

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

In the Matter of

LONG BRANCH BOARD OF EDUCATION,

Public Employer,

-and-

LONG BRANCH FEDERATION OF TEACHERS,
NJSFT, AFT, AFL-CIO,

Petitioner,

DOCKET NO. RO-83-21

-and-

LONG BRANCH SCHOOL EMPLOYEES ASSN.

Intervenor.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, directs an election among teachers and certain other Board employees to ascertain their representational desires. The Director denies the incumbent's request that the Commission, prior to an election, establish guidelines regulating campaign access to the employer's premises. Commission policy is not to engage in pre-election regulation of campaign conduct, but to review claims of irregularity affecting an election in a post-election objection forum. The Director also denies the incumbent's request that an election be delayed pending review of its unfair practice charge alleging that the Board wrongfully refused to allow an NJEA representative to enter the High School to meet with its officials. The purpose of the visit, according to the incumbent, was to provide assistance in the administration of the unit. The Director finds that there is no evidence to support the claim that this circumstance has affected the incumbent's "position" in the forthcoming election.

The Director distinguishes those matters which are reviewed in post-election representation processes from those matters which may be reviewed prior to an election under the Commission's "blocking charge" procedure.

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Appearances:

For the Public Employer
Murray, Granello & Kenney
(Malachi Kenney, of counsel)

For the Petitioner
Rod Smith, Representative

For the Intervenor
Chamlin, Schottland, Rosen, Cavanagh & Uliano
(Thomas W. Cavanagh, Jr., of counsel)

DECISION AND DIRECTION OF ELECTION

On September 3, 1982, a Petition for Certification of Public Employee Representative, accompanied by an adequate showing of interest, was filed with the Public Employment Relations Commission (the "Commission") by the Long Branch Federation of Teachers, NJSFT, AFT, AFL-CIO (the "Federation") with respect to certain employees of the Long Branch Board of Education (the "Board"). On September 21, 1982 the Federation, expressing its desire to represent a unit of employees consistent with

the scope of the unit currently in place and represented by the Long Branch School Employees Association (the "LBSEA"), amended its petition to define the unit petitioned for as including "all certificated personnel, all secretaries, all matrons, custodians, maintenance persons, ground persons, and all aides in [the] existing unit." ^{1/}

The undersigned has caused an administrative investigation to be conducted into the matters and allegations involved in the petition. To date, the investigation reveals the following:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved after an evidentiary hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing where, as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The Long Branch Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees involved in the petition, and is subject to the provisions of the Act.

3. The Long Branch Federation of Teachers, NJSFT, AFT, AFL-CIO and the Long Branch School Employees Association are employee representatives within the meaning of the Act and are subject to its provisions.

4. The Federation seeks to represent a unit of employees currently represented by the Long Branch School Employees Association including "all certificated personnel, all secretaries, all matrons,

^{1/} The Federation originally petitioned for the above enumerated personnel as well as certain additional personnel not presently included in the LBSEA unit.

custodians, maintenance persons, ground persons, and all aides in [the] existing unit," and has filed a petition for certification with respect thereto. The employee unit is more specifically described in the recognition clause of the Agreement between the Board and LBSEA, effective July 1, 1981 through June 30, 1983, which clause provides recognition in a unit defined as follows:

1. All certificated personnel under contract with the Board in the following positions, but excluding all positions not specifically mentioned:

- Teacher
- Learning Disability Specialist
- Speech Therapist
- Librarian
- Nurse
- Guidance Counselor
- Coaches
- Social Workers
- Psychologist

2. All secretaries and clerks employed by the Board, except for the personal secretaries of the Superintendent of Schools and the Assistant Superintendent of Schools, who are specifically excluded, and
3. All matrons, custodians, maintenance men and groundsmen employed by the Board.
4. All corridor aides employed by the Board.

5. The positions of the parties were orally set forth at an investigatory conference convened by the assigned staff agent on September 21, 1982. The Federation desired the conduct of a secret ballot election and indicated its desire to execute an Agreement for Consent Election. Neither the Board nor the LBSEA disputed the appropriateness of the proposed unit and both consented to the conduct of a secret ballot election.

The above notwithstanding, the parties did not enter into an

Agreement for Consent Election inasmuch as they disagreed as to the date, hours and place(s) of the election.

