

D.R. NO. 2005-1

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

In the Matter of

LEAP ACADEMY UNIVERSITY CHARTER
SCHOOL,

Public Employer,

-and-

Docket No. RO-2004-080

LEAP ACADEMY TEACHERS ASSOCIATION/NJEA,

Petitioner.

SYNOPSIS

The Director of Representation dismisses objections to an election conducted among faculty at a Charter School. The Director finds that the objecting Board did not establish a prima facie case under the requirements of N.J.A.C. 19:11-10.3, where the evidence provided was hearsay; where the alleged conduct, even if it was not hearsay, would not have had the tendency to interfere with voters' free choice or the conduct of a fair election; and where the objections, even if sustained, were not sufficient to have affected the outcome of the election.

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Appearances:

For the Public Employer,
Genova, Burns & Vernoia, attorneys
(Jennifer Mazawey, of counsel)

For the Petitioner,
Sharon Allen, NJEA Field Representative

DECISION

On February 20, 2004, the LEAP Academy Teachers Association/NJEA (Association) filed a Representation Petition with the Public Employment Relations Commission (Commission) seeking to represent all certificated staff employed by the LEAP Academy University Charter School (Academy). The Association and Academy executed an Agreement for Consent Election providing for a secret ballot election to be conducted among the Academy's certificated staff to determine whether they wished to be represented for collective negotiations by the Association. Pursuant to the terms of the Consent, voting was held on

Wednesday April 21, 2004, in the Academy's elementary school in Camden, New Jersey. Of the approximately 58 eligible voters, 53 ballots were cast with the following results:

Votes For the Association: 33 votes,

Votes Against Representation: 20 votes.

There were no void or unresolved challenged ballots.^{1/}

Therefore, a majority of the valid votes counted were cast in favor of representation by the Association. The parties were served with the tally of ballots. On April 28, 2004, the Academy filed objections to the election. N.J.A.C. 19:11-10.3(h). The Academy alleges that the Association's organizer improperly threatened and/or harassed voters in order to influence their votes, and that the Association offered to throw a party if it won the election.

In support of its objections, the Academy submitted a statement of position and legal argument, a certified statement by the Academy's attorney and copies of letters submitted to the Academy by seven eligible voters and one Academy Board member/parent. None of these letters were in the form of affidavits or certified statements. The following summarizes the employees' statements submitted by the Academy:

^{1/} During the election, a single challenged ballot was cast; however, the parties agreed that the voter was eligible and, thus, the challenge was resolved as eligible and included in the total count.

Voter H. Elayne Sama avers that as a child she witnessed her father being pursued by Teamsters to be beaten for crossing a picket line. She also stated that she was disappointed with the results of the election, that "any union she has ever known did very little for its constituents," and that she was "harassed by being passed flyers and ... more NJEA propaganda on sidewalks." She asserts that the union organizers taped faculty meeting discussions, "instilling fear for simply asking a question." She also complained about having received mail at her home and stated: "This type of pressure, these tactics of harassment, this invasion of privacy through mail makes me tremble with the ... memories of union 'bad guys' from the past."

Voter Peter Law asserts that though he had informed the union organizer that he did not support the petition, she nevertheless continued to pursue and "pester" him to the point that he felt threatened and pressured to support and vote for NJEA.

Voter Marie Green stated that she felt threatened and pressured during the voting process and that the union organizer, "made disparaging remarks to students and supervising staff concerning her teaching."

Voter Ramon Santiago wrote that he felt "threatened and pressured to support and vote for NJEA in the election. He also stated that, although he had informed the organizer that he did not support her efforts, she "pursued and harassed him...to a point where [he] felt threatened and intimidated."

Voter Steve Halla also informed the union organizer that he did not support her effort but was approached many more times by her and "this pressure increased to the point that I felt threatened."

Voter Crawford Burley stated that he felt threatened by individuals who were "pushing their position and advances against [his] will." Burley was approached and solicited by union organizers and "giving [sic] information."

Voter Susan Carter also stated that she felt pressured to support and vote for the NJEA, that she felt

harassed by the receipt of e-mail, mail and verbal pressure to join the union.

In addition, the Academy submitted a letter from Board member Odessa Edmond alleging that the Association's organizer became loud and angry at Edmond's suggestion that the LEAP Academy employees did not need a union and again when the organizer observed students wearing signs which read, "Vote NO for union." Edmond did not state that this alleged anger tended to influence any voters or interfere with a free and fair election.

