

D.R. NO. 92-14

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

In the Matter of  
CITY OF NEWARK,

Public Employer,

-and-

P.B.A. LOCAL 3,

Docket No. RO-92-27

Petitioner,

-and-

F.O.P. LODGE NO. 12,

Intervenor.

SYNOPSIS

The Director of Representation denies 17 separate objections filed by FOP Lodge #12 contesting conduct surrounding an election for representation between FOP Lodge #12 and PBA Local 3 for police officers of the City of Newark. The Director certified PBA Local 3 as the exclusive majority representative.

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Appearances:

For the Public Employer,  
Oliver Cato, Assistant Corporation Counsel  
(Gregory Franklin, of counsel)

For the Petitioner,  
Zazzali, Zazzali, Fagella & Nowak, attorneys  
(Paul Kleinbaum, of counsel)

For the Intervenor,  
Markowitz & Richman, attorneys  
(Stephen C. Richman, of counsel)

DECISION

On October 11, 1991, a representation election was conducted by the Public Employment Relations Commission ("Commission") for all police officers of the City of Newark. There were 880 eligible voters. 397 votes were cast for the incumbent F.O.P. Lodge No. 12 ("FOP"), 420 votes were cast for the petitioner

P.B.A. Local 3 ("PBA") and 3 votes were cast for no representation.<sup>1/</sup>

On October 17, 1991, the FOP filed objections to conduct affecting the results of the election, with supporting evidence.<sup>2/</sup>

The FOP's objections are:

1. The vehicle of the Mayor of the City of Newark was parked for extended periods of time in the designated parking area immediately in front of the Green Street entrance to the polling area. It was parked in the designated area for voters. The Mayor's vehicle in the left rear window contains a gold PBA sticker. The location of the vehicle during the voting amply demonstrated to voters the City's support of the PBA.

2. A vehicle of one of the representatives of PERC which was parked in the designated parking area immediately in front of the Green Street entrance to the polling area also contained a PBA sticker in the rear window. A complaint was made during the course of the election and the sticker was covered. However, the sticker was observed by many voters.

3. The PBA was permitted to place signs and other propaganda on various trees and polls on City streets in the area of police precincts in violation of City ordinance.

4. The PBA had access to home addresses of bargaining unit employees through the City facilities. The City's facilities were used to access the state motor vehicle records to obtain home addresses of bargaining unit employees that were not otherwise available to the FOP.

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<sup>1/</sup> There were two challenged ballots.

<sup>2/</sup> Additional evidence was submitted on October 25, October 31 and November 4, 1991.

5. On the day of the election in the voting area, an employee of the City print shop was observed providing the PBA president with a stack of sample ballots that were reproduced in the print shop. Said employee of the print shop was wearing a PBA sticker. The FOP did not, of course, have access to the City's printing shop for the printing or copying of campaign material.

6. The PBA had obtained City parking lot permits which were distributed to designated bargaining unit employees for the purpose of voting in the election.

7. A superior officer was observed in front of the Green Street entrance to the polling area during the election telling bargaining unit employees to vote for the PBA. The superior officer is a PBA member.

8. On Thursday night, October 10, 1991, the PBA sponsored a party at Biase's restaurant on Bloomfield Avenue, Newark, New Jersey. During the course of the evening, central communications in the Newark Police Department broadcast announcements of the party and information concerning the party, contrary to departmental regulations.

9. Immediately prior to the election, the FOP posters and bulletin board in central communications and other locations were vandalized and removed.

10. A superior officer who is also president of the Bronze Shields, an organization of Afro-American police officers, in the Newark Police Department distributed letters throughout the bargaining unit recommending that bargaining unit employees vote for the PBA. The superior officer is a PBA member.

11. The PBA was permitted to place campaign stickers on City vehicles and property as well as wear organizational clothing, contrary to departmental regulations. Fraternal Order of Police complaints were ignored.

12. The City continues to grant paid release time to PBA officers in the bargaining unit who

are represented for collective bargaining purposes by the FOP. This matter is the subject of PERC Docket No. CO-91-170. Likewise, the City's support of the PBA is also demonstrated by the City's permitting PBA representatives to address recruits and reducing the time that is permitted for the FOP to address said recruits. These matters are the subject of PERC Docket No. CO-91-171.

