D.R. NO. 2020-14

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

In the Matter of

ATLANTIC COUNTY,
(MEADOWVIEW NURSING HOME),

Public Employer,

-and- Docket No. RO-2020-034

GOVERNMENT WORKERS UNION,

Petitioner,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES COUNCIL 63,
LOCAL 3408

Intervenor.

SYNOPSIS

The Director of Representation orders that a secret mail ballot election be conducted among an existing unit of institutional employees of Atlantic County (County) at the Meadowview Nursing and Rehabilitation Center and the Central Kitchen/Warehouse (Meadowview) based on a timely representation petition filed by Government Workers Union (GWU). The petitioned-for unit is currently represented for purposes of collective negotiations by American Federation of State, County, and Municipal Employees Council 63, Local 3408 (Local 3408).

In light of the objective of affording outside parties predictability and the clear retroactive start date and duration terms of Local 3408's contract, the Director found that the contract was in its fourth year and no longer barred the filing of representation petitions. The Director found that the Commission's decision in Atlantic Cty., P.E.R.C. No. 2018-5, 44 NJPER 80 (¶25 2017) did not support relying on evidence surrounding negotiations extrinsic to the contract in determining the period for a contract bar or otherwise departing from the normal contract bar rule, nor in treating GWU differently from other potential petitioners. The Director also found that In the Matter of Ridgefield Park Bd. of Ed. and Ridgefield Park Bd. of Ed. Ass'n, 459 N.J. Super 57 (App. Div.), certif. granted 239 N.J. 398 (2019) was inapplicable to the relevance of separate contracts in determining a contract bar period.

After considering the raised and relevant factors in this case, the Director determined that a mail ballot election was more appropriate to an in-person an election and that Atlantic Cty. did not dictate otherwise.

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Appearances:

For the Public Employer,
James Ferguson, County Counsel
(Jennifer Starr, Assistant County Counsel)

For the Petitioner,
(David Tucker, President)

For the Intervenor,
Beckett Law Office, attorneys
(David B. Beckett, of counsel)

DECISION AND DIRECTION OF ELECTION

On January 8, 2020, Government Workers Union (GWU) filed a petition for certification of representative by election, accompanied by an adequate showing of interest, seeking to

represent a collective negotiations unit of institutional employees employed by Atlantic County (County) at the Meadowview Nursing and Rehabilitation Center and the Central Kitchen/Warehouse (Meadowview). The petitioned-for unit is currently represented for purposes of collective negotiations by American Federation of State, County, and Municipal Employees Council 63, Local 3408 (Local 3408).

On January 14, 2020, Local 3408 filed a request to intervene, accompanied by a current collective negotiations agreement (CNA) covering the period January 1, 2017 through December 31, 2020, which I approved. N.J.A.C. 19:11-2.7(b)(2). Local 3408's intervention request was also accompanied by a position statement, served on the other parties, contending that GWU's petition is untimely and that Local 3408 is entitled to a contract bar of three years commencing January 1, 2018 through December 31, 2020, due to delays in negotiations attributable to the conduct of GWU as described in Atlantic Cty., H.E. No. 2017-7, 43 NJPER 362 (¶104 2017), modified P.E.R.C. No. 2018-5, 44 NJPER 80 (¶25 2017) (Atlantic Cty. I).[1/] GWU filed and served a response on January 15, 2020, and Local 3408 filed and served a reply later that day.

1/ The factual findings and procedural history of Atlantic Cty. I are set forth at length therein.

On January 16, 2020, the County provided another copy of the CNA, a memorandum of agreement (MOA) signed by Local 3408 and the County in January 2019 that led to the CNA, a list of the employees in the described petition, a certification that the Notice to Employees was posted, the payroll schedule, a statement that no organizations other than GWU and Local 3408 within the prior 12 months claimed to represent any of the petitioned-for employees, and a statement that the County took no position on the issue of the timeliness of the petition.

On January 22, 2020, Local 3408 filed and served an additional position statement before the telephone conference between the parties and the assigned Commission staff agent scheduled later that day. Local 3408 again argued that the petition was untimely, but also argued that, if the Commission finds that the petition is timely, an in-person election would be more appropriate than a mail ballot election. The position statement was accompanied by certified statements of some unit employees stating that they were misled by GWU and that they did not understand that the authorization cards they signed for GWU could result in an election.

During the conference, the parties reiterated their positions on the timeliness issue. Regarding the election methodology issue, GWU argued that a mail ballot election was more appropriate, and the County took no particular position

other than to state that it would like the election to be conducted in a way that would have minimal impact on the residents of Meadowview. Local 3408 also clarified that it was not challenging GWU's showing of interest, but was using the certified statements to support its argument that GWU engaged in misleading behavior and would engage in similar behavior during a mail ballot election that would make it less appropriate than an in-person election. After the conference, the staff agent requested additional position statements.

On January 29, 2020, GWU filed and served its position statement and, as exhibits, a blank copy of the authorization card used for its showing of interest and a copy of the Commission decision in Atlantic Cty. I. The same day, the County submitted a statement reiterating that it took no position on the timeliness issue nor the election methodology issue except to state its preference that the election have minimal impact on the residents of Meadowview. The County also provided location and employee shift information as well as other factors to consider when determining arrangements for an in-person election, should the Commission order one.

On January 30, 2020, Local 3408 submitted a position statement in reply to GWU's submission, a position statement in reply to the County's submission, five of the seven certified employee statements previously submitted, a certification of

employee and Local 3408 position-holder[2/] Janice Wright, and a certification of AFSCME staff field representative Yolanda Lawson.

We have conducted an administrative investigation to determine the facts. The disposition of the petition is properly based upon our administrative investigation. No substantial and disputed material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6.