N.J.A.C. 19:11-10.3(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 specific evidence which that party relies upon in support of the claimed irregularity in the election process.

This Rule sets up two separate and distinct components for evaluating election objections. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or

specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present for the objecting party to make its prima facie case. Under N.J.A.C. 19:11-10.3(i), if the objecting party presents a prima facie case, I initiate an investigation; if the conduct does not warrant setting aside the election as a matter of law, or if the objecting party fails to proffer sufficient evidence to support a prima facie case, I may immediately dismiss the objections.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub nom. AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971), the Commission articulated the following policy:

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 sufficient basis to invalidate an 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. [NJPER Supp. at 156.]

I have reviewed the Academy's objections and supporting documents and find that the Academy has not established a prima facie case as required by N.J.A.C. 19:11-10.3(h). First, the rule requires the submission of evidence demonstrating that the

conduct complained of has actually occurred. Hearsay evidence is generally insufficient to support claims of objectionable conduct. See Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313, (¶17119 1986) (objections on hearsay evidence dismissed); Newark Redevelopment and Housing Auth., D.R. NO. 87-1, H.E. NO. 87-5, 12 NJPER 610 (¶17232 1986), aff'd P.E.R.C. No. 87-34, 12 NJPER 766 (¶17292 1986) (Hearsay evidence alone is insufficient to prove union's claim that employer threatened voters with discharge for supporting union).^{2/} Here, there are no affidavits or certifications which demonstrate that the Association engaged in any egregious or specific conduct which interfered or tended to interfere with employees' rights to freely vote in the election. While the Academy's attorney attested to the Academy's receipt of the employees' letters, she cannot and did not attest to the truth or accuracy of the statements contained therein.

^{2/} The purpose of the requirement that affidavits be provided in cases where allegedly objectionable conduct has been witnessed by voters is to insure the greatest possible reliability of such allegations. The rule exists because, as a matter of law, elections are presumed valid (and not to be easily invalidated) unless specific information reveals that conduct occurred which was destructive of the conduct of a free and fair election. However, in Passaic Valley Sewerage Comm., P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980), the Commission held that the Jersey City requirement of direct evidence of interference with employees' free choice may be tempered by the severity of the alleged conduct. If the conduct is egregious and severely hampers the conduct of a fair election, then the requirement for direct evidence is relaxed.

Additionally, I find that, even if the evidentiary rule were to be relaxed, the employees' statements do not show conduct which is destructive of the atmosphere necessary for a free and fair election.

It is expected that petitioners in an election for majority representative will advocate vigorously for their outcome. Activities such as sending mail, e-mail, and verbal advocacy on sidewalks are not, in themselves, harassing, as some of the above statements seem to assert. None of the statements indicate specifically what "threats" were made (for example, no threats of physical harm, harm to reputations, or future harm in the form of retaliation), or that the organizer had the ability to carry out any threat, but only that these voters "felt" threatened. Apparently, the above voters believed that once they had informed the organizer that they were not interested, any further communication concerning the union amounted to harassment and undue pressure. But, employee organizations are free to campaign vigorously, even to those voters who they have not previously convinced.

Further, the taping of faculty meetings does not destroy the fairness of the election process. See Watchung Hills Reg. Bd. of Ed., D.R. No. 86-21, 12 NJPER 317 (¶17122 1986) (election objections dismissed where the Board taped a meeting it held to discuss the election). This is especially true here since voting

in this election was in secret and anonymous. The seven statements do not connect any threat to the alleged interference with free choice. Thus, it is not apparent how, in a secret ballot vote setting, they were not free to choose because of the alleged threats.

Finally, even if we found merit to the allegations presented here, and all seven voters had been improperly influenced by the Association's conduct, their "no" votes could not alter the outcome of the election. The margin of those who voted in favor of representation by the Association was 13 votes. Where there is a flaw in the election process which potentially affects the election outcome, we will conduct an investigation and take appropriate corrective action, including, where necessary, re-running the election. See Rutgers University, D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. for rev. den., P.E.R.C. No. 2000-101, 27 NJPER 1 (¶32000 2000) (order that 112 ballots, originally misplaced by the post office, be opened and counted). However, where objectionable conduct could not affect the outcome of the election, there is no basis to set the election aside and re-run the election. See Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002) (claim that two voters were improperly permitted to vote was dismissed where those votes could not have affected the outcome). Here, even if all seven voters voted against representation, such voting would be numerically

insufficient to affect the outcome of the election. Accord, Borough of Bernardsville, D.R. No. 2003-10, 29 NJPER 35 (¶13 2003) (One misdirected ballot was not sufficient to set aside the election since one vote could not alter the election's outcome).