13. City improperly transferred and/or promoted on election day bargaining unit employees in return for their support of the PBA.

14. The City had recently obtained approximately 26 new police radio cars which it would not release to the department notwithstanding the department's need for said vehicles. The use of motor vehicles and equipment was a campaign issue and the City's refusal to release said vehicles was designated to undermine the FOP's position. Likewise, the City refused to make available walkie-talkies to further undermine the position of the FOP.

15. The FOP complained continuously during the course of the campaign about the utilization of PBA bumper stickers and campaign materials in the auto squad and other departmental locations. The City ignored said complaints and permitted PBA stickers and materials to be posted and utilized notwithstanding departmental regulations.

16. Various superior officers who were members of the PBA were observed directing their subordinates, members of the bargaining unit, to vote for the PBA.

17. The City failed to make available the room in which the election was to be conducted in timely fashion and as a result, the election was initially conducted in the hallway. As a result, voters were discouraged from participating and the laboratory conditions upon which the election should take place were destroyed.

An investigation of objections to an election will be conducted only where the objecting party provides evidence 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...and shall produce the specific evidence which that party relies on in support of the claimed irregularity in the election process. N.J.A.C. 19:11-9.1(h).

That is, the FOP must proffer sufficient evidence to support a prima facie case before the Commission orders an investigation of the objections.

An election conducted by the Commission is a presumptively valid expression of employees' free choice. An allegation of objectionable or unlawful conduct will not, standing alone, set aside election results. An objecting party must show that conduct interfered with or tended to interfere with, the exercise of free choice to such an extent that it materially interfered with the results of the election. Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970), aff'd sub nom AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super. 463 (App. Div. 1971) citing NLRB v. Golden Age Beverage Co. 415 F2d 26, 71 LRRM 2924 (5 Cir 1969); New Jersey Civil Service Assoc., P.E.R.C. No. 82-24, 7 NJPER 510 (¶12228 1981). The evidence must show a direct relationship between the improper activities and the interference with the freedom of choice.

Some activities presumptively tend to interfere with the freedom of choice. See Englewood Bd. of Ed., D.R. No. 82-47, 8 NJPER 251 (¶13111 1982).

After reviewing the 17 objections and evidence supplied by the FOP in support of their objections,<sup>3/</sup> I found that two objections warranted an investigation and by letter of November 8, 1991, I ordered such an investigation into Objection #2 concerning a car bearing a PBA sticker driven by a Commission representative; Objection #2 was decided on the evidence submitted (see below) and Objection #5 concerning the unauthorized reproduction and distribution of a Commission sample ballot. N.J.A.C. 19:11-9.1(b) provides: The reproduction of any document purporting to be a copy of the Commission's official ballot which suggests either directly or indirectly to employees that the Commission endorses a particular choice may constitute grounds for setting aside an election upon objections properly filed.

The investigation of Objection #5 revealed material and substantial facts were in dispute. Accordingly, I convened a hearing pursuant to N.J.A.C. 19:11-9.2(j) on January 14, 1992. The parties examined witnesses and presented evidence.

The testimony was as follows:

George Lytwyn, Daniel Santos and Thomas Possumato, Jr. testified on behalf of the FOP. Lytwyn and Santos stated that on the day of the election they were outside of the polling place, on Green Street, when someone, who they both believed works for the

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<sup>3/</sup> An eighteenth objection was submitted by the FOP on November 1, 1991 concerning the conduct of Newark City Councilman, Ronald Rice. This objection was not filed within five days of the election and was not considered. N.J.A.C. 19:11-9.2(h).

City in the City Hall print shop, handed a stack of papers to the President of the PBA, Rocco Malanga, who was campaigning in the same area. Malanga divided up these papers among several nearby PBA workers. Lytwyn testified he obtained a copy of the papers from the stack given to Malanga. The paper was a photo copy of a Commission sample official ballot. The PBA's name on the ballot was heavily underlined and a large, thick X was placed in the square on the ballot for the PBA. (FOP #1 in evidence) Lytwyn then gave the photocopy to Thomas Possumato, the FOP president, who initialed it.

