

D.R. NO. 87-20

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

In the Matter of

ESSEX COUNTY PROBATION DEPARTMENT,

Public Employer,

-and-

I.B.E.W., LOCAL 1158,

Docket No. RO-87-52

Petitioner,

-and-

ESSEX COUNTY PROBATION INVESTIGATORS ASSOCIATION,

Intervenor.

SYNOPSIS

The Director dismisses objections to an election conducted among probation investigators. The objections, filed by the IBEW, allege that the court administrator concealed that new employees started work after the cut off date for eligibility; that there was inadequate notice of the time and place of the election; that the Essex County Probation Department Investigators Association was unequally permitted access to voters and to the employers equipment during working hours; that an IBEW proponent was transferred to create undue influence on voters to vote for the Investigators Association and that the P.E.R.C. Agent's conduct tainted the election.

The Director found that the objecting party failed to demonstrate, pursuant to N.J.A.C. 19:11-9.2(h), conduct which would warrant setting aside the election.

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Appearances:

For the Public Employer
Joan Kane Josephson, Chief of Labor Relations

For the Petitioner
Cecchi & Politan
(Anthony P. Alfano, of counsel)

For the Intervenor
Harvey S. Grossman, Esq.

DECISION

Pursuant to an Agreement for Consent Election entered into by the parties on October 15, 1986, a representation election was conducted on November 3, 1986 by the Public Employment Relations Commission ("Commission") among approximately 52 employees of the Essex County Court Probation Department ("Judiciary"). Employees were provided the opportunity to choose a representative, either the

International Brotherhood of Electrical Workers, Local 1158, ("IBEW") or the Essex County Probation Department Investigators Association ("ECPDIA") or to choose not to be represented. The tally of ballots reveals that 19 valid ballots were cast for the IBEW; 23 valid votes were cast for the ECPDIA; no valid ballots were cast against representation and five ballots were challenged by the PERC staff agent because the five employees were not on the eligibility list. The challenges were determinative.

On November 7, 1986, pursuant to N.J.A.C. 19:11-9.2(h), the IBEW filed post-election objections. On November 14, 1986, the IBEW provided supporting affidavits.

On November 26, 1986, the Judiciary filed its response and provided certain documentary material.

On December 1, 1986, the ECPDIA provided a statement of position together with affidavits and other documentary material.

The IBEW alleges that William Carpenter, the Court Administrator, concealed information that new employees would begin work four days after the cutoff date for eligibility; that employees received inadequate notice of the time and place of the election; that the ECPDIA, in collusion with the employer, was allowed unequal access; and that the election procedures were irregular.

N.J.A.C. 19:11-9.2(h) sets forth the initial standard for the Director's review of 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.

Pursuant to N.J.A.C. 19:11-9.2(i), the Director of Representation must then review the objections and supporting evidence to determine "if the party filing said objections has furnished sufficient evidence to support a prima facie case." The truth of the specific evidence offered by the objecting party is assumed. If the evidence submitted is not enough to support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence is submitted, then, and only then, the Director will investigate the objections. See, State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd App. Div. Dkt. Nos. A-3275-80T2 & A-4164-80T3.

This regulatory scheme sets up two distinct components of the evaluation process. The first is a substantive component; the allegation of conduct which warrants setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence which precisely or specifically shows the occurrence of the substantive conduct alleged. Unless both of these components are present the objections will be dismissed.

When investigating election objections, we apply the presumption the Commission articulated in Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (Slip. Op. at 10), aff'd sub.

nom. AFSCME, Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971):

The Commission presumes that an election conducted under its supervision is a valid expression of employees choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate a election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

In its first objection, the IBEW asserts that the Court Administrator concealed the fact that employees started after the cutoff date for eligibility, and that the five challenged ballots should be counted.

On October 15, 1986, the parties signed an Agreement for a Consent Election, specifying October 10, 1986, the end of the pay period immediately preceding the Agreement for Consent Election, as the payroll date for eligibility. In other words, only employees on payroll on that date were eligible to vote. The list of eligible voters did not change at any time between the Agreement for Consent Election and the election. Both employee organizations had the same list of the same pool of employees from the date of the consent to the date of the election from which to solicit votes. Neither organization had a stake in the votes of the five new employees, whose votes were challenged. Four employees started work on October 14, 1986, and voted by challenged ballot pursuant to N.J.A.C.

19:11-9.2(e). One other employee began work shortly before the election. She also voted by challenged ballot. The challenged ballots remained sealed and were not counted in the tally. This is standard Commission procedure.^{1/}

The IBEW asserts the Court Administrator concealed that these employees were hired on October 14, 1986 at the October 15, 1986 conference. It is difficult to understand this assertion because there is no suggestion or allegation that the Court Administrator had any knowledge of the representational preferences of the five employees.

The IBEW's second objection concerns inadequate notice of the time and place of the election. The IBEW asserts that notices were not posted until the morning of the election, and were posted inconspicuously. The IBEW further alleges that Maurice Waters, an investigator, was not permitted to vote because, lacking adequate notice, he arrived after the polls closed.