* * * * *

Timeliness Issue

N.J.A.C. 19:11-2.8 provides, in relevant part:

> (c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:
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> * * *
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> 2. In a case involving employees of a county or a municipality, any agency of a county or municipality or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement;
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> * * *

2/ The exact position within Local 3408 was not indicated.

> (d) For the purpose of determining a timely filing, an agreement for a term in excess of three years will be treated as a three-year agreement and will not bar a petition filed at any time after the end of the third year of the agreement; an agreement for an indefinite term shall be treated as a one-year agreement measured from its effective date and will not bar a petition filed at any time after the end of the first year of the agreement.

These restrictions are intended to strike a balance between the employees' statutory rights to select or refrain from selecting negotiations representatives and the need to maintain and enhance stable employer-employee relationships. Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) (Clearview); N.J.S.A. 34:13A-2, -5.2, -5.3, -5.4(e), -6(d), -11. While stable negotiations relationships are a statutory policy concern, the ability to select or refrain from selecting a representative at reasonable intervals is a statutory right. The insistence upon the assertion of the contract bar is subject to the acceptance or disapproval of the Commission whose mandated responsibility is to ensure that its rules not be utilized for purposes repugnant to the Act. Clearview.

The Commission's contract bar rule is a concept patterned after the experience of the National Labor Relations Board.[3/]

3/ The Commission can appropriately look to NLRB precedents and guidelines in representation cases. Lullo v. Intern. Assn. of Fire Fighters, 55 N.J. 409 (1970).

See General Cable Corp., 139 NLRB 1123, 51 LRRM 1444 (1962). The Board has stated:

> Two objects of the Board's contract bar policies are to afford parties to collective-bargaining agreements an opportunity to achieve, for a reasonable period, industrial stability free from petitions seeking to change the bargaining relationship, and to provide employees the opportunity to select bargaining representatives at reasonable and predictable intervals. To properly achieve these objects, in determining whether an existing contract constitutes a bar, the Board looks to the contract's fixed term or duration because it is this term on the face of the contract to which employees and outside unions look to predict the appropriate time for the filing of a representation petition.... (footnote omitted).
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> [Union Fish Co., 156 NLRB No. 33, 61 LRRM 1012 (1965), cited in East Brunswick Bd. of Ed., D.R. No. 80-39, 6 NJPER 308 (¶11148 1980) and City of Atlantic City, P.E.R.C. No. 82-81, 8 NJPER 137 (¶13059 1982) (City of Altantic City I]

In East Brunsick Bd. of Ed., the Director found that the matter did not present circumstances which could result in the routine or normal application of the contract bar rule. The duration provision of the contract had a paragraph that clearly provided for a two year agreement, while other paragraphs reflected the intent for a three year agreement. The Director explained that any validity to the contract as a three year agreement was not the determining factor with respect to contract bar protection. Rather, the compelling consideration was whether

the duration had been defined with sufficient clarity to afford the parties full three year protection and restrict the rights of employees to petition to change their negotiations representative. The Director found it doubtful that employees or outside unions could predict with reasonable certainty the contract's fixed term, as they would be confused as to whether the agreement terminated after two or three years and which one of two "window periods" during the life of the agreement was the appropriate period for the filing of petitions. The Director found that although the contract was not one of indefinite duration, it could not protect against the filing of a certification petition for a three year term since it failed to provide the object of certain predictability necessary for the full protection of the contract bar rule. The Director concluded that the dual objects of providing stability of relationships and certain predictability for the filing of representation petitions could be accomplished by treating the contract, for contract bar purposes, as providing two "window periods."

In City of Atlantic City I, the Commission held that it is the face of the contract that will determine whether or not it has a fixed duration, that parol evidence is inadmissible to establish the intent of the parties concerning its duration, and that an employer and an incumbent union who desire maximum labor stability must include a specific term of duration in their

negotiated agreement so that employees or outside unions will know with reasonable clarity when they can file their petitions.

The Director in W. Orange Tp. Library, D.R. No. 85-14, 11 NJPER 106 (¶16047 1985) reiterated the two essential objectives to be achieved by the contract bar rule: 1) providing stability to negotiations relationships, and 2) affording any outside party an opportunity to determine when a representation petition can be timely filed.

N.J.A.C. 19:11-2.8 provides that an agreement for an indefinite duration term is treated as a one-year agreement measured from its effective date. However, the rule does not provide for the starting point of agreements with definite duration terms, and the Commission has consistently considered the start of the term to be that which is specifically identified in the agreement, and even applied retroactively because the agreement was ratified later than that date. In Upper Tp., D.R. No. 80-27, 6 NJPER 118 (¶11063 1980), the employer recognized an employee organization as the majority representative on May 5, 1979, with such recognition alleged to have been in conformance with N.J.A.C. 19:11-3.1 for purposes of a one-year recognition bar. A contract was entered into on May 7, 1979, and stated that the terms of the contract were effective January 1, 1979 through December 31, 1979 (one year). The Director determined that the recognition bar was extinguished by the contract and that a

petition could be filed after the contract expiration date, even though this was sooner than what would have been the expiration of the recognition bar or the expiration of a contract bar had the contract not set definite duration terms.

Accordingly, an agreement that covers a term of four years will start its fourth year and be "open" to the filing of representation petitions sooner if the earlier years were covered retroactively from the ratification date pursuant to the agreement's terms, compared to a ratified agreement that covers a four year duration going forward.

In Atlantic City M.U.A., AFSCME Council 63 filed a representation petition for a unit represented by GWU. The M.U.A. submitted an MOA that it and GWU signed on December 4, 2018, setting forth various substantive terms and conditions of employment and extending from January 1, 2015, through December 31, 2019. The Director noted that, if authentic, the MOA would constitute a contract for the purposes of the contract bar and would extinguish any certification bar that could otherwise be extended due to the employer's alleged failure to negotiate. Considering the retroactive start date of the MOA, the Director noted that the petition was filed during the open period between the end of the third year of the agreement and its expiration.

