D.R. NO. 83-20

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

DOCKET NO. RO-83-103

Petitioner,

-and-

CWA SUPERVISORS (HIGHER LEVEL),
AFL-CIO,

Intervenor.

SYNOPSIS

The Director of Representation directs an election among State of New Jersey Higher Level Supervisors to ascertain whether they wish to be represented for the purposes of collective negotiation by United Public Employees, by CWA Supervisors (Higher Level) or by neither. The Director declines CWA's request that the election proceeding be blocked pending litigation of certain unfair practice charges which it has filed against the State. The charges allege that the State favored UPE and discredited CWA by holding meetings with UPE representatives, by giving lists to UPE containing unit members names and addresses as well as additional information, and by distributing a letter to unit members concerning the assessment of representation fees. The Director concludes that the evidence CWA submitted does not substantiate the claim that the atmosphere of free choice has been so tainted as to prevent a fair election nor does it establish that the nature of the alleged conduct by the State could have rendered such assistance so as to require the dismissal of the Petition.

D.R. NO. 83-20

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

UNITED PUBLIC EMPLOYEES,

DOCKET NO. RO-83-103

Petitioner,

-and-

CWA SUPERVISORS (HIGHER LEVEL),
AFL-CIO,

Intervenor.

Appearances:

For the Public Employer
Irwin Kimmelman, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Petitioner
Fox & Fox, attorneys
(David I. Fox of counsel)

For the Intervenor
Steven P. Weissman, Associate Counsel

DECISION AND DIRECTION OF ELECTION

On November 1, 1982, a Petition for Certification of Public Employee Representative, accompanied by an adequate showing of interest, was filed with the Public Employment Relations Commission ("Commission") by United Public Employees ("UPE"). UPE seeks to represent higher level supervisors employed by the State

of New Jersey ("State"). These employees comprise the Higher Level Supervisors Unit and are presently represented by CWA Supervisors (Higher Level), AFL-CIO, an affiliate of the Communications Workers of America (hereinafter "CWA"). CWA has intervened in this proceeding on the basis of a current written agreement between it and the State which covers terms and conditions of employment affecting unit members effective through June 30, 1983. N.J.A.C. 19:11-2.7.

The undersigned has caused the conduct of an administrative investigation into the matters and allegations involved in the Petition. The parties have submitted positional statements, and an informal investigative conference has been convened among the parties with assigned staff representatives. On January 5, 1983, the undersigned wrote to all parties, acknowledging the receipt of all materials in the investigation and advising that further action would be taken in accordance with N.J.A.C. 19:11-2.6(b). This rule authorizes the Director to dismiss the Petition, to direct an election on the basis of the materials obtained in the administrative investigation, to direct the conduct of an evidentiary hearing, if necessary, or to take further action as deemed appropriate.

On the basis of the administrative investigation herein, the undersigned finds and determines as follows:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that

no substantial and material factual issues exist which may more appropriately be resolved at a hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing where, as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The State of New Jersey is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), is the employer of the employees who are the subject of the Petition and is subject to the provisions of the Act.

3. The CWA Supervisors (Higher Level), AFL-CIO and United Public Employees are employee representatives within the meaning of the Act and are subject to its provisions.

4. On November 1, 1982, UPE filed a timely Petition for Certification of Public Employee Representative seeking an election among employees in the Higher Level Supervisors Unit to ascertain their representational desires under the Act.

5. The State consents to the conduct of an election.

6. CWA does not consent to the conduct an election. CWA has challenged the validity of the showing of interest submitted by UPE. CWA further asserts that the State engaged in certain conduct that improperly favored UPE and which interfered with CWA. CWA argues that the consequences of the State's conduct enabled UPE to obtain the employee support necessary to raise a question concerning representation and that the State's conduct

has impaired the voting atmosphere in which employees may exercise free choice concerning representation. On July 27, 1982, prior to the filing of the UPE Petition, an Unfair Practice Charge (Docket No. CO-83-21) concerning the State's alleged misconduct had been filed with the Commission by CWA. Amendments to the initial charge were filed on September 1, 1982 and on December 3, 1982. CWA requests that the Commission treat the Charge as a "blocking charge." 1/

CWA has not raised any other issues regarding the instant question concerning representation.

7. In accordance with established policy, CWA was permitted to submit evidence with respect to its challenge of UPE's showing of interest. The undersigned reviewed CWA's submission and, on December 22, 1982, advised the parties that CWA's submission was not sufficient to overcome the presumption of validity accorded to the UPE showing. Having determined that the UPE Petition met the Commission's processing requirements pursuant to N.J.A.C. 19:11-1.2(a), the parties were advised of the continued review of CWA's blocking request.