Adequacy of notice is measured by the extent of knowledge, or lack thereof, among eligible voters, no matter which party delivers the notice. City of Newark, D.R. No. 78-43, 4 NJPER 202 (¶4102 1978).

^{1/} The following five employees' votes were challenged by the Commission agent because they were not on the list of eligible voters: Noelle Schmidt, Derek Perry, John Gault, Allison Lyons, and Mark Latimer.

The Commission notice was posted at some point between October 28, 1986 and November 3, 1986. Sette, the IBEW's Assistant Business Manager, personally saw that notice posted on the morning of the election. The notice was covered by a memo from Mr. Casalle directing the posting. Judith Martin, an IBEW proponent, alleges that the notice was not posted until the morning of the election, but does not state whether she knew of this of her own personal knowledge or was relying in her affidavit on the hearsay of another. Richard Heim, president of the ECPDIA, personally observed Commission notices of the election posted in ten different locations where investigators work on October 28, 1986.

It is not clear when the Commission notices of election were posted. Besides the Commission notices, it appears that several other forms of notice of the election were circulated. Pat Pici, an investigator, observed notices of the date, time and place of the election posted as early as October 16 or 17, 1986. Specifically, she saw copies of the Commission notice that a Petition for Certification was filed with the date, time and place of the election handwritten in, or attached on, a separate piece of paper posted throughout the building. She also stated she received mailings from both the ECPDIA and the IBEW during the course of the campaign. Richard Heim stated that the ECPDIA placed two mailings in employee mailslots.

One investigator, Maurice Waters, did not vote because he arrived at the polls after 1 p.m.^{2/} He stated that he had second-hand knowledge that the election ran from 12 p.m. until 2 p.m. Waters said he did not see the notice of election posted in his work area. Pici stated that a few days before the election Waters indicated that the election took place during his lunch period.

Over 80 percent of eligible voters participated in this election. Only one individual out of approximately 56 eligible voters claimed that he was unable to vote due to lack of adequate notice. It appears that eligible voters received adequate notice of the date, time and place of the election. Absent specific evidence that adequate notice was not available to employees, we find the IBEW fails to meet its burden of showing that lack of adequate notice effected the outcome of the election. See, City of Newark. The fact that one employee did not see notice posted near his work station is not sufficient to show inadequate notice. It is unclear whether that employee even looked for notice of the election. It is clear however, that this employee knew the date and place of the election, as he appeared to vote ten minutes after the election was over.

For these reasons and the fact that only one employee was even possibly effected by a lack of adequate notice, we are

^{2/} Voting took place between 12 p.m. and 1 p.m.

satisfied that the results of this election were not affected by lack of adequate notice.

The third objection alleges that the ECPDIA enjoyed access to the voters during working hours, and access to the employer's equipment to prepare campaign materials, while IBEW representatives were reprimanded for "campaigning during working hours."

In Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50 (1976), the Commission found during an election campaign employee organizations must be given equal access to communications facilities, including employee mailboxes. That ruling was specifically applied to employee mailboxes in Elizabeth Board of Education, P.E.R.C. No. 83-66, 9 NJPER 21 (¶14010 1982). See also, County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983).

In Ocean County Judiciary, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986),^{3/} we held that permitting one organization to engage in a certain campaign activity where there is no showing that the other organization involved made a similar request and was denied similar privileges does not constitute unequal access.

^{3/} There, we relied on LaPointe Machine Tool Company, 113 NLRB 172, 36 LRRM 1273, 1274 (1955), where the NLRB held that It is not an interference with an election to permit one of two unions to solicit support on company time and property where there is no showing that the other union involved had requested, and had been denied similar privileges.

It is undisputed that the parties agreed that there would be no campaigning on the premises during working hours. In a letter dated October 24, 1986, Heim complained to William Carpenter, the Court Administrator, that "the IBEW had two representatives campaigning prior to the lunch hour (1-2 p.m.) for the child support unit." In response, Carpenter called Sette and indicated that campaigning during work hours is against the rules. Sette admits that he received the call from Carpenter, but asserts that, "two representatives of Local 1158 were discussing the time and place of an upcoming meeting with an Essex County Probation Investigator during that employee's lunch hour." Heim also states that an IBEW shop steward discussed the election with investigators during work hours. He is not specific as to which investigators were involved and when these conversations took place.

The details surrounding the campaigning incident giving rise to the ECPDIA's complaint and the Court Administrator's subsequent reprimand to Sette are unclear. Specifically, there are no allegations as to who was talking to the investigator, the time of the lunch hours of the employees involved, or when or where the conversation occurred. Carpenter indicated that he did not receive complaints about the ECPDIA's conduct from the IBEW.

We are presented with a situation similar to that in Ocean County Judiciary. There the CWA objected to certain campaigning by the OPEIU. CWA, however, did not allege that it was denied similar access. Denial of similar access is the crucial element of unequal access.