Coupled with the premature extension doctrine,[4/] the Director determined that the period of a contract before its open period does not serve the same purpose as the certification year,[5/] and a failure to negotiate before the open period does not warrant an extension of the contract bar. Atlantic City M.U.A.

If we will not extend a contract bar due an employer's failure to negotiate in good faith toward a successor contract, then it stands to reason that we will not extend a contract bar if a third party employee organization interfered with the negotiations between the employer and the majority representative.[6/] This is particularly so if a contract was eventually ratified before a petition was filed, since the

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4/ See Monmouth Cty., D.R. No. 99-3, 24 NJPER 492 (¶29229 1998) (discussing the premature extension doctrine, which provides that a new contract signed during the term of a previously executed contract can only act as a bar for the remainder of the period when the prior contract itself would have been a bar)

5/ The purpose of the certification year is to give the representative a presumption of majority status for an adequate period of time to negotiate a first contract. Atlantic City M.U.A. The policy reasons for its extension when the majority representative is precluded from good faith negotiations are articulated in City of Atlantic City, D.R. No. 2019-10, 45 NJPER 227 (¶60 2018) (City of Atlantic City II).

6/ As noted in Atlantic City M.U.A. at n.10, as opposed to dismissing a petition as untimely due to an extended bar, an election may be blocked if documentary evidence shows a nexus between the alleged misconduct and the possibility of a free and fair election. See Atlantic Cty. I.

parties to the contract could have provided for the full duration to go forward rather than have some of it apply retroactively.

The cases cited above suggest that the clear duration term in the contract itself will be the guide to outside parties as to the timing of representation petitions, rather than the potentially ambiguous date on which the agreement became binding[7/] or the date on which it could have been finalized absent interference. Thus, we will apply the clear termination date in the contract itself, as well as the clear start date (even if retroactive), without relying on extrinsic evidence, to determine the open period of the contract.

In this matter, the current CNA between Local 3408 and the County on its face covers the period of January 1, 2017, to December 31, 2020. Its duration clause under Article 2, Section 10, Subsection A states: "This Agreement shall be effective as of January 1, 2017 and shall remain in full force and effect until December 31, 2020." (emphasis added) Accordingly, this agreement is a four year agreement which no longer bars the filing of petitions after the end of its third year, which ended on January

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7/ An agreement can become binding upon the signatures of authorized representatives or ratification, depending on the terms of the agreement, discussions during negotiations, or the past history of the parties. Palmyra Boro., P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007), recon. granted P.E.R.C. No. 2008-16, 33 NJPER 232 (¶89 2007) (granting reconsideration on separate issue).

1, 2020, despite Local 3408 and the County not signing the agreement until July 2019.

Local 3408 argues that GWU's conduct found by the Commission in Atlantic Cty. I, and the remedy ordered therein support the conclusion that Local 3408 is entitled to a three-year contract bar that remains in effect. Local 3408 maintains that it was precluded from negotiations during the pendency of the litigation in Atlantic Cty. I until at least the date of the Commission decision on August 17, 2017. Local 3408 asserts that the three years for the bar should be deemed to start as of January 1, 2018. I disagree that the Commission's decision supports Local 3408's argument.

In Atlantic Cty. I, the Commission agreed that GWU had committed an unfair practice when its agents attempted to induce unit employees into signing authorization cards in support of GWU as the majority representative over Local 3408 by promising them gifts in the form of paid gift cards. The Commission adopted the part of the hearing examiner's recommended remedy providing Local 3408 the benefit of a one-year election bar against any petitions (not just those filed by GWU). The Commission modified the part of the Hearing Examiner's recommended remedy of precluding the processing of petitions filed by GWU or its agents (but not other petitioners) until the open period in a second successor contract to instead preclude the processing of petitions until the open

period of the contract then existing or being negotiated (i.e., GWU would only be barred as any other petitioner by normal contract bar rules). The Commission determined that the recommended remedy "could infringe upon employee free choice should a majority of the unit desire, in the absence of coercion or interference, to be represented by GWU" while the ordered remedy struck the "proper balance." Atlantic Cty. I. The Commission also declined to order GWU to publicize the Atlantic Cty. I decision.

The Commission explained that the crux of GWU's misconduct was the promise of gift cards by its agents in their effort to supplant Local 3408, not any continuing advocacy against Local 3408 by GWU's agents. The Commission thus only barred GWU from filing until the open period prescribed by N.J.A.C. 19:11-2.8 for the CNA then in effect or being negotiated, as any other organization would be. In footnote 16, the Commission noted:

> Should the employees already be in a successor CNA, GWU may, like all other parties, file a representation petition during the open period in the final year of a CNA of three years or less, or after the third year of a CNA exceeding three years. See N.J.A.C. 19:11-2.8(c)-(d).
>
> [Atlantic Cty. I at n.16 (emphasis added)]

The Commission was explaining the normal procedures under the contract bar rule, and it was not articulating a special procedure or one that only applied to GWU. Had there already

been a contract in place on the date of the Commission's decision, GWU would have been able to file a petition during the normal open period for that contract, provided the one-year election bar had also passed. Thus, if there had been a contract in place on the date of the Commission's decision, and if on August 18, 2018, there was no contract in place or a contract was in the open period prescribed by N.J.A.C. 19:11-2.8(c)(2) ("not less than 90 days and not more than 120 days before the expiration") or -(d) ("any time after the end of the third year of the agreement"), GWU would have been able to file a petition.