6. On September 23, 1982, the undersigned advised the parties that he was inclined to direct an election in the absence of disputed factual issues and provided all parties an additional period of time for the presentation of any further material.

7. The LBSEA, in correspondence dated September 24, 1982 and October 6, 1982, has requested that the undersigned, in considering an order directing the election, review and remedy certain alleged activities undertaken by the Board since September 2, 1982, in implementation of a memorandum issued by its Superintendent on that date. The memorandum at issue, which is set forth in full below, seeks to regulate certain conduct by the parties and their representatives on school premises. 2/

2/ The contents of the Superintendent's memo is as follows:

OFFICE OF THE SUPERINTENDENT
Long Branch Public Schools

MEMORANDUM

TO: All Staff Members

FROM: Herbert A. Korey
Superintendent of Schools

DATE: September 2, 1982

RE: LBSEA-LBFT Open Period

The Administration has been informed that the Long Branch Federation of Teachers plans to challenge the Long Branch School Employees' Association for exclusive representative status for the bargaining unit of teachers, coaches, secretaries, clerks, custodial and maintenance employees, and corridor aides during the open period from September 1 through October 15. The following policies and rules will apply to staff activities during the open period.
(continued)

2/ (Continued)

Two basic policies will govern. First, the two organizations will be treated equally and have exactly the same rights of access. Second, no actions will be permitted which will interfere with or distract from the primary purpose of our school system, which is providing education to our students.

Pursuant to these guidelines, the following rules will apply:

1. Both organizations will be permitted to use staff mailbox facilities before the teacher school day for communications with employees.
2. Both organizations will have equal use of one bulletin board in the faculty room of each school. Each organization will be assigned one-half of the faculty room bulletin boards.
3. Each organization will be permitted, subject to prior approval by the building principal and Central Office, the use of school facilities for after-teacher school day meetings. Requests for approval for such organizational meetings shall be submitted via regular building permits. Please note that, per contract, "after the teacher school day" is here defined as following the 30 minutes after the scheduled close of the student school day, except on Fridays and on days immediately preceding holidays or vacations when the teacher school day concludes immediately following the dismissal of students and their exit from school.

Additionally, meetings of the two organizations shall not conflict or interfere with regularly scheduled faculty meetings.

Each organization will be given the opportunity for the same number of meetings.

4. No employees will be permitted to engage in soliciting, electioneering, campaigning, or any other related activity during school working hours on school premises.
5. No outside representative of either organization will be permitted entry into the schools during regularly scheduled school hours.

(continued)

LBSEA asserts, in its October 6 correspondence:

The Long Branch School Employees Association wishes to formally memorialize its oral objection to the denial of access to representatives to campaign, other than in accordance with the Board memo. At present, neither employee group can enter schools until 1/2 hour after dismissal. The result is that teachers are on their way to a second job, pick up children from Day Care Centers, and other obligations. The practical effect is to deny the ability to campaign & speak to the employees. The Board policy is unduly restrictive, unfair, and taints the entire election process.

The LBSEA wishes the Director to allow access to the employees during the school day, at lunch time and during free periods. The LBSEA does not desire to, nor will it, disturb the education process. My client wishes the above issue to be considered and decided prior to the election, in your order to be issued shortly.

Additionally, in both the September 24 and October 6 correspondence, the LBSEA has requested that the undersigned accord "blocking charge" effect with respect to an unfair practice charge it filed on September 21, 1982 (Docket No. CO-83-64), alleging that on September 15, 1982, the Board, in implementing its memorandum, denied access to a nonemployee representative of the LBSEA who sought to enter the High School for the avowed purpose of meeting with the Charging Party's

2/ (continued)

It is recognized that a representation contest involving the LBSEA and the LBFT may generate great interest among the staff, and that the outcome will be a matter of real importance to the staff. However, this matter cannot be allowed to interfere with the primary purpose of education. The rules set forth above will be enforced.

Administration staff has been advised that, during the open period, the two organizations are to be treated equally.

