoff, Esqs.
(Theodore M. Simon, of Counsel)

For the Respondent, Irving C. Evers, Esq.

INTERLOCUTORY DECISION

On April 1, 1977, Mark Press and the Ridgefield Park Education Association (hereinafter the "Charging Parties") filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the Ridgefield Park Board of Education (hereinafter the "Board") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge was supplemented by the submission of attachments designated as Schedules A through F, received by the Commission on April 4, 1977. The Charge alleges that the Board has violated subsections (1) and (3) of Section 5.4 of the Act [1/] by certifying tenure charges in November, 1976, pursuant to N.J.S.A. 18A:6-10 et seq., seeking the dismissal

1/ N.J.S.A. 34:13A-5.4(a)(1) and (3) provide:
a. Employers, their representatives or agents are prohibited 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.

of Charging Party Mark Press, as a reprisal against Press' exercise of rights protected by the Act, including his right to assist an employee organization, the Ridgefield Park Education Association, during the course of negotiations with the Board.

The Unfair Practice Charge was accompanied by a request for interim relief [2/] pending the disposition of the unfair practice proceeding. A proposed Order to Show Cause was prepared on behalf of the Charging Parties and submitted to the Commission in correspondence dated April 12, 1977. The Commission granted the request for an Order to Show Cause but prepared its own order and mailed said order, dated April 18, 1977, to the parties along with a cover letter requesting that the Charging Parties file a brief in support of their request for interim relief to be received by the Commission no later than ten days prior to the return date of the Order to Show Cause. This letter, in part, also requested that the Board file an answering brief with the Commission, no later than five days prior to such return date. Thereafter a brief dated May 2, 1977, in support of the request for interim relief, was submitted by the Charging Parties. The Board of Education submitted an answering brief, dated May 4, 1977, in opposition to the petition for interim relief applied for by the Charging Parties. Furthermore, an additional submission dated May 6, 1977 was proffered by the Board of Education. This supplemental submission was received by the Commission on May 9, 1977. The Charging Party submitted an additional letter memorandum, dated May 6, 1977, that was received on May 9, 1977.

The Charging Parties prayed for relief that would (1) preliminarily enjoin the Board from proceeding to litigate tenure charges pending before the

2/ The application for interim relief was made pursuant to N.J.A.C. 19:14-9.1 et seq. See also Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super. 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

Commissioner of Education pending P.E.R.C.'s determination of the propriety of Press' conduct and the protected nature of his activities; (2) declare the conduct of Press, which was the subject of the tenure charges, to be protected activity under the Act; (3) order the Board, along with its agents and representatives, to cease and desist from coercing employees in the exercise of protected activities under the Act and from bringing reprisals against said employees on account of the exercise of these protected rights; (4) adjudge the Board and those in concert with said Board to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3); (5) enjoin the Commissioner of Education from further processing tenure charges filed against Press; and (6) order such other and further relief as the Commission would deem appropriate. 3/

The Order to Show Cause hearing was conducted on May 10, 1977, by the undersigned, who has been delegated the authority to act upon requests for interim relief on behalf of the Commission. All parties appeared at the hearing represented by counsel. At the conclusion of that hearing the undersigned entered his determination into the stenographic record. The undersigned concluded that the Charging Parties had not satisfied the Commission's standards that have been developed for evaluating the appropriateness of interim relief 4/ and therefore denied the Charging Parties' application for interim relief as sought in its formal application before the Commission. This written Interlocutory Decision has been prepared in accordance with the request of the parties as a written exposition of the reasons for that determination. 5/

3/ At the hearing the attorney for the Charging Parties amended his prayer for relief by stating that with regard to the request for a preliminary injunction, the Charging Parties were not seeking injunctive relief against the Commissioner of Education.

4/ These standards will be referred to in a later section of this Interlocutory Decision.

5/ Little has been added to the undersigned's oral determination entered into the stenographic record on May 10, 1977. However, citations and additional comments have been added to clarify this earlier determination.

The Association is the exclusive collective negotiations representative for non-supervisory professional and certain other employees employed by the Board. At all material times Mark Press has been the president of the Association and a tenured teacher employed by the Board.

In or about October, 1975, the Association and the Board commenced negotiations for a 1976-77 collective negotiations agreement. The parties were unable to achieve an agreement through the services of a Commission-appointed mediator and fact-finder and negotiations appeared to break down in the late summer of 1976.

On or about August 20, 1976, Press, pursuant to a directive of the Association's executive board, sent the Association's members a letter informing them of the status of negotiations and scheduling a membership meeting for September 7, 1977. A copy of this letter is attached to this decision as Appendix "A."