John Colesanti, Paul Lorence and Rocco Malanga testified on behalf of the PBA that Malanga, President of the PBA, received photocopies of a sample ballot and Colesanti and Lorence passed them out to voters. However, they testified they did not hand out FOP #1. What they handed out (PBA #1 in evidence) was similar to a photocopy of a Commission sample ballot but had several significant differences. On PBA #1, the squares for the other election choices, "FOP Lodge No. 12" and "No Representative" were blank. PBA Local 3's name was printed in its box in bold print several times larger than the print on the Commission's official ballot. The normal Commission voting instructions are not printed on PBA #1.<sup>4/</sup> Rather, in their place appeared "NOW is the Time. VOTE PBA", is printed, again in bold oversized type and underneath that, in very small print, appears "Paid for by Newark PBA Local 3".

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<sup>4/</sup> The normal instructions on the ballot are "DO NOT SIGN BALLOT. Fold and drop in ballot box. If you spoil this ballot return it to the Commission Agent for a new one".



Malanga testified that PBA #1 is a photocopy of one side of a two sided glossy card (PBA #2 in evidence) used as a mailing in the election campaign. The other side of the card is a calendar highlighting the date of the election with an announcement of the date, time and place of the election. Malanga testified that the PBA had a few hundred of those cards left after the mailing. He had the PBA campaign workers hand the cards out to voters. When the cards were running low, he called the PBA office and asked that two hundred copies of the ballot side of the cards (PBA #2) be photocopied and brought over to the election for distribution.

Salvatore Palumbo and Carlos Lopez testified on behalf of the PBA that on the day of the election, Palumbo was working at the PBA office. He received Malanga's call, made the photocopies and had Lopez take the ballots over to the election site.

Lopez works for a private security company, S.O.S., as an "intake officer" at City Hall. He was on his day off on the day in question and had volunteered to drive a rental van for the PBA. Palumbo gave him about 200 copies of PBA #1. He drove them over to the election site and delivered them to Malanga.

The witnesses for both the PBA and the FOP were credible witnesses. However, it is significant that Lytwyn did not explain how he obtained a copy of FOP #1 (See Lytwyn's affidavit dated October 28, 1991.). Further, there is no testimony from any voters as to which document was distributed - FOP #1 or PBA #1 and although the FOP had the name of the City print shop employee it claims

provided Malanga with FOP #1, this person was never called as a witness.

In County of Hudson - Meadowview Hospital, E.D. No. 13 (1970), the Executive Director of the Commission found that a copy of a ballot, which in size and heading was similar to a Commission ballot, did not suggest that the Commission endorsed a particular choice. The ballot was printed on a leaflet which was "written in Spanish, as well as English", urges voters to vote for Local 286 rather than to mark an "x in the square of your choice", and is identifiable as partisan campaign propaganda by the words in both Spanish and English which appear in large letters across the bottom of the ballot requesting that voters "Vote Teamsters Local 286".

As in County of Hudson, document PBA #1 and PBA #2 are sufficiently different from the Commission's official ballot so they do not suggest the Commission endorsed a particular choice.

The appearance of FOP #1 is not so clear. However, the FOP as the objecting party has the burden of proving that the reproduced document suggested that the Commission endorses a particular choice. N.J.A.C. 19:11-9.1(b).

The FOP's facts as to which ballot was reproduced are circumstantial and key evidence and testimony is lacking. The PBA's facts are consistent and complete.

Accordingly, I find that the FOP has not shown by even a preponderance of the evidence that improper campaign material was distributed to voters in violation of N.J.A.C. 19:11-9.1(b).

Objection #5 is dismissed.

After conducting an investigation, I dismissed objection #2 which concerns a PBA decal affixed to a window of a P.E.R.C. agent's car parked in a spot reserved for P.E.R.C. agents.

My investigation revealed that:

An area near the Green Street entrance to the election site was reserved for P.E.R.C. personnel with Temporary "no parking" signs. Sometime before 9:30 a.m., Stuart Reichman, of the Commission's staff, parked his car in the assigned area (The election began at 7 a.m.). Commission Agent Susan Weinberg was outside the Green Street entrance and approached Reichman; they began a conversation. When someone approached Weinberg and asked about an election-related issue, she identified Reichman as a P.E.R.C. agent. Four or five minutes later, an FOP representative approached Weinberg and said, "one of your P.E.R.C. representatives pulled up with a PBA sticker on his car". Weinberg immediately relayed this to Reichman and within seven to ten minutes of his initial arrival, Reichman covered the 3" x 3" decal with masking tape. The decal read "PBA member" and had an "S" in background. The printing could be read from only a few feet away and did not refer to Local 5. It was affixed to the window by the car's previous owner, not Reichman. Reichman did not realize the PBA sticker was on the car when he drove that morning. Reichman normally does not drive that car on business; it is driven by his wife. However, a family emergency compelled him to drive the car in question.