The Commission was not stating that Local 3408 was entitled to a three-year contract bar. The Commission was only stating the effect of a contract in excess of three years.[8/] That there was no contract in place on the date of the Commission's decision is of no significance. Local 3408 was provided a one-year election bar within which to negotiate a successor contract. If the successor contract had been executed before the expiration of the election bar, the contract itself would have continued to bar the filing of any petitions (not just those of GWU) for the time

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8/ Indeed, even a normal four year contract does not bar the filing of petitions for the full period of the first three years. In addition to not barring a petition any time after the end of the third year, a contract in excess of three years is treated as a three-year agreement for the purposes of a timely filing. N.J.A.C. 19:11-2.8(d). Thus there is also an open period during the third year pursuant to N.J.A.C. 19:11-2.8(c).

applicable to the contract's duration, whatever that might have been.

A contract's duration, like any of its other terms, is negotiated between the employer and the majority representative. While Local 3408 may have wanted a four-year contract, the County might not have agreed. Likewise, while Local 3408 might have wanted a contract to cover four years going forward from the execution date, the County might have preferred retroactive coverage and to not bind itself too far into the future. Thus, it was possible that a successor contract executed during the last day of the election bar period would have only been for a duration of one year, in which case it would have expired by now.

In fact, no contract was executed before the expiration of the election bar. After the expiration of the election bar, GWU or any other organization could have filed a petition until the successor CNA was in place in July 2019, or possibly until the January 2019 MOA was in place.

Local 3408's proposed period for the contract bar would depart from the actual words of N.J.A.C. 19:11-2.8 and from our consistent practice in applying it. If the Commission intended such a departure, it would have explicitly articulated it in its decision. It did not.

As the contract explicitly covers the period January 1, 2017 through December 31, 2020, it is beyond its third year and no

longer bars the filing of any organization's petition. Even if I assume that Local 3408 could not reasonably have executed a contract until January 1, 2018, I disagree that the year 2017 should not count and that the contract should be considered to be a three-year contract covering the period January 1, 2018, through December 31, 2020. As explained above, this would be unfair to other petitioners who would have no notice of the issues surrounding negotiations extrinsic to the clear terms of the contract itself.

Applying a contract bar to GWU's petition exclusively would be contrary to the Commission's remedy that placed GWU on the same procedural footing as any other interested employee organization. The Commission acknowledged that it was without power to issue a punitive remedy and instead embraced ". . . employee free choice should a majority of the unit desire, in the absence of coercion or interference, to be represented by GWU." Atlantic Cty. I.

Local 3408 may have benefitted from a longer contract bar period if it negotiated two contracts with the County: one covering the period before ratification retroactively and another covering the period prospectively from ratification. Assuming that the second contract covered a period extending from July 2019 to December 2020 or later, a contract bar would still be in place.

Local 3408 argues that the Appellate Division decision in In the Matter of Ridgefield Park Bd. of Ed., and Ridgefield Park Bd. of Ed. Ass'n, 459 N.J. Super 57 (App. Div.) certif. granted 239 N.J. 398 (2019) (Ridgefield Park), supports its argument that a petitioner should not have to engage in the "procedural gymnastics" of negotiating two separate contracts in order to receive the benefit of a longer prospective contract bar. Even assuming that the New Jersey Supreme Court will affirm the Appellate Division decision, I find that Ridgefield Park is inapplicable to the circumstances of this matter.

In Ridgefield Park, the Commission interpreted L. 2011, c. 78, §§ 39 and 41 (Chapter 78), codified in relevant part at N.J.S.A. 18A:16-17.2, as precluding negotiations over health insurance premium shares until the full premium share of Chapter 78 had been implemented and requiring negotiations for the first contract to be executed after full implementation to be conducted as if the full premium share was included in the prior contract. For a contract executed before full implementation, the Commission held that the full premium share remained in effect for the entire duration of the contract, even if the duration extended past the date of full implementation and the contract terms indicated that the premium share would be reduced. The Commission held that if two contracts had been negotiated, one that expired after full implementation had occurred and another

that only covered a period after full implementation, the latter contract's alternate premium share terms would have been in effect.

The Appellate Division reversed. It noted that while it gives deference to the Commission's interpretation of the Employer-Employee Relations Act, it owed no deference to the Commission's interpretation of Chapter 78 because the Commission was not charged with administering that law. The court held that, under the circumstances of that case and based on the intentions of the parties when they negotiated the contract, requiring full premium share contributions for the remainder of the contract even though full implementation had already occurred would create an absurd result contrary to the intent of the statute. The court considered the Commission's recognition – that the result could have been avoided with two separate contracts – to be shortsighted because the parties did not have the benefit of the Commission's prior ruling on the issue. The court felt constrained to put aside the "procedural gymnastics" regarding separate contracts and to reach a conclusion it found to be equitable. Id. at 72.

The Ridgefield Park decision is inapplicable to this case for at least three reasons. First, unlike Ridgefield Park, which involved an interpretation of a statute that the Commission is not charged with administering, this matter concerns a contract

bar, which requires the Commission's balancing of the rights of employees under the Act to choose a representative or no representative and the Act's policy considerations of labor stability, which the Act empowers the Commission to do. Clearview; N.J.S.A. 34:13A-2, -5.2, -5.3, -5.4(e), -6(d), -11.

Second, in Ridgefield Park, the Appellate Division considered what the parties intended when they executed the contract and reached a result that it found to be equitable. However, even assuming that the County's intentions were the same as Local 3408's,[9/] the contract bar affects more than the signator parties. The Commission must equitably consider other interested representatives and the employees who have a statutory right to choose a representative or no representative. Applying the clear duration term in a contract rather than extrinsic evidence for purposes of a contract bar advances the objective of affording any outside party an opportunity to determine when a representation petition can be timely filed. East Brunswick Bd. of Ed.; W. Orange Tp. Library; City of Altantic City I.