On the evening of September 1, 1976 the Board met in public session. During that portion of the Board's meeting dedicated to petitions and commentary from the public, Mark Press read a prepared statement, a copy of which is attached to this decision as Appendix "B."

On November 8, 1976, the Board certified tenure charges against Press to the Commissioner of Education, pursuant to N.J.S.A. 18A:6-10 et seq. Said charges sought the dismissal of Press from his employment based upon certain statements contained within Press' prepared statement made on September 1, 1976 and Press' letter of August 20, 1976. Said charges are currently pending before the Commissioner of Education.

Attorneys for both parties presented oral argument at the Order to Show Cause hearing, which arguments supplemented those made in their respective briefs.

The Charging Parties asserted that the Board's certification of tenure charges against Press related directly and exclusively to oral and written communications by Press relating to the ongoing negotiations with the Board, made in Press' capacity as president and chief spokesman of the Association. The Charging Parties contended that these communications constituted protected activity under the law and that any charges resulting therefrom against Press were retributive in purpose, in violation of the Act. The Charging Parties concluded that any further action before the Commissioner of Education should be restrained pending P.E.R.C.'s determination as to the protected nature of Press' activities complained of in the Board's certification of charges. It was submitted that tenure charges would be barred if the Commission would sustain the Charging Parties' arguments, because it was contended that no negative sanction could be brought before the Commissioner of Education by a board of education against a teacher solely for participation in protected activities under the New Jersey Employer-Employee Relations Act. The Charging Parties cited the New Jersey Supreme Court's decision in Board of Education, Borough of Union Beach v. N.J.E.A., et al, 53 N.J. 29 (1968) in partial support of its statement that union leaders like Press have the right under the New Jersey Employer-Employee Relations Act to denounce a public body such as the Board as well as its officers and positions, "in the most searing terms, even with a wide margin of error."

The Board in part alleged that the statements and actions of Press that were the subject of the certification of charges against him, pursuant to the Tenure Employees Hearing Law [N.J.S.A. 18A:6-10 et seq.], were in no way protected activities within the intendment of the Act. Press' letter of August 20, 1976, was categorized by the Board as urging teachers to prepare for an illegal strike. The Board further argued that Press' "scandalous and scurrilous" attacks against Board trustee Lawrence Massey and the Board itself were not pro-

tected activities. The Board cited a long line of federal decisions that have determined that the right of free speech was not an absolute one, but subject to certain limitations. The Board specifically referred to the New Jersey Appellate Division decision titled In the Matter of the Tenure Hearing of Kathleen M. Pietrunti,[6/] and was identified by the Board as being most applicable to the instant matter. The Board, in part, cited the court's language in the Pietrunti decision that "An aggressive, contentious and, perhaps, controversial teacher working within the structure of a school district as a faculty member and/or as an education association representative may confidently look to the First Amendment as a protective shield for his or her activities; however, an intemperate, venomous employee, be he or she a teacher or otherwise, cannot claim constitutional protection when he or she attacks his or her superiors in public in brawling terms for no purpose discernible other than to satisfy some personal need." The Board re-emphasized that Press' conduct and statements relating to the student records of Massey violated state law and regulations and federal law and regulations relating to the confidentiality of pupil records and abridged Massey's right of privacy. The Board concluded that the preferring of charges against a tenured employee is a managerial prerogative and that the Commission therefore had no jurisdiction whatsoever to interfere in such matters, especially when no "protected activities" had been engaged in by the individual affected by the certification of charges.

In passing upon these various arguments it must be borne in mind that this is an interim proceeding seeking extraordinary relief pursuant to N.J.A.C. 19:14-9.1 et seq. The undersigned has been designated by the Commission to hear such emergent matters, but cannot substitute his judgment for that of the Com-

6/ In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, 1972 S.L.D. 387; aff'd by State Board, 1973 S.L.D. 782; aff'd by N.J. Super. Ct., App. Div., 128 N.J. Super. 149; certif. den., 65 N.J. 573 (1974); cert. den. by U.S. Sup. Ct., 419 U.S. 1057, 42 L.Ed. 2d 654 (1974).

mission. Therefore, the standards that have developed for evaluating the appropriateness of interim relief are of a rather stringent nature. These standards are quite similar to those applied by the courts when confronted with similar applications. Basically the test is twofold: the likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the relief is not granted. Stating the latter test another way, can the matter be remedied at the conclusion of the case? See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER ____ (1976).