Here, the IBEW campaigned, possibly in violation of an agreed-upon restriction. The ECPDIA complained, and the Court Administrator advised the IBEW business agent that such conduct violated the restriction. There is no evidence that the ECPDIA violated or attempted to violate the restriction, or that the IBEW complained about any such violation.

We fail to see how the Court Administrator's reprimand to Sette, based on a letter of complaint, without more, constitutes unequal access. There are no allegations that any unit member or IBEW member received discipline for campaigning. Nor is there any evidence that the court administrator's call to Sette resulted in the IBEW being denied access granted to the ECPDIA. Even if the IBEW was reprimanded for campaigning during lunch hour and not for campaigning during work hours, it has not shown how that reprimand interfered with its ability to conduct its campaign.

Judith Martin states she personally received campaign literature from the ECPDIA during work hours. She does not state whether such literature was personally handed to her or received in her mail slot. Nor does she mention any conversation about the election during work hours. She notes her awareness that ECPDIA proponents were permitted to question investigators who signed IBEW cards. She does not state with specificity when, where, or between whom these conversations occurred.

There are no specific allegations concerning what equipment the ECPDIA used during the campaign or of personal knowledge that

such equipment was indeed used. Additionally, the IBEW does not allege that it attempted to use such equipment.

Heim states that the only campaign activity the ECPDIA engaged in after October 15, 1986, involved distributing two mailings to employees in their mail slots before working hours.

There is no indication that the IBEW distributed, or attempted to distribute campaign materials through the employee mailboxes. Nor is there any indication that they were prohibited from doing so. Under the principles discussed above, the IBEW has failed to demonstrate that it was denied equal access.

The IBEW next objects to the transfer of Judith Martin, an IBEW proponent, from a work station near a majority of investigators to a work station seven floors away near only a few investigators. The IBEW alleges that this action was taken by the Judiciary to create undue influence on the investigators to vote for the ECPDIA.

Casale, the Criminal Case Manager, distributed the reassignment memo on October 6, 1986, transferring Martin, along with ten other investigators effective October 20, 1986. If the IBEW believed that Martin's transfer would taint the election, the appropriate time to raise that issue was before the Agreement for Consent Election was signed. When the IBEW consented to submit to an election, it waived all issues that could have been properly

raised at that time.^{4/} Since the Agreement for Consent Election was signed after the memo of transfer, any objections to the election on that ground have been waived.

Next, the IBEW contends the PERC Agent's alleged conduct, combined with problems with the posting of notices "could have easily resulted in leaving the impression that such election was not taking place between 12 p.m. and 1 p.m. and thus causing confusion as to when such voting was taking place." The IBEW alleges the PERC Agent instructed the observers they were not permitted to leave the voting area during the election, then let the Judiciary's observer leave the area and that the PERC agent left the voting area mid-way through the election with the ballot box.

We fail to see how the alleged conduct of the PERC Agent, even if true, would taint the election process. The IBEW observer was present throughout the election to inform any potential voters that the election was in progress. "Voting Place" signs were posted at each entrance to the room, and the voting booth was in place throughout the election. Over 80 percent of eligible voters

^{4/} The Agreement for Consent Election reads in part as follows: Pursuant to a Petition duly filed under Chapter 11 of the Public Employment Relations Commission's Rules and the New Jersey Public Employer-Employee Relations Act of 1968, and subject to the approval of the Executive Director of the Commission, the undersigned parties hereby waive a hearing and all issues that could properly be raised at said hearing....

participated in the election. Given the high voter turnout, it is unlikely that the PERC Agent's alleged conduct "caus[ed] confusion as to when such voting was taking place." Absent evidence that any conduct by the PERC Agent affected the results of the election, or interfered with the employees' freedom of choice, we find this objection without merit.

Finally, the IBEW asserts that Judith Martin, the IBEW's challenger, participated in the election without her employer's permission.

Martin received permission from Sid Damico, her immediate supervisor, but was informed not to leave her work area without permission from Anthony Casale, Criminal Case Manager. Casale was in a meeting at the time and said he would talk to Mr. Sette after the meeting. As a result, Martin participated in the election without permission.

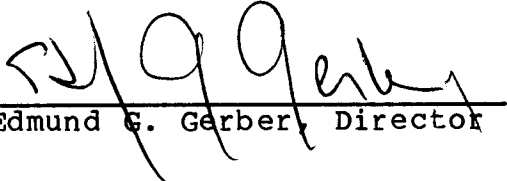
The Judiciary responded, noting that Martin should have requested permission to attend the election earlier than the morning of the election, and that no disciplinary action was taken.

Since no harm resulted from Martin's failure to obtain permission before attending the election, and there is no showing that the lack of permission affected the results of the election, we dismiss this objection.

In sum, we do not believe that the IBEW met its burden of proving, by the preponderance of the evidence that election

procedures were tainted and irregular. We therefore dismiss the objections to the election.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: February 11, 1987
Trenton, New Jersey