Finally, the parties in Ridgefield Park did not have the benefit of the Commission's prior rulings regarding Chapter 78 and the effect of multiple contracts on the premium share terms. The Appellate Division found it apparent that if the parties did

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9/ The County stated that it takes no position on whether a contract bar applies in this matter.

have the benefit of the prior rulings, they would have entered separate contracts. By contrast, the Commission has consistently (and, therefore, predictably) applied the clear duration terms in the contract itself to determine the period of a contract bar, even where part of the duration applies retroactively. Local 3408 had the benefit of the Commission's prior rulings regarding contract bars, and it is not shortsighted to recognize that Local 3408 and the County could have negotiated separate contracts in such a way that a contract bar would still be in effect while also providing outside parties clear guidance on when they could file petitions.

Accordingly, I find that GWU's petition is not barred by Local 3408's current contract, and I direct an election.

Methodology Issue

The New Jersey Employer-Employee Relations Act (Act) empowers the Commission to resolve questions concerning the representation of public employees through the conduct of a secret ballot election. N.J.S.A. 34:13A-6(d). Our mandate is to conduct "timely, free and fair elections, within reasonable time and cost." City of Newark, D.R. No. 2007-1, 32 NJPER 262, 263 (¶107 2006). Our election procedure under N.J.A.C. 12:11-10.3(a), provides:

> All elections will be by secret ballot . . . The secret ballot may be accomplished manually or by the use of a mail ballot or by

> a mixed manual-mail ballot system, as determined by the Director of Representation.

Accordingly, the methodology of the election is within our discretion.

In City of Newark, the Director noted that the Commission has been conducting mail ballot elections since 1969 and explained:

> While the agency will continue to conduct in-person elections where circumstances dictate, there will not be a preference or practice in favor of in-person elections even in contested elections. When laboratory conditions for elections can be adequately met through the conduct of elections by mail, and/or in the future by telephone or internet systems or any combination thereof based upon the factors we consider, we will utilize those methodologies particularly when the financial and human resource cost to the agency in conducting in-person elections is unjustified.
> [Id. at 263]

Although the Director in that case determined there would not be a significant burden on the agency to conduct an in-person election at a central location when the 94 eligible voters all worked between 11:00 a.m. and 2:00 p.m. and did not work far from the proposed voting site, critical to the Director's decision in ordering an in-person election was the employer's representation that the employee address list may have been inaccurate if employees provided inaccurate addresses to comply with the residency requirement. Id.

In Lakewood Tp., D.R. No. 2019-5, 45 NJPER 119 (¶32 2018), we explained:

> That petitioned-for Township employees comprise a relatively small unit and are not widely dispersed by geography or work schedules, rendering an in-person election not as costly to the agency as would other election scenarios, does not make an in-person election more appropriate than a mail ballot election, since the mail ballots can also reach those employees. Particular factors, such as the potential inaccuracy of an employee home address list, can demonstrate that a mail ballot election is the less appropriate method.

We set forth numerous factors to consider before deciding to substitute an in-person election for our preferred and more common mail ballot election process:

> (1) Scattering of voters due to job duties over wide geographic area;
>
> (2) Scattering of voters due to significantly varying work schedules preventing presence at a common location at common times;
>
> (3) Whether a strike, lockout, or picketing is in progress;
>
> (4) Desires of all the parties;
>
> (5) Likely ability of voters to read and understand mail ballots;
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> (6) Availability and accuracy of addresses for employees;
>
> (7) Efficient and economic use of Commission agents and resources;
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> (8) Size of unit;

> (9) Potential disruption to employers and employees by conducting in-person elections;
>
> (10) Security issues for in-person elections;
>
> (11) Employee access to telephone and/or Internet connections.

See also, Vineland Bd. of Ed., D.R. No. 2014-13, 40 NJPER 385 (¶133 2014); Bergen Cty., D.R. No. 2003-9, 28 NJPER 463, 465 (¶33170 2002) (citing San Diego Gas & Electric and Int'l. Brotherhood of Electrical Workers, Local Union 465, AFL-CIO, 325 NLRB 1143, 158 LRRM 1257 (1998)); City of Newark, 32 NJPER at 263.

In Lakewood Tp., a different AFSCME council argued that, as a consequence of its former local president petitioning on behalf of the rival organization, employees would benefit from seeing a "professionally run" in-person election demonstrating the seriousness and legitimacy of the process. We explained that such a salutary result or goal did not distinguish that election case from any other; that our mail ballot elections are as professional as our in-person elections and are now the more common method we use to conduct representation elections; that it was not demonstrated that voters would be unable to read or understand the mail ballots; and that any voter confusion regarding the ballots, the overall election proceeding, and its consequences would likely and properly be addressed to voters in the unions' election campaigns.

Considering all of these factors, I find that a mail ballot election is the most appropriate methodology for the circumstances of this case.

Initially, I find that, in light of GWU's opposition to an in-person election, factor 4 (desires of the parties) favors a mail ballot election. Although the County does not specifically oppose an in-person election, it has stated its preference that the election have minimal impact on the residents of Meadowview; that additional people would need to be brought in if an in-person election raised security concerns; that State inspections could occur anytime between March 1 and July 1, 2020; and that a mail ballot election would not interfere with the residents or operations of the facility like an in-person election would. This implicates factor 9, which involves the potential disruption to employers and employees by conducting in-person elections. Local 3408 submitted the certification of AFSCME Council 63 Staff Representative Yolanda Lawson, who certifies that she has personal knowledge that Local 3408 has routinely used the meeting/break room of the main Meadowview building for union meetings and internal elections without disruption to care of residents or facility operations. However, the impact of smaller members-only meetings may not be indicative of the potential impact of a contested election open to all unit employees. Also, a significant disruption of coverage, schedules, or both would

likely ensue if a State inspection of the facility occurred on the date set for an election.