After reviewing all the material submitted by attorneys for the parties and having listened to their oral arguments the undersigned concludes that it cannot be said at this juncture that either the facts or the law germane to this instant matter are so clearly in the Charging Parties' favor so as to concede to them the substantial likelihood of success before the Commission on the ultimate merits of this case. For example, as evidenced by the parties' lengthy submissions and oral argument, there are many judicial and administrative decisions that may be applicable in determining whether Press' statements made on September 1, 1976 constituted protected activity under the New Jersey Employer-Employee Relations Act. The Commission itself has not yet determined in any comprehensive fashion what the parameters of "protected activity" may be under the Act. Given the facts in this case it would not be appropriate for the undersigned to predict what the Commission's decision will be on this yet undecided point of law. It is also apparent that there are substantial and material disputed factual issues relating to whether Press did in fact improperly invade any

of the confidential student records maintained by the Board relating to Massey or whether any of the information set forth in those student records was made known to Press.[7/]

Additionally, even assuming arguendo that the Charging Parties had satisfied the "reasonable likelihood of success" aspect of the standards enunciated by the Commission relating to requests for interim relief, the undersigned does not conclude that any harm suffered by the Charging Parties as a result of the Board's actions in filing tenure charges against Press will be irreparable.[8/]

Assuming arguendo that the Commissioner of Education sustained the Board's charges against Press and dismissed him before P.E.R.C. had issued a final administrative decision in the instant unfair practice charge, the undersigned concludes that the Commission could fully remedy the situation if it determined, for example, that the certification of charges against Press was at least in part motivated by the exercise of protected rights.[9/] The Education Association questioned whether the recent Appellate Division decision Gallo-

7/ The undersigned notes that approximately one-half of the twenty-two charges certified against Press refer to alleged violations of state and federal law and regulations and/or Board policy relating to the confidentiality of pupil record.

8/ On the basis of the parties' submissions it is apparent that Press was not suspended by the Board at the time it certified charges against him and thus the Board will be precluded from taking any such action during the pendency of the matter before the Commissioner of Education -- a process that may take many months to complete [N.J.S.A. 18A:6-14]. For example, based on statements of the parties it would appear that eight months after the certification of the charges, the parties are still involved in litigation concerning discovery motions. The "harm" defined by the Charging Parties' submissions refers to the chilling effect on the rights of Press and other members of the Education Association to actively form, join and assist the employee organization of their choosing freely, without fear of penalty or reprisal, that the pendency of the charges before the Commissioner of Education has had. The Charging Parties state that other Association members must now feel compelled to act with restraint as to any associational activities or face the same fate as their president. It may thus be seen that the nature of the harm suffered by the Charging Parties has not been easily enunciated.

9/ The Commission adopted standards for the application of N.J.S.A. 34:13A-5.4 (a)(3) in In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 2 NJPER 365 (1977).

way Township Board of Education v. Galloway Township Association of Educational Secretaries, Docket No. A-3015-75 (App. Div. 1977), ___ N.J. Super. ___ (1977) restricted the Commission's ability to fashion an appropriate reinstatement and back pay remedy in an (a)(3) discrimination case. The undersigned first notes that both P.E.R.C. and the Educational Secretaries Association are presently appealing this particular decision. Petitions for certification with the Supreme Court have been filed with the New Jersey Supreme Court after Requests for Rehearing were denied by the Appellate Division. Secondly, the undersigned believes that the above-mentioned decision is distinguishable from the matter at bar. The Galloway decision concerned an (a)(5) "refusal to negotiate" situation and the court specifically noted that its holding was without reference to statutory remedies for the recovery of back pay by illegally dismissed or suspended public employees [citing N.J.S.A. 18A:6-30 and N.J.S.A. 40:46-34 (repealed but re-enacted in modified fashion as N.J.S.A. 40A:9-172 and N.J.S.A. 40A:14-151)].

With further regard to the "irreparable harm" standard, the undersigned believes that the five-month passage of time from the date of the certification of tenure charges against Press to the date of the filing of the instant charge with P.E.R.C. raises additional doubts as to the irreparable nature of any harm that has been suffered by Press or by the Association in this matter.

For all the foregoing reasons the application for interim relief is hereby denied.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

By: Stephen B. Hunter
Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
July 5, 1977

Appendix "A"

C-2

August 20, 1976

Dear Fellow Member,

Negotiations have come to a standstill. The situation is bleak and there are no meetings currently scheduled between the Association and the Board prior to the opening of school.

The Board has flatly rejected the Factfinder's Report and is evidently trying to "bust the union."

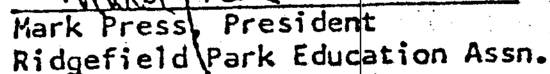
Your Executive Board has met and determined that they have no alternative but to exercise their authority, as vested in them by the membership last spring, to call a strike.

