D.R. NO. 82-58

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

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Public Employer,

-and-

ENGLEWOOD TEACHERS ASSOCIATION, NEW JERSEY EDUCATION ASSOCIATION,

DOCKET NO. RO-81-92

Petitioner,

-and-

LOCAL 29, RWDSU, AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses objections filed by Local 29, RWDSU to the conduct of a rerun representation election, finding that Local 29 failed to establish a prima facie case of conduct which interferes with or reasonably tends to interfere with the free choice of voters. Local 29 alleged that in rescheduling the election, more time was needed to attenuate the misconduct which led to the setting aside of the first election and to reestablish laboratory conditions. The Director notes the lack of any evidence to support the claim that more time was necessary than the amount of time normally provided in scheduling rerun elections. Local 29 further stated that the Commission was required to advise employees of the reasons for the setting aside of the first election and that employees were confused as to the reasons. The Director notes that employees were aware from election notices that the first election was set aside, and that the rerun was rescheduled for May 7, 1982. The Director, relying on private sector experience, finds that the Commission was not required to advise employees of the reasons for the setting aside of an election and the party responsible for the misconduct.

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Appearances:

For the Public Employer
John Miraglia, Consultant

For the Petitioner
Schneider, Cohen, Solomon & DiMarzio, attorneys
(Bruce D. Leder of counsel)

For the Intervenor
Osterweil, Wind & Loccke, attorneys
(Manuel A. Correia of counsel)

DECISION

Pursuant to a Decision setting aside an election [1/] a rerun election was conducted by the Public Employment Relations Commission ("Commission") among custodial and maintenance employees of the Englewood Board of Education ("Board") on May 7, 1982. The employees were given the opportunity to designate the Englewood

1/ In re Englewood Bd. of Ed., D.R. No. 82-47, 8 NJPER 251 (¶ 13111 1982).

Teachers Association ("Association"), Local 29, RWDSU, AFL-CIO ("Local 29"), or neither, as their exclusive representative for the purpose of collective negotiations. A majority of employees cast their ballots for the Association.

The initial election, held on February 19, 1982, was set aside on March 26, 1982 because the Association caused the distribution of tampered official Notices of Election. 2/ The undersigned ordered that the rerun election be conducted within thirty days 3/ and, in fact, an election was scheduled for April 19, 1982. However, the undersigned postponed the rerun election on April 16 when the Board advised that the new election notices were not posted in all locations.

Following the May 7, 1982 rerun election, Local 29 filed timely post-election objections, which are the subject of the within determination. Three affidavits were filed in support of the objections. Local 29 asserts two objections which relate to the procedures regulating the conduct of the rerun election: (a) the 30 day period within which the undersigned ordered the conduct of the rerun election was not sufficient time to reestablish the laboratory conditions necessary for the conduct of an election; and (b) the failure of the Commission election notices to speci-

2/ Id. The Association did not admit this conduct, but declined the opportunity to rebut the prima facie case presented by Local 29 in support of its post-election objections. Instead, the Association sought a rerun election.

3/ Local 29 sought Commission review of the determination to conduct the rerun election within thirty days of the objections decision. Said request was denied on April 16, 1982, In re Englewood Bd. of Ed., P.E.R.C. No. 82-93, 8 NJPER ___ (¶ ___ 1982).

fically detail the reasons for the rerun election and to explain whose conduct was responsible for the first election being set aside resulted in confusion among the employees that affected the rerun election.

N.J.A.C. 19:11-9.2 sets forth the procedures and standards utilized by the Commission in determining the disposition of objections to an election. N.J.A.C. 19:11-9.2 states in part:

> (h) Within five days after the tally of ballots has been furnished, any party may file with the director of representation an orignial and four copies of objections to the conduct of the election or conduct affecting the results of the elections. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall be served simultaneously on the other parties by the party filing them, and a statement of service shall be made. 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.
>
> (i) Where objections as defined in subsection (h) of this section are filed, the director of representation shall conduct an investigation into the objections if the party filing said objections has furnished sufficient evidence to support a prima facie case. Failure to submit such evidence may result in the immediate dismissal of the objections.

Accordingly, objections, when filed, must describe conduct which would warrant the setting aside of the election as a matter of law and the objecting party has the burden to proffer

evidence, sufficent to support a prima facie case, which precisely and specifically shows the occurrence of the alleged objectionable conduct.