8. CWA's blocking request has been reviewed in accordance with the standards articulated in In re State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶ 12019 1980), aff'd P.E.R.C. No. 81-84, 7 NJPER 105 (¶ 12044 1981), mot. for recon. den. P.E.R.C. No. 81-95, 7 NJPER 133 (¶ 12056 1981), aff'd sub nom New Jersey State

1/ CWA, in specifying the allegations of misconduct relating to its blocking request, has not referred to certain portions of the initial charge and to the alleged misconduct which underlies the basis of its first amended charge. The undersigned's review of CWA's blocking request, infra, is therefore limited to certain portions of the charge, as amended.

Employees Assn., Local 4089 a/w AFT, AFL-CIO v. State of New Jersey et al., App. Div. Docket No. A-3275-80T2. 2/

In D.R. No. 81-20, the undersigned stated:

> ... the undersigned has required that parties asserting unfair practice charges specifically state whether they desire that the charges should block representation proceedings. In addition, the undersigned requires such parties to submit documentary evidence in the representation forum to establish the basis for the claim that the conduct underlying the alleged unfair practices prevents the conduct of a free and fair election. Where such material has not been furnished, the undersigned has declined to exercise his discretion to block an election. See In re Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶ 11300 1980). (footnote omitted)
>
> Where such material has been furnished, the undersigned, in establishing a standard for the exercise of his discretion, has been guided by the policies and experience of the NLRB and the court decisions in review thereof. The ultimate consideration is whether the employees could, under the circumstances, exercise their free choice in an election. See N.J.A.C. 19:11-2.6(b)(3). (footnotes omitted)
>
> The NLRB, in exercising its discretion to determine whether a fair election can be conducted notwithstanding the pendency of meritorious charges considers the following factors:
>
> > ... the character and scope of the charge and its tendency to impair the employees' free choice; the

2/ CWA provided its full positional statement and supportive evidence in correspondence dated December 16, 1982. The proferred evidence consists of affidavits from CWA officers, shop stewards and representatives, and copies of newspaper articles. CWA's Charge attached additional documentary material.

> size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interest of the employees in an expeditious expression of their preference for representation; the relationship of the charging parties to labor organizations involved in the representation case; the showing of interest, if any, presented in the R case by the charging party; and the timing of the charge.
>
> N.L.R.B. Casehandling Manual, ¶11730.5

Accordingly, the charges asserted as a block have been analyzed pursuant to this standard.

CWA's blocking request, as it relates to the initial Charge filed July 27, 1982, specifies that the State engaged in two kinds of improper activities that affect voter free choice. The first type of alleged misconduct concerns meetings between the State and UPE representatives. The second type of alleged misconduct relates to a direct communication with unit employees concerning implementation of contractual terms. A third type of activity, described in the amended charge of December 3, 1982, involves allegations that the State directly assisted UPE by providing UPE with lists containing certain personnel information. The undersigned shall first address the allegations of the first two types of conduct together, inasmuch as CWA argues that the State's alleged misconduct in the first two situations affects free choice because "CWA's credibility and effectiveness in the eyes of many State workers has been adversely affected."

Two meetings between the State and UPE representatives are alleged to have occurred. The first meeting purportedly transpired on January 25, 1982, between Frank Mason, Director of the Office of Employee Relations and Paul Scherbina, a State employee who is a spokesperson closely associated with the efforts of UPE. The second meeting assertedly occurred on July 20, 1982, among Governor Thomas Kean and other State representatives and representatives of UPE.

CWA maintains that these meetings violated the Act because (1) they were held without advance notice to CWA, (2) matters relating to terms and conditions of employment were "discussed," and (3) UPE presented grievances. 3/

CWA's Charge concerning direct communications relates to the following letter, dated July 15, 1982, from Governor Kean to all employees in the four white collar negotiations units represented by CWA and its affiliates. The State does not dispute

3/ N.J.S.A. 34:13A-5.3 provides, in part,

> ... Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances.

CWA states that the January 25, 1982 meeting related to layoffs of State employees. CWA asserts that the July 21, 1982 meeting concerned the topics of layoffs and agency shop.

that this letter was distributed to unit employees, and enclosed with paychecks issued on the first effective date of the assessment of a representation fee in lieu of dues, commonly known as an "agency shop" fee.

> Dear State Employee:
>
> State employees in bargaining units represented by the Communication Workers of America (CWA) under contracts recently negotiated will experience a payroll deduction for the first time. This is generally known as the "Agency Shop" provision. The deduction shows on your pay stub on the extreme right hand column under the title of "UNION AMT."
>
> Only employees in the affected bargaining units represented by CWA are affected by this provision.
>
> An amendment to the New Jersey Employer-Employee Relations Act was signed into law by former Governor Byrne on February 27, 1980. This new law empowered the State and the various unions representing public employees to negotiate concerning the payment of a representation fee for services in lieu of dues for all non-members in a bargaining unit. It permits such a fee even if the union does not represent 50% or more of the total employees in the bargaining unit.
>
> On December 14, 1981 the Byrne Administration signed an agreement with the Communication Workers of America which included the "Agency Shop" provisions requested by the CWA. Under this contract, beginning the first full pay period in the 1982-1983 fiscal year, non-member employees in the Administrative-Clerical, Professional, Primary Level Supervisory and Higher Level Supervisory units are required to pay a representation fee of 85% of those union dues assessed a member of the unit. This will remain in effect during the duration of the contractual agreement between

> the State and CWA. Under the law, individuals have a right to an appeal process through the union, and ultimately to a 3-member state appeals board, if they do not believe the 85% basis is appropriate.
>
> Thus, this payroll deduction is required under existing law enacted by and under contracts negotiated with CWA by the previous administration.
>
> Sincerely yours,
> Thomas H. Kean
> Governor

CWA objects to the content as well as the method of delivery of the above letter.

