D.R. NO. 89-27

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

In the Matter of

MORRIS COUNTY BOARD OF SOCIAL SERVICES (MORRISVIEW NURSING HOME),

Public Employer,

-and-

MORRIS COUNCIL #6, NJCSA,

Petitioner,

-and-

DISTRICT 1199J, NUHHCE,

Intervenor.

Docket Nos. RO-E-89-97

SYNOPSIS

Dismissing election objections, the Director concludes that Morris Council #6, NJCSA failed to furnish sufficient evidence to support a prima facie case. N.J.A.C. 19:11-9.2(i). The affidavits submitted by Council #6 lacked the specificity and precision required by N.J.A.C. 19:11-9.2(h).

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Appearances:

For the Public Employer
O'Mullan and Brady, Esqs.
(Daniel W. O'Mullan, of counsel)

For the Petitioner
Fox and Fox, Esqs.
(Dennis J. Alessi, of counsel)

For the Intervenor
Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs.
(Arnold S. Cohen, of counsel)

DECISION

On February 17, 1989, Morris Council #6, NJCSA ("Council 6") filed a Petition for Certification of Public Employee Representative (Docket No. RO-89-97) seeking to represent certain employees of Morris County Board of Social Services ("County") at the Morrisview Nursing Home. When Council 6 filed its petition, the employees were represented by District 1199J, NUHHCE ("District 1199J").

On March 8, 1989, a Commission staff agent conducted an informal conference and the parties executed an Agreement for Consent Election.

On March 21, 1989, Council 6 filed an unfair practice charge (Docket No. CO-89-270) alleging that District 1199J violated subsection 5.4(b)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by: defacing election notices; marking sample ballots; giving 1199J buttons to patients, and intimidating and threatening Council 6's President and several employees at the Morrisview Hospital. Council 6 asserted that its charge, together with an unfair practice charge filed on March 6, 1989 (Docket No. CO-89-248), should have blocked the election scheduled for March 30, 1989.

On March 23, 1989, we denied Council 6's request that its unfair practice charges block the election. On March 28, 1989, Council 6 requested that the Commission review the Director's decision. On March 29, 1989, the Chairman denied Council 6's request for review, without prejudice to its right to file objections to the conduct of the election or conduct affecting the results of the election. See N.J.A.C. 19:11-9.2.

On March 30, 1989, we conducted the election. Of 297 valid ballots, 68 were cast for Council 6, and 225 for District 1199J.

On April 4, 1989, Council 6 filed post-election objections alleging that District 1199J "engaged in a pattern of intimidation and harrassment which destroyed the 'laboratory condition' of the

election process." In support of its objections, Council 6 relied on affidavits submitted with its request to block the election and with its request to the Commission to review the Director's denial of the block. It also asserted that when one employee voted, another employee entered the booth and instructed her to voter for District 1199J.

N.J.A.C. 19:11-9.2(h) provides that:

> (h) Within five days after the tally of ballots has been furnished, any party may file with the Director of Representation an original and four copies of objections to the conduct of the election or conduct affecting the results of the election. 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.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970) (Slip Op. at 10), aff'd sub. nom. AFSCME, Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971), this legal standard was articulated:

> 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.

See also Passaic Valley Sewerage Comm'n, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980); State of New Jersey and N.J.C.S.A./N.J.S.E.A., P.E.R.C. No. 76 (1973); City of Linden, E.D. No. 17 (1970); Ocean County, D.R. No. 79-34, 5 NJPER 220 (¶10121 1979), aff'd P.E.R.C. No. 80-12, 5 NJPER 305 (¶10166 1979); County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979); City of Newark, D.R. No. 78-43, 4 NJPER 202 (¶4102 1978); Camden Cty. Bd. of Chosen Freeholders, D.R. No. 78-7, 3 NJPER 272 (1977).[1/]

1/ Parties filing objections to private sector elections must meet a similarly stringent burden of specificity and materiality. Thus, in NLRB v. Golden Age Beverage Co., 71 LRRM 2924, 2926 (5th Cir. 1969), a leading 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 Court further 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 the interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

In AFSCME, Local 1959 v. P.E.R.C., supra, at 468-469, our Superior Court, Appellate Division, quoted this language with approval. See also, e.g., NLRB v. Whitney Museum of American Art, 105 LRRM 3239 (2nd Cir. 1980); NLRB v. Dobbs House Inc.,

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N.J.A.C. 19:11-9.2(i) provides that:

> (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.

We conclude that Council 6 has not furnished a prima facie case "that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law." N.J.A.C. 19:11-9.2(h).

Pursuant to N.J.A.C. 19:11-9.2(i), the Director of Representation must review the objections and supporting evidence to determine "if the party filing said objections has furnished sufficient evidence to support a prima facie case." The Director will assume the veracity of the specific evidence proffered by the objecting party. If sufficient evidence has not been submitted to

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1/ Footnote Continued From Previous Page

> 103 LRRM 2889 (5th Cir. 1980); NLRB v. Spring Road Corp., 98 LRRM 3309 (9th Cir. 1978); Magnolia Screw Products v. NLRB, 94 LRRM 3255 (6th Cir. 1976); NLRB v. O.S. Walker, 81 LRRM 2726 (1st Cir. 1972); Richardson Engineering Co., 248 NLRB No. 73 (1980). 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 of America v. NLRB, 86 LRRM 2984 (5th Cir. 1974), cert. den. 419 U.S. 1049.
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> Thus, a party's conduct will constitute grounds for setting aside an election only where it has affected the outcome of the election by coercing employees in the exercise of their rights at the polls. See Great Atlantic and Pacific Tea Co., 177 NLRB 942, 71 LRRM 1554 (1969).

support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence has been submitted, then, and only then, will the Director conduct an investigation into the objections. See In re State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd App. Div. Dkts. No. A-3275-80T2 & A-4164-80T3.