The undersigned is further guided by the following standard established by the Commission in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (Slip Opin. 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 employee 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 sufficent basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between theimproper activities and the interference with freedom of choice, established by a preponderance of the evidence. 3/

3/ In NLRB v. Golden Age Beverage Co., 71 LRRM 2924, 2926 (5th Cir. 1969), a leading private sector case, the Court observed that the objecting party has the burden of proving that there has been prejudice to the fairness of the election. The Circuit Court stated:

> This is a heavy burden; it is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required showing not only that the unlawful acts occurred, but also, that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

The purpose behind imposing such a demanding burden of proof is to avoid unnecessary delay in certifying a bargaining representative, thus prolonging labor unrest and impeding negotiations. See United Steelworkers v. NLRB, 86 LRRM 2984 (5th Cir. 1974), cert. denied, 419 U.S. 1049.

In interpreting the New Jersey Employer-Employee Relations Act ("Act"), the New Jersey Supreme Court stated that PERC should look to the law and policies under the National Labor Relations Act as a guide to its own decisions in representation proceedings. Lullo v. Int'l. Assn. of Fire Fighters, 55 N.J. 409, 424 (1970).

Thus, in discharging his duties under the rule and in accordance with Commission standards, the undersigned must assess at this juncture whether Local 29 has established a prima facie case that the procedures regulating the conduct of the rerun election fostered a climate which actually interfered with a free and fair election, or whether, even absent evidence of actual interference, the procedures utilized would reasonably tend to result in a deprivation of free choice. Since the alleged objections relate to the Commission's procedural conduct of the election, the undersigned may take note of facts within the Commission's knowledge and its experience in regulating election procedures. Accordingly, the undersigned has set out to determine whether the proferred evidence and argument "precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law."

In its first objection, Local 29 asserts that the undersigned's order to conduct a rerun election within 30 days of his decision setting aside the first election was not sufficient time to reestablish the laboratory conditions necessary for a fair election. The undersigned issued his decision and order directing the second election on March 26, 1982. Subsequently an election was scheduled for April 19, 1982. However, the election was postponed and rescheduled for May 7, 1982. Thus, the second election took place not within 30 days after the undersigned's order, but, due to the postponement, six weeks later, and nearly three months after the election misconduct. Local 29 offers no

evidence to support its claim that during this time period the misconduct attributable to the tampered election notices had not or could not have been attenuated, or that employees were otherwise interfered with in the exercise of free choice as a result of the timing of the rerun election.

Moreover, there is no reason to assume that any period of time other than the normal period in redirecting elections was necessary to insure employee free choice. The employees had fresh, untampered with notices of the second election. (This notice also explained that the February 19, 1982 election had been set aside and that the scheduled April 19, 1982 election had been postponed.) Local 29 has not produced any evidence which remotely suggests that the conduct which resulted in the first election being set aside would be repeated or that it was so egregious as to require additional time to restore laboratory conditions. Therefore, the undersigned cannot conclude that the adherence to the normal thirty day period for redirecting elections had the reasonable tendency to deprive employees of laboratory conditions. Accordingly, the first of Local 29's objections is dismissed.

Local 29 next asserts that the Commission's failure to include in its election notices the reasons for the setting aside of the election and the party responsible for such conduct resulted in confusion among the eligible voters that diminished free choice in the rerun election. This objection is coupled with a claim that the notice of the rescheduled rerun election confused

voters as to why the rerun election was being postponed and as to which party was responsible for the postponement. Local 29 has submitted affidavits in support of this allegation.

Again, the crucial inquiry is whether there is evidence of confusion which interfered with employee free choice. Further, was there evidence that employees did not know of the second election and the concomittant nullification of the first election? Did the employees know the second election counted?

There is no evidence at all of any confusion among the employees as to the reasons for and the circumstances surrounding the second election. While there are allegations of ignorance and confusion concerning the reasons for the rescheduling of the elections, the affiants state their awareness of a posting of a notice in all facilities which advised that "the election in February had been set aside because of improper conduct affecting the election and the second election was postponed because of insufficient time providing notice of the election." The same number of people voted in both the February 19 and the May 7 elections, with the Association clearly winning each election with 85% and 79% of the vote, respectively. 4/ Moreover, the election notice itself states that any employee with any questions

4/ The vote tally for the February 19, 1982 election was as follows:

Association	33
Local 29	6

The tally for the May 7, 1982 election was as follows:

Association	31
Local 29	8

concerning the election may communicate with the Commission agent in charge of the election. This office received no inquiries whatsoever from any employee concerning the May 7, 1982 election.