With regard to the objection based upon the Association's alleged threats made to voters, I find that the Academy has not established a prima facie case as required by N.J.A.C.

19:11-10.3(h).

With respect to the statement by a Board member/parent that the Association organizer became angry at her, such conduct is not a relevant objection since that person is not an eligible voter. Further, there is no demonstration that such a display of anger had any nexus to employees' rights to chose representation or vote against it.

Finally, none of the statements substantiated the allegation that the Association offered to throw a party. Nevertheless, such an offer, if made, amounts to routine campaigning in representation elections. Here there is no indication that such conduct illegally affected laboratory conditions for a free and fair election.

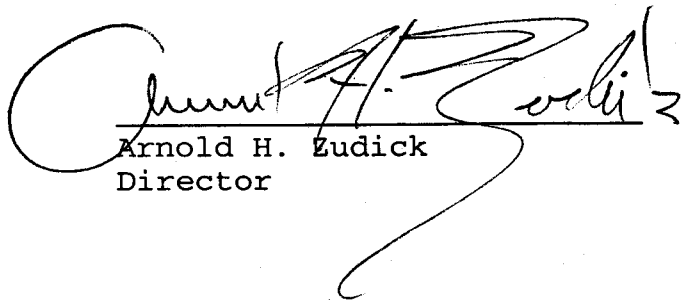
Accordingly, I find that the LEAP Academy's objections do not warrant setting aside the election as a matter of law and, therefore, do not state a prima facie basis to void the election. For the above reasons, I dismiss the objections. A certification

of representative certifying the Association as the unit's
collective negotiations representative is attached.

ORDER

The objections to the election are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director

DATED: July 14, 2004
Trenton, NJ

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

In the Matter of

LEAP ACADEMY BOARD OF TRUSTEES,
Public Employer,

-and-

LEAP ACADEMY TEACHERS ASSOCIATION/NJEA,
Petitioner.

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DOCKET NO. RO-2004-080

CERTIFICATION OF REPRESENTATIVE

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. A majority of the voting employees selected an exclusive majority representative for collective negotiations. No valid timely objections were filed to the election.

Accordingly, **IT IS HEREBY CERTIFIED** that

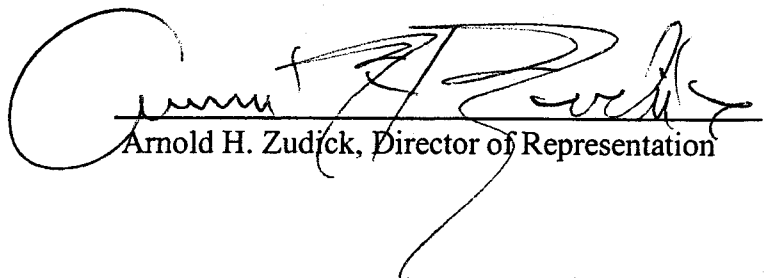
LEAP ACADEMY TEACHERS ASSOCIATION/NJEA

has been selected by a majority of the employees of the above-named 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 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 representative is responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership. The representative and the above-named 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. Written policies setting forth grievance procedures shall be negotiated and shall be included in any agreement.

UNIT: Included: All certificated staff, including but not limited to classroom teachers, nurse, librarian and teacher fellows who possess provisional certification employed by the LEAP Academy Board of Trustees

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, casual employees, police and non-professional employees; all other employees, contracted services - child study team and social worker, head nurse, director of special education, substance abuse coordinator, acting curriculum supervisor, lead teacher and teacher fellows who are not certificated

DATED: July 14, 2004
Trenton, New Jersey



Arnold H. Zudick, Director of Representation

Attachment:

Certification of Representative dated: July 14, 2004

In the Matter of

LEAP ACADEMY BOARD OF TRUSTEES

-and-

LEAP ACADEMY TEACHERS ASSN/NJEA

Docket No. RO-2004-080

Service on the following:

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