A mail ballot election will always have less impact on a work facility than an in-person election. Even assuming that an in-person election will not disrupt the County's operations at Meadowview, the lack of disruption alone will not justify an in-person election over a mail ballot election. Similarly, although there is no strike, lockout, or picketing in progress (factor 3) that would interfere with an in-person election, the lack of such activity alone does not make an in-person election more appropriate than a mail ballot election.

Regarding factor 6, Local 3408 does not allege that the home addresses of unit employees are unavailable or inaccurate. Contrast City of Newark. For factor 11, Local 3408 asserts that employee access to phones and internet should not be presumed. However, the quotation taken from City of Newark above makes clear that this factor would be applicable if, in the future, elections were to be conducted by telephone or internet systems. We have not yet implemented such procedures.

With regard to factors 1 (scattering over geography), 2 (scattering over work schedules), and 8 (size of unit), about 160 employees work in two buildings less than one-half mile apart, although some employees are "on the road." The unit size is moderate and there appears to be no significant geographic

scattering, although it is unclear if employees on the road are always present at the two buildings at some time during their shift.

However, scattering over work schedules is more significant. Days off vary between employees. Meadowview is a 24-hour facility with 3 overlapping shifts: 10:45 p.m. - 7:15 a.m., 6:45 a.m. - 3:15 p.m., and 2:45 p.m. - 11:15 p.m. The shifts for warehouse employees are: 6:30 a.m. - 3:00 p.m. and 7:30 a.m. - 4:00 p.m. The shifts for central kitchen employees are: 5:30 a.m. - 2:00 p.m., 6:00 a.m. - 2:30 p.m., and 7:30 a.m. - 4:00 p.m. The shifts for food service workers are: 7:00 a.m. - 3:30 p.m., 7:30 a.m. - 4:00 p.m., and 8:00 a.m. to 4:30 p.m.

Although Yolanda Lawson certifies that Local 3408 members on night shifts or on their days off have come in for internal elections during the day, the motivation for dues-paying and active members to attend their organization's internal elections on their off-time may be greater than the motivation of less active members or nonmember employees to use their off-time to attend an election for a majority representative.

The Commission's goal is to maximize opportunity to participate in a free and fair election. Requiring some employees to make transportation arrangements during their non-work hours to return to the work location to vote is burdensome. Generally, for in-person elections, the Commission seeks a voting

time period that will allow each employee to vote either during their shift, or, if the nature of their duties makes that impractical, during a period immediately before or after their shift. For the shifts in this case, an in-person election would likely need to be conducted from 5:00 a.m. to 8:30 a.m. and 1:30 p.m. to 5:00 p.m. Given that the days off for employees also vary, more than one day for election may also be required.[10/]

These circumstances show that an in-person election would implicate both employees' practical opportunity to vote and the efficient and economic use of Commission agents and resources (factor 7) in ways that a mail ballot election would not. If the Commission limits the days or shifts during which the in-person election would be held, the practical opportunity to vote for some employees would be reduced. Conversely, ensuring that every employee could vote in person either during their shift or immediately before or after their shift would require more Commission agents and resources. A mail ballot election would be the most efficient and economical use of agents and resources and would also provide every employee an opportunity to vote at a personally convenient time during the several weeks between our

10/ Local 3408's proposed election period of 12:00 p.m. to 5:00 p.m. would require 18 night shift workers to come in during their time off. Because days off also vary, it is also not clear whether there is any one day when all day shift workers are on duty.

mailing of the ballots and the date they must be mailed back to be received in our post office box.

Even if the employees were not scattered over different shifts and workdays, the lack of scattering in a relatively small unit does not alone make an in-person election more appropriate, since mail ballots can also reach those employees while saving Commission resources.[11/] Lakewood Tp. Rather, other factors would need to show that a mail ballot election is the less appropriate method. Id.

To this end, Local 3408 contends that GWU misled some voters when they signed authorization cards for GWU. The authorization cards were entitled "Authorization for Representation - Government Workers Union" and set forth the following:

> I [name] residing at [address] hereby authorize the Government Workers Union, exclusively, to represent me for purposes of collective bargaining and to negotiate and service all agreements regarding the effects, wages, hours, working conditions and any and all other terms and conditions

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11/ Local 3408 downplays the significance of a single time period for a one-day in-person election on Commission resources. As discussed, the efficient and economic use of Commission resources has always been a factor for consideration in deciding election methodology. In Lakewood Tp., the Director noted that the representation section of the agency had less staff then at the time of City of Newark and the impact to Commission resources during an open period was greater. The representation section still has a staffing shortage, and the impact on Commission resources remains great because of the increased volume of representation petitions during this period (many contracts expired on December 31 or January 1, ending contract bars).

> of employment with my employer [employer name]. My position title is [title]. I understand and agree that this authorization card may be used to obtain organizational recognition from my employer, by card check, without an election being held. [date] [signature].
> (capitalization altered for clarity)

Local 3408 submitted certified statements from seven unit employees providing:

> I, [name], hereby withdraw and rescind the petition I signed on [date] in support of a petition by GWU for an election of union representative at Meadowview. I did not understand that the card I was being given to sign by GWU representative could result in an election for a new union. I do not want an election. I was misled by the GWU representative. I do not give my consent to use my name and withdraw any consent that GWU may believe it has from my signature. Put simply, I do NOT support a vote. I do no[t] want to have my signature count toward any showing needed to force an election for a representative at Meadowview Nursing Home. I hereby certify that the foregoing statements are true and accurate. I understand that if any statement made here is willfully false that I am subject to punishment. [signature].