The cooperation of all staff members is needed in order to maintain the instructional program and fulfill the legal and contractual requirements of both the bargaining and challenging organizations.

treasurer on "ordinary" association business unrelated to election-eering. By this action, the LBSEA alleges in its charge:

The action of Respondent is in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (5). This illegal action by Respondent has, in the context of the pendency of RO-83-21, filed September 3, 1982, created an atmosphere rendering improbable a free choice by the subject employees. It cannot be gainsaid that the Respondent's conduct herein complained of has produced a climate of tension and coercion so that the subject employees are effectively precluded from making a free choice concerning a bargaining representative pursuant to RO-83-21, as well as being denied effective administration of the current Collective Bargaining Agreement.

8. Under the Commission's blocking charge policy, an election in a representation proceeding may be delayed by the undersigned pending consideration of certain unfair practice allegations involving parties to the election proceeding. See In re State of N.J., D.R. No. 81-20, 7 NJPER 41 (¶ 12019 1980) aff'd PERC No. 81-94, 7 NJPER 105 (¶ 12044 1981); In re City of Newark, D.R. No. 78-43, 4 NJPER 202 (¶ 4102 1978); In re Matawan Reg. School District Board of Education, D.R. No. 78-11, 4 NJPER 37 (¶ 4019 1977). Consistent with the requirements of the blocking charge procedure, the LBSEA was directed to present documentary and other evidence in support of its blocking charge request in the representation proceeding forum. See State of N.J., supra; In re Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶ 11300 1980).

9. The undersigned shall first address LBSEA's request that the Commission impose certain pre-election instructions governing campaign access to employees on school premises. The Commission, like the NLRB from whose experience the Commission takes guidance, Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970), does not

engage on pre-election regulation of campaign conduct. In re United Aircraft Corp., 103 NLRR No. 15, 31 LRRM 1437 (1953). Moreover, the Commission does not prescribe in advance a course of conduct which the parties must pursue. The Commission ensures "laboratory conditions" by reviewing claims of election irregularity in the post-election objection forum, pursuant to N.J.A.C. 19:11-9.2(b).

The Commission, therefore, prior to an election will not as a matter of course pass upon issues of alleged election interference where a remedy is fully adequate and available in the post-election objection mechanism. Nonetheless, where a party to an election has filed unfair practice charges alleging the most egregious conduct and has proffered sufficient evidence to establish the need for the litigation and remedy of such unfair practices prior to the conduct of the election, the undersigned has postponed the direction of election pending the litigation of the alleged unfair practices and, where proven, until such time as the effects of the misconduct have been attenuated.

Accordingly, the undersigned denies LBSEA's request that a blanket rule permitting "access to the employees during the school day, at lunch time and during free periods" be established by the Commission. This issue may be considered fully in a post-election proceeding.

The undersigned, however, shall examine the allegations underlying the unfair practice charges, as requested, and the documentary material presented by the LBSEA in the representation

forum, ^{3/} in order to determine whether the nature of the conduct is so egregious as to require that an election be delayed pending full review of the charge.

As noted in the State of New Jersey matter, supra, the undersigned, citing the NLRB Casehandling Manual, ¶11730.5, considers the following factors in determining whether a fair election can be conducted in the face of pending unfair practice charges:

The character and scope of the charge and its tendency to impair the employees' 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 interest 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; the showing of interest, if any, presented in the R case by the charging party, and the timing of the charge.

The LBSEA has submitted affidavits from its President and a New Jersey Education Association representative as evidentiary proffers supporting its blocking charge request.

The LBSEA is the incumbent representative of approximately 425 Long Branch teachers and other employees of the Board. It has a statutory responsibility to fairly represent the interests of unit members and to administer its collective negotiations agreement with the Board. The LBSEA asserts that prior to the issuance of the Superintendent's September memorandum, representatives of the NJEA were permitted virtually unrestricted access to school buildings during the

^{3/} Review of the charge itself is insufficient. In processing an unfair practice charge the Commission will issue a complaint assuming the truth of all statements. N.J.A.C. 19:14-2.1. In order to block an election, some probative evidence in support of the allegations is necessary.

school day in order to assist it in meeting its representational responsibilities.

On September 15, 1982, NJEA representative, John Molloy and an associate, appeared at the Senior High School to meet with "an officer" of the LBSEA. Molloy states that "the purpose of this meeting was to assist the Association in the exercise of its lawful rights to concert (sic) activities and this visit was not for the purpose of 'electioneering'." Molloy sought to sign-in at the main office, and was advised there by certain unidentified administrators that he was being denied access to the school premises and that unless he left he would be arrested. Subsequently, Molloy met with the Superintendent and was again directed to leave. Prior to this event, Molloy had been made aware of the Superintendent's memorandum and had, on September 9, 1982, objected to it.