The FOP does not argue, nor has it presented evidence that the presence of the sticker on the car influenced voters. Rather, it has argued that this conduct compromised the Commission's appearance of impartiality and requires that the election be set aside.

The National Labor Relations Board has dealt with the appearance of impartiality. In Athbro Precision Engineering Corp., 166 NLRB 966, 65 LRRM 1699 (1967), enf'd. 423 F2d 573, 73 LRRM 2355 (1st Cir., 1970), an NLRB agent was observed drinking beer with a union representative in a restaurant near the election site during a break in the voting. Only one unit member who had voted saw this activity, and no actual interferences was shown. Nevertheless, the Board set the election aside.

The Board held:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. Athbro Precision Engineering Corp., 65 LRRM at 1699.

However, "not all ambiguous or arguably partial conduct requires the Board or the courts to set aside an election". The Developing Labor Law 2nd Edition, page 404, the Bureau of National Affairs, Inc., Washington, D.C.

The NLRB did not set an election aside when a Board agent announced to waiting voters that, "the polls were open and employees

could vote for the union representative of their choice". Wabash Transformer Corp., 205 NLRB 148, 83 LRRM 1545 (1973) aff'd 509 F2d 647, 103 LRRM 2889 (CA5, 186) nor did the Board set aside an election when its agent prophesied to the employer's observer that the union would win and that it would "do the people a lot of good". NLRB v. Dobbs Houses, Inc. 435 F2d 109, 76 LRRM 2120, (CA5 1970) again another election result was sustained when a Board election agent stated to an observer that he had been hired by the Board because he was a union steward at his previous job. Shorewood Manor Nursing Home, 217 NLRB 187, 89 LRRM 1484 (1974).

Reichman owns the disputed automobile. It bears no emblems of the State. The FOP became aware of his ownership only when FOP supporters working on the election saw Reichman arrive in the car and was then introduced as a P.E.R.C. agent. PBA stickers are rather common on cars. Given all the circumstances here, I do not believe the existence of the sticker so compromised the Commission's appearance of neutrality that the election must be set aside.

The other FOP objections did not meet the requirements of N.J.A.C. 19:11-9.1(h) and were dismissed. A review of these objections follows.

Objection 1 - the Mayor's car bearing a PBA sticker was parked near an entrance to the polling area; Objection 10 - the President of the Bronze Shields, a police sergeant, issued a letter

supporting the PBA;<sup>5/</sup> and Objections 7 and 16 - superior officers urged subordinate bargaining unit members to vote for the PBA, all must be dismissed.

No rule absolutely requires superiors to remain neutral in a representation campaign and the mere fact that superiors expressed their preference for the PBA is not objectionable. County of Hudson - Meadowview Hospital; See A & E Stores, 272 NLRB 737, 117 LRRM 393 (1984). The FOP must show that the superiors' alleged electioneering actually interfered or tended to interfere with the employees' free choice. County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979). None of the conduct alleged in these objections threatens or promises benefits. State of New Jersey; Jersey City Dept. of Public Works.

Objections 3, 11 and 15 allege that the City permitted the PBA to place signs and campaign stickers on City vehicles and property and it permitted officers to wear "organizational clothing" in violation of a City ordinance and departmental regulations. The FOP further claims that its complaints about these activities were ignored. Objection 8 alleges that the City's communications system was used to announce a PBA party on the evening of October 10,

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<sup>5/</sup> Although the FOP did not specifically object to the letter, evidence it submitted suggests that the letter contains a misrepresentation. This letter was dated October 5, 1991 and the FOP had sufficient time to respond by October 11, the date of the election. (A misrepresentation may be grounds for setting an election aside only where there is not sufficient time for the other side to respond. Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987).)

