

D.R. NO. 93-22

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

In the Matter of

BOROUGH OF RED BANK,

Public Employer,

-and-

Docket No. RO-93-131

PESU, LOCAL 702,

Petitioner,

-and-

UFCWU, LOCAL 56,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections filed by the United Food and Commercial Workers Union, Local 56, to an election conducted among a broad-based unit of employees employed by Red Bank Borough. The Director declined to find that the petitioner's issuance of a memo on Borough letterhead and posting of campaign notices in the election area, which were removed prior to the beginning of the election, created the improper appearance that the employer supported it or warranted setting aside the election. Finally, the Director found that other allegations in the objections were not supported by evidence "precisely and specifically showing conduct that would warrant setting aside the election as a matter of law." N.J.A.C. 19:11-9.2(h).

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Appearances:

For the Public Employer
Richard O'Connor, attorney

For the Petitioner
Hott & Margolis, attorneys
(Timothy Hott, of counsel)

For the Intervenor
Guazzo, Perelson, Rushfield, & Guazzo, attorneys
(Mark C. Rushfield, of counsel)

DECISION

On April 20, 1993, pursuant to an order directing an election, D.R. No. 93-20, the New Jersey Public Employment Relations Commission conducted an election among employees in a unit of blue collar and office/clerical employees employed by the Borough of Red Bank.

Of approximately 63 eligible voters, 41 ballots were cast

for the Public Employees Service Union, Local 702; 17 ballots were cast for United Food and Commercial Workers Union, Local 56; and 2 ballots were cast for no representative. There were no challenged or void ballots.

On April 27, 1993, Local 56 filed the following objections to the election, pursuant to N.J.A.C. 11-9.2(h):

1. During the "election period" Local 702 promised benefits and preferential treatment to certain employees which were to be delivered only if Local 702 were selected as majority representative. These promises of benefits/preferential treatment are alleged to have improperly influenced the votes of those voters.

2. Local 702 created the improper appearance that the Borough supported, approved and desired employees to select Local 702 as their exclusive majority representative when it mailed, inserted into time card slots, and posted on bulletin boards a memo to all employees from "Shop Stewards" printed on Borough letterhead paper. This memo contained exhortations to select Local 702.

3. Local 702 improperly influenced voters on the day of the election by posting pro-Local 702 campaign notices in and around the election site and by improper campaigning by Local 702's election observer in the voting place during the election.

Local 56's objections were accompanied by a single affidavit attesting to the receipt of the letterhead memo by mail and in a time card slot and also seeing the memo on a bulletin board.

On May 3 and 6, 1993, Local 702 filed a response to Local 56's objections. The Borough has not filed any position statement.

ANALYSIS

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing

election objections:

A party filing objections must furnish evidence such as affidavits or other documentation that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process. (emphasis added.)

An election conducted by the Commission is a presumptively valid expression of employee choice. An objecting party must show evidence of conduct that has interfered with or reasonably tended to interfere with the freedom of that choice. The evidence must demonstrate a direct relationship between the improper activities and the interference with the voters' freedom of choice. An allegation of seemingly objectionable conduct, without more, will not be sufficient to set aside an election. Jersey City Dept. of Public Works, P.E.R.C. No. 43, (1970), aff'd sub. nom. AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971). See also, Bor. of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 64 (¶19021 1989).

Pre-election promise of benefits and preferential treatment

With respect to the objections concerning improper promises of benefits and preferential treatment, notices at the election site and campaigning at the election by Local 702's observer, Local 56 has not presented any evidence in support of these allegations. The sole affidavit submitted refers only to the letterhead memo. Since

Local 56 has not met its burden of proof -- by the production of affidavits or documents which precisely and specifically show that the alleged conduct occurred which warrants setting aside the election -- these objections are dismissed.

The Letterhead Memo

The affidavit of Local 56 concerns a letterhead memo addressed "to all employees from the stewards." The memo is typed on what appears to be Red Bank Borough letterhead and bears the Borough logo. The affidavit does not state when the affiant received the letterhead memo or when it was posted on the bulletin board. The memo is dated April 15, 1993, 4 days prior to the election. It states, in relevant part:

On Tuesday, April 20, 1993, we urge every employee to vote on who will represent us in our next contract with the Borough of Red Bank.

If you are totally satisfied with our present union, then vote for them, if not, please vote for a change with Local #702, Public Employees Service Union. . .

We the stewards have worked hard for this change, and you must realize if our present union did it's job properly, their would be NO VOTE on April 20, 1993 . . .

...We have had Local 56 for the past 7 years, we need a change, make your vote count, vote Local #702, Public Employees Service Union.

The New Jersey Supreme Court in Lullo v. IAFF, 55 N.J. 409 (1970) declared that the Commission should be guided by the policies established under the National Labor Relations Act. The National Labor Relations Board approaches allegations of misleading or forged pre-election propaganda on a case-by-case basis. The Board has

rejected a per se rule which automatically sets aside elections on the basis of misleading campaign statements or documents whose creators or proponents are not identified. The Board will intervene and reverse election results only where the alleged forged document "renders the voters unable to recognize the propaganda (or forgery) for what it is and evaluate its claims." Midland National Life Insurance Co., 263 NLRB 127, 133, 110 LRRM 1489 (1982). The philosophical basis for the rule is that "employees are mature individuals who are capable of recognizing campaign literature for what it is. SDC Investment, Inc., 274 NLRB 556, 557, 118 LRRM 1410 (1985). SDC Investments established a two-step test: first, determine whether the source of the (altered) document is clearly identified; second, if the source is not identified, then examine the contents of the document to determine whether it has the tendency to mislead employees into believing the Board favors one party's cause. See also, Cf., Otterbacher Mfg., 279 NLRB 160, 122 LRRM 1145 (1986).

In North American Directory Corp. v. NLRB, 939 F.2d 74, 119 Lab. Cas. ¶10858, 138 LRRM 2001 (3rd Cir. 1991), the Court held that the Board properly refused to set aside an election that a union won by a wide margin even though on the day before the election employees received a plain envelope containing a memo on what appeared to be company letterhead which contained pro-union statements. Applying the two-step test, the Board found that "the forged memorandum was readily identifiable as having been prepared

by someone other than North American and as containing pro-union propaganda." The Board concluded that an employee who read the memo could not reasonably believe that North American [after vigorously campaigning against the union,] had changed its opinion. 138 LRRM 2005-2006.

Applying the above standards, I find that the letterhead memo issued and posted to employees clearly does not meet the standards for setting aside the election conducted on April 20, 1993. The memo was created and sent, four days prior to the election, by a group of stewards urging voters to select Local 702. There is no evidence that anyone who received the memo was confused by the use of Borough letterhead.

Accordingly, I dismiss the objections concerning the letterhead memo and will issue a Certification of Representative designating Local 702 as the exclusive majority representative of the petitioned-for unit.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: May 12, 1993
Trenton, New Jersey