The submitted certified forms provide only a conclusory legal allegation of GWU's misleading of employees. They do not set forth statements of GWU representatives. Only two forms provide a date on which they were signed, and only those two and another form provide a date on which the contested authorization cards were signed. The pre-printed statement on the authorization cards is not lengthy; requires the employee to

complete multiple blank lines soliciting information; and clearly indicates that the signer authorizes GWU to be his, her, or their negotiations representative.

We have not required authorization cards to specify that they can be used as a showing of interest for an election. A showing of interest for certification by an election may simply be signed and dated cards or petitions authorizing the organization to represent the employees for collective negotiations. Our regulation also permits current dues records, an existing agreement, or other evidence of employee interest approved by the Director. N.J.A.C. 19:10-1.1. A signed and dated card indicating that the employee wishes to be represented for collective negotiations by the named organization can also be used for recognition by the employer or for a certification by card check without an election, as indicated on GWU's authorization cards themselves. See Id. Therefore, the cards themselves are not inherently misleading.[12/]

Employees do not need to know the exact process of obtaining a Certification of Representative from the Commission to effectively indicate their designation of or desire to designate an organization as their collective negotiations representative.

12/ By contrast, a card that only expresses a desire for an election for the organization would be misleading if used for a card check certification without an election, so the Commission will only accept such cards for an election case.

That the existence of two interested organizations in this matter required GWU to file a petition for election rather than a petition for card check does not indicate that GWU was misleading employees. An election allows those employees who signed authorization cards to reaffirm or reject their previously indicated support for GWU, providing them another opportunity that might not have otherwise been available if GWU had been able to proceed with a petition for card check.[13/]

Local 3408 submitted a certification from unit employee and local representative Janice Wright, providing that employees can be afraid of and intimidated by GWU supporter India Cooper generally and will sign what she instructs them to sign without understanding. However, Wright has not certified that she personally observed Cooper intimidate or mislead employees into signing GWU authorization cards. Wright certifies that other

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13/ Local 3408 cites the certified statements (alleging misrepresentations by GWU) to suggest that similar conduct by GWU may make a mail ballot election less preferable than an in-person election. Despite the language on the certified statements, Local 3408 has acknowledged that it is not challenging the validity of GWU's showing of interest. I note that a showing of interest is merely an administrative concern of the Commission to satisfy itself that its processes are not abused, and that an election is the best way to resolve challenges rather than an evidentiary hearing that may compromise the confidentiality of employee preferences. See Atlantic City M.U.A., D.R. No. 2020-1, 46 NJPER 44 (¶11 2019) (denying GWU's request for a hearing to determine if AFSCME Council 63 engaged in forgery or misrepresentation in obtaining authorization cards and finding that an election would be the best method to determine employee preference).

employees told her that they did not understand what they were signing. These reported statements are hearsay and do not indicate what was said, if anything.

Local 3408 has not provided any examples of GWU's misrepresentations based upon an affiant's personal knowledge. Even if it had, it is not clear how they would make an in-person election preferable to a mail ballot election. Either method would involve a ballot that clearly presented a choice to voters as to which organization, if any, they wished to represent them for collective negotiations. Despite asserting that the alleged misrepresentations regarding the authorization cards implicate factor 5 above (likely ability of voters to read and understand mail ballots), Local 3408 does not allege that employees would be unable to understand a mail ballot as opposed to an in-person ballot. In Vineland Bd. of Ed., the Director explained that an in-person election would not assist voters' understanding of ballots any more than a mail ballot election; that a mail ballot election provides more time for voters to review and ask questions; and that voter confusion regarding the ballots, the overall election process, and its consequences are properly addressed through voter education outreach as part of the unions' respective election campaigns.

To the extent that Local 3408's primary concern is with voter intimidation or coercion, Local 3408 has not provided

personal accounts of or documents indicating how GWU intimidated or coerced employees into signing authorization cards supporting the instant petition that suggest that such intimidation or coercion would continue during the course of the election. The alleged misrepresentations regarding the authorization cards are unrelated to this concern, as misrepresentation is a type of misconduct different from intimidation or coercion.

In Atlantic Cty. I, the Commission found that agents of GWU had attempted to induce employees into signing authorization cards for GWU by promising them gift cards. A presumption that GWU will continue such unlawful conduct in this matter would be close to being punitive. The Commission in Atlantic Cty. I acknowledged that it was not authorized to issue a punitive remedy. Even if such a presumption would be more ameliorative and preventative than punitive, it would be inconsistent with the Commission's decision in Atlantic Cty. I, which modified the Hearing Examiner's recommended remedy of precluding the processing of a GWU petition until the open period in a second successor contract. The Commission instead precluded the processing of any and all petitions until the open period of the contract then-existing or being negotiated. The Commission determined that the recommended remedy "could infringe upon employee free choice should a majority of the unit desire, in the absence of coercion or interference, to be represented by GWU."

Atlantic Cty. I. (emphasis added). The Commission also declined to order GWU to publicize the Atlantic Cty. I decision.

The Commission apparently assumed that GWU could file a representation petition in the future without engaging in coercive conduct and did not intend for GWU to be forever labeled a potentially coercive organization. If the Commission intended for the next election involving GWU to be an in-person election, in could have stated so. It didn't, and I decline to order an in-person election solely on the basis of GWU's conduct in Atlantic Cty. I. Moreover, it is unclear how an in-person election would prevent potential coercion. As explained in Vineland Bd. of Ed., an in-person election may be more vulnerable to voter intimidation than an election where the same voters have the opportunity to choose their majority representative in the privacy of their own residences.

