

D.R. NO. 90-2

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

In the Matter of

MIDDLESEX COUNTY UTILITIES AUTHORITY,

Public Employer,

-and-

Docket No. RO-89-93

AFSCME, COUNCIL 73, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation dismisses election objections based on a letter the employer distributed to employees the day before an election. The Director finds that such campaigning is not per se objectionable where no nexus between the alleged electioneering and employee free choice has been demonstrated.

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Appearances:

For the Public Employer
Wilentz, Goldman & Spitzer, Esqs.
(Glen D. Savits, of counsel)

For the Petitioner
Don Dileo, Staff Representative

DECISION

Pursuant to an Agreement for Consent Election, a representation election was conducted on May 26, 1989, by the Public Employment Relations Commission ("Commission") among approximately 69 blue collar employees of the Middlesex County Utilities Authority ("Authority"). The tally of ballots reveals that 29 valid ballots were cast for Council 73, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"), 34 ballots were cast against representation and 4 ballots were challenged. Therefore, a majority of valid ballots were cast against representation.

On May 31, 1989, pursuant to N.J.A.C. 19:11-9.2(h), AFSCME filed post-election objections stating that the day before the election (May 25, 1989), the Authority distributed a letter that

urged the employees to vote against the union. AFSCME alleges that distribution of the letter so close to the election interfered with employee free choice. It also submitted signed statements from eight employees stating that they received the letter on May 25, 1989.

N.J.A.C. 19:11-9.2(h) sets forth the standard for reviewing election objections:

A party filing objections must furnish evidence such as affidavits or other documentation, that precisely and specifically shows that conduct has occurred which would warrant setting aside the election as a matter of law. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election and shall produce the specific evidence which that party relies upon in support of the claimed irregularity in the election process. (emphasis supplied)

Under N.J.A.C. 19:11-9.2(i), if the Director of Representation concludes that the objecting party has presented a prima facie case, he shall conduct a further investigation; failure of the objecting party to furnish evidence which establishes a prima facie case may result in immediate dismissal of the objections.

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), the Commission articulated the following policy:

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the

employee's freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

The letter that forms the basis of AFSCME's objections contains the Authority's rebuttal to a letter sent to employees by one of their peers, as well as a claim that the Authority has treated union supporters fairly. The final sentence of the letter urges the employees to "VOTE NO on Friday, May 26, 1989." It is signed by Authority Executive Director Frederick H. Kurtz. AFSCME submitted statements signed by employees -- five stated that the letter was received on May 25, 1989, and three stated that the letter was received with their paychecks on May 25, 1989. AFSCME contends that distribution of the letter with employee paychecks, in some cases within twelve hours of the election, prevented the employees from voting in an atmosphere free of interference.

The Authority admits that the letter was distributed on May 25th, but states that it was distributed separately from the sealed paychecks. Eighteen voters received checks on May 25th because they were not scheduled to work the following day. The Authority states that although it distributed the letter, it neither made speeches nor held employee meetings the day before the election.

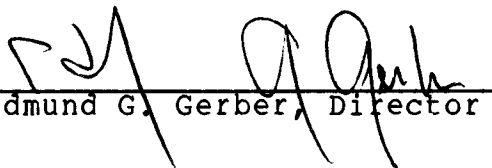
In Passaic Valley Sewerage Auth., P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980), the Commission articulated its standard for campaign statements made in the course of a representation election -- a representation election will be set aside where there has been a misrepresentation or other similiar campaign trickery which involves a substantial departure from the truth and which is made at a time which prevents other parties from making an effective reply. The misstatements, whether deliberate or not, must reasonably be expected to have a significant impact on the election.

The Commission has held that meetings conducted within 24 hours of an election by either party are grounds for setting aside an election. Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987); Tp. of East Windsor, D.R. No. 79-13, 4 NJPER 445 (¶4202 1979). However, it has not extended this rule to campaign activities other than meetings conducted within 24 hours of an election; nor has it applied the rule to situations where no nexus between alleged electioneering and employee free choice has been demonstrated. County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979); Middletown Tp. Sewerage Auth., D.R. No. 84-14, 10 NJPER 2 (¶15001 1983); County of Camden, E.D. No. 9 (1970); City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982).

AFSCME does not contend that the letter of May 25th contained any factual misrepresentations or substantial departures from the truth. The sole basis for AFSCME's objections is that the letter was distributed within 24 hours of the election. Election

day campaigning is not per se misconduct. City of Atlantic City, Middletown, supra.^{1/} The letter does not rise above the level of campaign rhetoric. AFSCME has failed to demonstrate a direct relationship between distribution of the letter and interference with employee free choice. Jersey City Dept. of Public Works, supra. Its objection is based solely on the timing of the letter and cannot be sustained. The objections filed by AFSCME are dismissed and a certification of the results of the election is issuing simultaneously with this decision.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Edmund G. Gerber, Director

DATED: August 9, 1989
Trenton, New Jersey

^{1/} In Midland Nat'l Life Ins. Co., 263 NLRB 127, 110 LRRM 1489 (1982), the NLRB held that campaign literature distributed by an employer with employee paychecks the day before an election was not sufficient grounds to set aside an election, even though the union learned of the literature three-and-one-half hours before the polls opened.