The Federation's petition was filed with the Commission on September 3, 1982, and was accompanied by a valid showing of employee support. Its filing has not been attributed to any action by the employer. Matawan, supra. If successful in an election, the Federation would replace LBSEA as the exclusive representative.

LBSEA seeks to connect the Board's denial of Molloy's access to premises to a diminishment of its representational capabilities which has and will deleteriously affect its "position" in the election. Specifically, LBSEA's President states:

During September, Mr. Molloy visited the premises as he explained in his affidavit previously filed, for the purposes of administering the contract, at which time he was threatened with arrest if he did not leave. The inability to consult with Mr. Molloy as a result of the memorandum and the inability to obtain his guidance and counseling has greatly reduced the affectiveness of the local union in being able to service its members. In

my opinion, the prohibition that has been entered despite the contract in effect between the parties has had a direct dilatorious affect on both the L.B.S.E.A.'s ability to perform its function and has had the additional affect of causing a weakening of the position of the L.B.S.E.A. in the local election because it is unable to deliver the type of service to its members previously delivered, and it is unable to obtain counseling from the state representative despite the prior practice to that affect. In my opinion, this perhaps will have a direct and substantial affect on the position of the L.B.S.E.A. in the upcoming election and must be rectified immediately and consideration given to retroactive retribution. (sic)

The above statement concerning the particular effect of the alleged incident on LBSEA's representational capabilities is significantly lacking in any evidentiary support. Likewise, the claimed potential effect of denying NJEA representatives access to school premises, pursuant to the memorandum, lacks an evidentiary basis. In the absence of any evidence which would provide a nexus between the Board's instruction and LBSEA's inability to meet its representational responsibilities, or even a significant diminishment thereof, the undersigned cannot seriously credit LBSEA's additional premise that its position in the election is affected by the Board's policy. As indicated by the LBSEA, Molloy's services are made available by the NJEA during non-school hours. Although Molloy's schedule is claimed to be difficult to arrange during non-school time, it strains the undersigned's credibility to accept the proposition that during a period in which there is a question concerning the representation of a substantial number of employees, and during which the LBSEA would naturally be seeking to demonstrate the quality of its representation, that the LBSEA and Molloy could not surmount Molloy's scheduling difficulties.

Lastly, the undersigned has reviewed the charge in the context

of the Board's curtailment of electioneering by restricting the use of school property during the pre-election period. As noted previously, issues concerning the alleged restrictive nature of the Board's policy upon each party's ability to campaign may be reviewed subsequent to an election and adequately remedied, if warranted. The undersigned's concern in the present context would relate to a claim that the Board's policy is not designed to treat all parties equally, and is thus discriminatory. No such allegation has been presented herein and there is no evidence suggestive thereof.

For the aforementioned reasons the undersigned concludes that the factors present in this matter support the conclusion that a fair election can be conducted. The undersigned therefore finds, pursuant to N.J.A.C. 19:11-2.6(b)(3), reasonable cause to believe that a valid question concerning representation exists in an appropriate unit, that the policies of the Act will be effectuated by the prompt conduct of an election and that an election will reflect the free choice of the employees in the appropriate unit.

Accordingly, there existing no substantial and material factual issues in dispute which may more appropriately be resolved after a hearing, the undersigned finds that the disposition of this matter is properly based upon the administrative investigation herein. Therefore, the undersigned finds that the appropriate unit for collective negotiations is as defined in paragraph 4 above.

Pursuant to N.J.A.C. 19:11-2.6(b)(3), the undersigned directs that an election be conducted among the employees described above. The election shall be conducted no later than thirty (30) days from the date set forth below. ^{4/}

^{4/} The undersigned shall, by correspondence and Notice of Election, advise the parties of the date, time and places of election.

Those eligible to vote are the employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are 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.

Pursuant to N.J.A.C. 19:11-9.6, the Public Employer is directed to file with the undersigned and with the Federation and the LBSEA an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with the Federation and LBSEA, with statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the Federation or the LBSEA.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in

the election. The election directed herein shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: October 13, 1982
Trenton, New Jersey