As part of its objections, Local 29 asserts that the Commission was required to include on the Notice of Election a statement indicating who was responsible for the nullification of the first election. By failing to do so, Local 29 argues that it may be inferred that it, Local 29, was responsible for the improper conduct.

The undersigned has again been guided by the procedures and experience of the National Labor Relations Board ("NLRB") in the private sector. The NLRB will not as a rule include such language in the election notices unless requested to do so. See Lufkin Rule Co., 56 LRRM 1212 (1964). In Lufkin, the union after the NLRB set aside an election and directed a rerun, moved to include language in the election notices stating responsibility for the nullification of the first election and the specific conduct involved. While the NLRB ordered the election notice to attribute responsibility for the interfering conduct, it disallowed detailing the specific conduct involved. 5/ However, in the instant matter, it was not until several days before the May 7, 1982 election and after two election notices had been posted, (the first, announcing the rerun; the second, announcing the

5/ Even under Lufkin, Local 29 is asking the Commission to include more than the case would require. The NLRB will not detail the specific conduct involved except to say that there was interference with employee free choice in the first election.

rescheduled rerun) that Local 29 first requested that language be included in the notices attributing responsibility for the objectionable conduct and explaining the reasons for nullification of the first election. 6/

Given the NLRB policy, established over 30 years of conducting representation elections, which does not include as a matter of routine procedure the posting of election notices with the type of language requested by Local 29, the undersigned cannot conclude that the absence of such information creates a defect in election procedures which has a reasonable tendency to deprive employees of free choice. The central inquiry, after all, is actual evidence of employee confusion and whether the employees were able to cast their ballots intelligently. There is no evidence that the parties were unable to communicate directly with the voters and advise them of their respective positions. 7/

Based upon the above, the undersigned concludes that Local 29 has failed to establish a prima facie case demonstrating that the conduct complained of interfered with or tended to

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6/ Certain inquiries raised by Local 29 in its letter dated April 28, 1982 and received April 30, 1982, were addressed in the undersigned's letter to the employer, dated April 28, which was copied to Local 29. A formal response to Local 29's letter was issued on May 6.

7/ In the decision of March 26, 1982, served on all parties, the undersigned detailed the objectionable conduct and identified the party responsible for its commission. Local 29, it it so desired, had approximately six weeks within which to advise voters of the decision, and its contents, which attributed responsibility for the objectionable conduct to its adversary in the election. This is not to suggest that Local 29 had the responsibility to disseminate this information.

interfere with the free choice of the employees. Therefore, the undersigned hereby dismisses all of the election objections filed by Local 29. 8/ In accordance with the rules of the Commission, the undersigned shall issue the appropriate Certification of Representative (attached hereto and made a part hereof) to the Association in the unit of all custodial and maintenance employees.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: June 9, 1982
Trenton, New Jersey

8/ In the identical affidavits submitted by Local 29 on June 1, 1982, reference is made to certain Association meetings. The allegations relating to these meetings were not contained in the initial objections filed by Local 29 and are barred from consideration herein.

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DOCKET NO. RO-81-92

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the undersigned in accordance with the New Jersey Employer-Employee Relations Act, as amended, and Chapter 11 of the Commission's Rules and Regulations; and it appearing from the Tally of Ballots that an exclusive representative for collective negotiations has been selected; and no valid objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefore;

Pursuant to authority vested in the undersigned, IT IS HEREBY CERTIFIED that

Englewood Teachers Association, N.J.E.A.

has been designated and selected by a majority of the employees of the above-named Public Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the said representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. Pursuant to the Act, the said representative shall be responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership; the said representative and the above-named Public Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment; when an agreement is reached it shall be embodied in writing and signed by the parties; and written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: All custodial and maintenance employees employed by the Englewood Board of Education excluding all supervisors within the meaning of the Act, managerial and confidential employees, teachers, secretaries, and all other employees of the Englewood Board of Education.

Carl Kurtzman, Director
of Representation

DATED: Trenton, New Jersey
June 9, 1982