1991. Objection 9 alleges that the FOP posters on bulletin boards were vandalized and removed. The evidence reflects that the FOP complained to the City about such conduct.

These objections must be dismissed. No evidence supports a finding that the alleged conduct unduly influenced the employees' freedom of choice. Nor has the FOP presented any proof that the City actually permitted the PBA to engage in the alleged activity. That PBA signs and stickers appeared on City property and vehicles does not presume that the City supported this organizational activity; nor does the removal of FOP materials constitute sufficient grounds to set aside the election. Franciscan Hospital, 226 NLRB No. 46 , 94 LRRM 1048 (1976). An employer does not act unlawfully merely because it fails to restrict anti-union activities. See County of Hudson - Meadowview Hospital; Harrison Steel Castings, 262 NLRB 450; 110 LRRM 1424 (1982).

The FOP must show that this alleged collusion by the PBA and City caused apprehension or confusion or otherwise interfered or tended to interfere with the employees' exercise of free choice. County of Atlantic, 5 NJPER 18 (¶10010 1979). No evidence suggests such interference.

Objection 4 alleges that the PBA used City facilities to access State motor vehicle records for home addresses of "bargaining unit employees." The evidence submitted by the FOP reveals that the only address obtained through any City facility was that of Thomas Possumato, FOP President. The improperly obtained home address of

the FOP president does not show that the PBA had access to other unit employee addresses. Nor does the evidence show that the City participated or colluded in this conduct.

Objection 13 accuses the City of improperly transferring and/or promoting employees on election day in return for their support of the PBA. The FOP submitted the affidavit of one officer with actual knowledge of such incidents.<sup>6/</sup> The affiant states he had a conversation with Patrol Officer Martinez, who was recently transferred to the South District and was unhappy about it. Martinez stated he called the PBA office and asked to speak to Rocco Malanga (the PBA president). Martinez was told by a PBA official that Malanga was not there but asked if he could help. Martinez asked if Malanga could get him back to the North District. The PBA official said he would talk to Malanga and then get back to Martinez. The day after the election, Martinez was transferred to the North District.

On the day of the election, the affiant observed another officer, Dennis Tassie working for the PBA. The following day, Tassie stated to the affiant "I bet your going to say that the PBA got me transferred to the East District. Well it wasn't the PBA. My father had me transferred." Tassie's father is a lieutenant in the Newark Police Department and is a PBA member.

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<sup>6/</sup> The affidavit of Thomas Possumato's affidavit also refers to these incidents but Possumato does not claim actual knowledge.



These incidents do not establish a prima facie case of interference sufficient to set aside the election. They do not establish that the PBA helped to have these men transferred.

Objection 14 concerns the release of 26 new police radio cars and fails to state a prima facie case. The evidence in support of the objection states only that the City "recently" obtained the cars and refused to release them. No specific dates were alleged.<sup>1/</sup>

Objection 6 alleges the PBA obtained City parking permits. However, no evidence was proffered in support of this allegation. The objections must be dismissed.

Objection 12 claims that certain matters were a subject of an unfair practice charge currently pending before the Commission and should therefore be of a nature which should invalidate the election. These unfair practice charges are currently the subject of a hearing and were filed by the FOP prior to the filing of this representation petition. The FOP did not seek to have the Commission block the processing of the representation petition. Rather, it signed a consent election agreement which states, "the parties hereby waive a hearing on all issues that could be raised at a hearing". Accordingly, this objection is also dismissed.

Objection 17 states that the City failed to make available the room which the election was to be conducted in in a timely

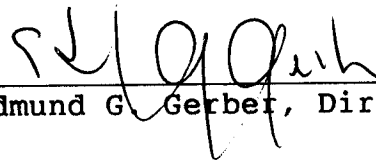
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<sup>1/</sup> No evidence was submitted concerning "walkie-talkies" and accordingly, must also be dismissed.

fashion. However, the FOP failed to submit any evidence in support of this objection and specifically failed to show how any voters were discouraged from participating in the election.

Accordingly, I dismiss the election objections filed by FOP Lodge No. 12. In accordance with the rules of the Commission, I shall issue the appropriate Certification of Representative (see attached) to PBA Local 3.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Edmund G. Gerber, Director

DATED: January 22, 1992  
Trenton, New Jersey