Local 3408 suggests that since witnesses are not present when a mail ballot is voted or mailed, GWU representatives could be present to pressure or mislead voters. This is a speculative argument. The mail ballots we send remind employees to keep their votes secret. If an employee felt pressured to vote in the presence of a party's representative or designee(s), that employee could subsequently and promptly contact us and explain the circumstances with a reasonable assurance of maintaining his, her or their anonymity; and/or could refuse to mail the ballot

and instead request a replacement ballot from the Commission. Voters might also be intimidated in an in-person election to photograph their cast ballot for later confirmation. These scenarios are speculative, and our determination of election methodology cannot turn on such speculation. Should evidence arise that voters were intimidated or that confidentiality was compromised, the parties may file timely post-election objections. N.J.A.C. 19:11-10.3(h).[14/]

Local 3408 argues that GWU's alleged misrepresentations and hypothetical future coercion also implicate factor 10, involving security. However, Vineland Bd. of Ed. makes clear that this factor is about security issues pertaining to an in-person election. The County advises that if an in-person election creates security concerns for residents or patients, it would have to bring in additional personnel because none are currently available for that purpose. Although the tensions between the two organizations may suggest a risk of verbal confrontation at

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14/ I note that the legislature explicitly authorized the Commission to issue certifications without an election on the basis of signed authorization cards submitted by the petitioner alone if no other representative is seeking to be the majority representative. N.J.S.A. 34:13A-5.3. While the Commission keeps authorization cards (in effect, ballots) confidential with respect to other parties, the legislature was aware that the petitioner would know who signed and did not sign the authorization cards that were distributed by the petitioner, and the Commission accordingly presumes that the authorization cards were validly signed absent substantial, reliable evidence that raises a legitimate and substantial doubt. N.J.A.C. 19:11-2.1, -2.6(b).

an in-person polling site, the parties have not specifically suggested that security is a particular concern. Regardless, while the presence of security issues may make an in-person election less appropriate, the absence of security issues does not make a mail ballot election less appropriate. Other factors would need to show that a mail ballot election was the less appropriate option.

Local 3408 argues that an in-person election ensures greater participation. In Bergen Cty., the Director dismissed concerns about voter turnout disparities after reviewing Commission statistics between in-person and mail ballot elections, writing: "In any event, our objective is to run elections in a manner which provides employees maximum opportunity to participate in any election, given the particular circumstances." Bergen Cty. (emphasis added). See also Atlantic City Housing Auth., D.R. No. 78-6, 3 NJPER 270 (1977) (finding that all eligible voters were given notice and opportunity to vote; "An axiom of democratic elections is that those persons who choose not to vote acquiesce in the will of the majority.")

Local 3408 argues that higher participation in an in-person election held between GWU and AFSCME Local 2302 for a different negotiations unit in Atlantic County (Dkt. No. RO-2017-028),[15/]

15/ In that matter, all parties consented, and, most importantly, the Commission had significantly more staff to (continued...)

compared to lower participation for a mail ballot election directed for another negotiations unit in Atlantic City M.U.A. (Dkt. No. RO-2019-057) favors conducting an in-person election in this case. Local 3408 avers, without support, that low turnout in RO-2019-057 was likely due to members not receiving or understanding the mail ballot. One example of low turnout does not outweigh the Commission's consistent experience with mail ballot elections or provide guidance in the instant matter, which involves different employees in an different negotiations unit of a different employer. It is also not clear that an in-person election in RO-2019-057 would have ensured greater participation. As explained above, the Commission is concerned with the opportunity to participate. Local 3408 provides no support for its assumption that employees did not receive or understand the ballots, and we therefore assume that those employees who did not vote elected not to participate.[16/]

15/ (...continued)
justify an in-person election. GWU lost in the election.

16/ In Atlantic City M.U.A., GWU had alleged that petitioner AFSCME Council 63 had engaged in forgery or misrepresentation in obtaining authorization cards. GWU ultimately prevailed in the subsequent election. In contrast to Local 3408's speculation that the different employees in that election did not receive or understand the mail ballots, it may be equally speculated that low turnout was due to employees never having supported the petitioner or changing their minds. The point is that this one case does not provide support that an in-person election is preferable to a mail ballot election, particularly where an
(continued...)

Accordingly, I find that a mail ballot election is the most appropriate method under this factual record.

ORDER

A secret mail ballot election is directed among the employees in the following unit:

> **Included**: All regularly employed institutional employees of Atlantic County at the Meadowview Nursing and Rehabilitation Center and the Central Kitchen/Warehouse, including employees in the titles of assistant cook, assistant human services, building maintenance worker, building service worker, clerk driver/stockhandler, cook, dietician helper, environmental therapy aide, food service worker, head cook, institutional attendant (non-cert.), institutional attendant (cert.), laborer, licenced practical nurse, restorative aide, senior building service worker, senior clerk driver/stockhandler, senior cook, and senior institutional attendant.
>
> **Excluded**: Managerial executives, confidential employees, and supervisors within the meaning of the Act; craft employees, police, casual employees; employees in other negotiations units; and all other employees of Atlantic County.

Eligible voters are those employed during the payroll period ending February 8, 2020, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in military service. Employees who resigned or were discharged for cause since the

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16/ (...continued)
entirely different negotiations unit with different employees is involved.

designated payroll period and who have not been rehired or reinstated before the election date are ineligible to vote.

Within three business days of this decision, the County shall file and serve an election eligibility list, consisting of an alphabetical listing of the names of all eligible voters and their last known mailing addresses and job titles. An opportunity will be provided for the parties to agree on dates and hours of the mail ballot election proceedings and the designations on the ballot. Absent agreement, I shall determine such arrangements. N.J.A.C. 19:11-5.1.

The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/Jonathan Roth
Director of Representation

DATED: February 20, 2020
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by March 2, 2020.