This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. 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 in order for an investigation to be initiated. If this two-part test is not met, the objections will be dismissed. Ocean Cty. Judiciary, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986); Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986).

We note initially that Council 6's objections are procedurally inadequate because it failed to serve copies on the other parties. Id.

We move now to the substance of the affidavits submitted by Council 6 which allege that: District 1199J representatives destroyed Council 6 authorization cards; prior to the March 8, 1989 informal conference, someone defaced the Commission's Notice to Public Employees; patients at Morrisview Hospital were wearing

District 1199J campaign buttons, given them by District 1199J representatives; a District 1199J representative threatened the President and attorney for Council 6 and the incident was described in the Civil Service Shield and local newspaper articles; District 1199J representatives tried to trick employees into joining its union by telling them they would have to pay agency shop fees if they did not voluntarily join; Council 6 supporters were afraid to wear campaign buttons due to threats of reprisals by Distrcit 1199J representatives; a District 1199J supporter had checked a list to see if a Council 6 supporter has signed out to attend a meeting about the election and then spoke with a supervisor; and the sample ballot attached to the notice of election had been defaced. In its April 4, 1989 letter, Council 6 also alleged that someone told a voter in the polling booth to mark an "x" by District 1199J. This was the only allegation dealing with the conduct of the election at the polling site. An investigation reveals that the two voters were not in the booth together but that one was talking to the other while she was voting. An election observer pointed this out and the PERC election officers instructed the voters not to speak with each other. The employee casting her vote then went back into the booth marked her ballot and placed it in the ballot box. No one challenged her ballot.

While we do not condone conduct which interferes with a voter's right to cast her own ballot, under these circumstances and

given the wide margin of the tallied ballots, we conclude that this conduct involving only one voter did not affect the outcome of the election.

Council 6's complaints about the defaced Notice to Public Employees and the sample ballots were cured prior to the election. The Commission sent fresh copies to the County and it posted them promptly.

Council 6's allegation of the agency fee trickery and the signing-out incident are contained only in the affidavit of Council 6's President. These allegations were vague and not supported by precise and specific facts. We have no idea of when the District 1199J allegedly tried to trick employees into joining its union or how the alleged conduct affected the election.

Misrepresentations of fact or other campaign trickery will be sufficient to block an election only when they involve substantial departures from the truth and when they are made at a time which prevents other parties from making effective replies. Middletown Tp. Sewerage Authority, D.R. No. 84-14, 10 NJPER 2 (¶15001 1983). Here, no date is given as to when these statements were made. However, we can conclude that it was at least nine days before the election (the date the charge was filed). Accordingly, we find that Council 6 had adequate time to disseminate its own information to counter the statements allegedly made by District 1199J. Thus, this allegation is not sufficient to set aside the election.

The allegations about the District 1199J representative speaking with a supervisor after checking a sign-out sheet for a meeting about the election is, at best, confusing. There are no allegations about what this 1199J supporter said to the supervisor or that any Council 6 supporter was in any way affected by this conversation.

Council 6's allegation about campaign buttons also lack the precision and specificity required by N.J.A.C. 19:11-9.2(h). There are no facts alleged that would tend to show that by wearing District 1199J buttons, the patients at Morrisview Hospital interfered with employees' rights to a free and fair election. The affidavits submitted by three employees state simply that they were afraid to wear Council 6 buttons because they had been threatened with reprisals. There are no allegations of who threatened the reprisals, when the threats were made or what was said. These allegations lack the specificity required to meet the requirements of N.J.A.C. 19:11-9.2(h). Ocean Cty. Judiciary; Jersey City Medical Center.

Council 6 also alleged that District 1199J representtaives destroyed Council 6 authorization cards. This destruction allegedly occurred in October 1988, approximately five months before Council 6 consented to an election. These allegations fail to suggest that the affected employees were prevented from casting non-coerced ballots on March 30, 1989.

Finally, Council 6 alleged that its President and attorney were threatened at the March 8 conference. A District 1199J representative allegedly told the Council 6 President that he would "get [her] ass." It is unlear what threat was made to Council 6's attorney. Neither the President nor the attorney for Council 6 were eligible voters. While we do not condone such conduct, we fail to see how the threats could have affected the election. Council 6's President alleged in her affidavit that the threats were printed in the Civil Service Shield and local newspapers. She did not allege what local newspapers or how the threats appeared. We note that the Civil Service Shield is Council 6's newsletter and that if the incident was discussed there, it was the result of Council 6's President. We fail to see how Council 6's use of this incident in its newspaper as part of its campaign could prejudice voters from voting for Council 6 at the election.

Based on the above, we conclude that Council 6 has failed to furnish sufficient evidence by precise and specific documentation to support a prima facie case as required by N.J.A.C. 19:11-9.2(h) and (i). Its objections are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Edmund G. Gerber, Director

DATED: April 12, 1989
Trenton, New Jersey