A special meeting of the entire membership is called for 8:00 a.m. on Tuesday, September 7, 1976 at the Sportsplex Inn (formerly Holiday Inn) at the Little Ferry traffic circle on Rt. 46. It is essential that all members attend this meeting.

The purpose of the meeting shall be to initiate and organize our strike efforts. If, by chance, a negotiations session between the Association and the Board does occur prior to September 7, 1976 and a tentative agreement is reached as a result of that session, then the purpose of the September 7th meeting shall be to ratify the agreement. However, we presently do not hold much hope for that possibility.

We look forward to seeing you at 8:00 a.m. sharp on the 7th of September.

Respectfully yours,



Mark Press, President
Ridgefield Park Education Assn.

P.S. Coffee and danish will be served.

F

C-2

RIDGEFIELD PARK EDUCATION ASSOCIATION STATEMENT FOR PUBLIC BOARD MEETING ON SEPTEMBER 1, 1976

Within several short days, the Ridgefield Park school system may be faced with a work stoppage. The situation is critical and people want to know what has brought about this terrible situation.

The Ridgefield Park Education Association has been attempting to negotiate with the Ridgefield Park Board of Education for the past year.

It must be understood that the Ridgefield Park Education Association represents all the teachers, custodians, secretaries and cafeteria workers that are employed in the district. Our negotiations deal with the terms and conditions of employment for all these people.

When we started the negotiations process, we wanted to begin with our proposals and salaries for the non-professional staff. The Board indicated that we should settle the teacher's portion of the contract first and then everything else would fall into place. This seemed reasonable and we agreed. After almost a year of bargaining and going through the process of mediation as prescribed by State Law, a tentative settlement was made for teachers' salaries. A total salary

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only if we accepted their offer for the non-professional staff. They intimated that we could have an agreement if we would sell the little people down the river. We refused.

How could we agree to throw our fellow members to the dogs? These are people who are among the lowest paid for their types of jobs in the County. These are people who, for the most part, live and pay taxes in Ridgefield Park.

Cafeteria workers are making little more than the minimum state wage.

Newly hired custodians are offered only $6440 for their first full year of work, while a head custodian who has been working here for 20 years makes only a little more than $11,000. Most custodians average only about $7,500 per year.

All the secretaries have been working in Ridgefield Park for 6 years and more. The highest paid secretary with almost 30 years of experience makes only a little more than $10,000. Despite these low wages, the Board wants us to accept raises that are ridiculously low and represent only about one-half of the increased cost of living. We can not do that. We can not sell out our fellow members.

What kind of Board of Education would want to treat its employees unequally?

What kind of Board of Education would expect its

violated the Law of this State in the way it has conducted its meetings! A Board of Education that was constantly advised of its violations but refused to obey the law until it was dragged into court at the cost of thousands of dollars to the people who live in Ridgefield Park. And after they lost in court, they try to lie and cajole their way out of it by saying that they went into court to seek direction from the courts. Well, we have fifty copies of the guidelines of the Sunshine Law printed by the State of New Jersey. We offer these copies to the citizens of Ridgefield Park. We made this same information available to the Superintendent of Schools and to the Board members months ago. They chose to ignore the law. They chose to be dragged into court. They chose to spend thousands of dollars in legal fees. Dollars that belong to the public. Dollars that they won't give to their custodians, secretaries and cafeteria employees.

The Board is preparing for the possibility of a strike. They are using every union-busting tactic they can think of. They have lined up 230 possible scab substitutes and are prepared to pay these scabs up to $25 above the regular scale. This bonus increase alone paid to a full substitute staff would equal in three days - the total amount needed to bring about a settlement and avoid a strike.

The difference between the Board's position and the Association's position of paying the secretaries, custodians and cafeteria at least the same percentage as the teachers

Mr. Massey, the chief negotiator for the Board, has pledged himself during his campaign for election, to " bust the union". It is not clear whether Mr. Massey hates unions more or teachers more. As a student in Ridgefield Park, he was constantly in trouble! He was a poor student according to the evaluation of his teachers. The records will show that. He was suspended from school and he was punished by his teachers. The records will show that. He was not allowed to graduate with his class. The records will show that. Now he has the opportunity to get even! It appears that he'll bust that teacher's union even if it's the last thing he does. Should vengeance be a controlling factor on the decisions of a school board? Should actions based on retribution set an entire community into turmoil?

The Board is locking out its teachers and preventing them from entering their classrooms to prepare for this year's school work. Where is the educational soundness to that?