In reviewing the above allegations, it must be emphasized that the concern focused herein is not whether the Charge may be litigated pursuant to the Commission's complaint issuance standard, 4/ or the likelihood that an unfair practice finding will be entered. Rather, the undersigned's concern is whether the evidence presented substantiates the claim that the atmosphere of free choice has been so tainted as to prevent a fair election, and, as alleged herein, that the conduct on the part of the State improperly assisted UPE to such an extent that the latter's Petition should be dismissed. It is in this regard that the undersigned reviews the nature of the Charge and the evidence of the taint upon the ability of employees to express their free choice.

CWA has submitted affidavits from officers of its locals and shop stewards purportedly demonstrating widespread knowledge among employees of the January 25 and July 21 meetings and the July 15 letter. How the meetings and the Governor's

4/ N.J.A.C. 19:14-2.1

letter have specifically affected higher level supervisors as opposed to other State employees who CWA represents is not established because the CWA's affiants generalize the overall employee reaction to these events. Typical of the affiants' statements is the instant passage from the affidavit of Michael Hopkins:

> During January through October of 1982, I have been attempting to sign up CWA members. Many of those refusing to sign CWA membership cards have made reference to either the meetings between State officials and Paul Scherbina or to the Governor's letter concerning agency fees.

All affidavits generally describe the affiants' views of employee reaction to UPE's ability to attract the State's attention regarding layoffs and describe employee doubt concerning CWA's ability to handle the layoff question.

With regard to the first element of CWA's claim of favoritism, it is noteworthy that there is no allegation by CWA that the State failed to meet with CWA, upon request, concerning layoffs. Likewise, there is no allegation or evidence that the State has affirmatively endorsed UPE or its positions. 5/ There is no evidence that the State "negotiated" with UPE regarding layoffs or that it processed a particular grievance. Since the Charges are being reviewed in the context of their effect on the exercise of employee free choice, the undersigned cannot attach

5/ Based on the campaign literature proferred by CWA, it appears that although UPE has campaigned on the basis of a less expensive dues structure, it has not campaigned against the concept of agency shop fees.

much significance to CWA's claim that absent discovery or direct examiniation in an unfair practice proceeding it is unable to ascertain the true nature of the meetings. Surely, information which has not been publicized to employees through either the media or through UPE campaign literature and is thus also unknown to CWA can hardly be the type of activity which can be said to taint free choice. 6/

Accordingly, the issue presented is essentially reduced to the question of whether the conduct of two meetings, six months apart, between State officials and a minority representative is a form of favoritism which taints the question concerning representation before the Commission or otherwise must be attenuated before free choice at an election can be guaranteed. Assuming for the present purposes that the State knowingly had meetings with a minority representive, and assuming as well that CWA was not provided notice of the meeting, it may fairly be claimed that the State had violated subsentence (a) of the above-cited portion

6/ Furthermore, CWA, as the incumbent representative, could contractually have grieved its claims of improper negotiations and grievance presentment under specific terms of its recognition clause and through this process could have obtained the necessary information.

Article I Section A(1) of the recognition clause provides, in part: "The State will not negotiate with nor grant rights afforded under terms or provisions of this Agreement to any other employee organization in connection with the employees in this unit." In addition, N.J.S.A. 34:13A-5.3 is incorporated by reference into collective agreements. See State v. State Supervisory Employees Assoc., 78 N.J. 54 (1978).

of § 5.3. A failure of notification may also cast doubt upon the propriety of the conduct of meetings with a minority representative. Nevertheless, putting aside the question of the commission of any unfair practice, the very nature of the form of "favoritism" described herein is a legislatively authorized meeting between a public employer and a minority representative. The public policy of authorizing such a meeting is not within the Commission's purview to question. In the judgment of the undersigned, neither the validity of the question concerning representation nor the atmosphere of free choice has been impermissibly affected by the alleged conduct of two meetings, occurring ten months and three months prior to the filing of the UPE Petition, and at least thirteen months and eight months, respectively, prior to the conduct of an election in this matter. The undersigned notes that no other meetings have been allegedly held during that period or since the filing of the UPE Petition.

CWA next alleges that the Governor's July 15, 1982 letter concerning representation fee deductions contained factual inaccuracies and was of such a nature as to have the tendency to discredit CWA. The undersigned has reviewed that letter in the context of the purported reaction by CWA represented employees and their ability to exercise free choice at an election. There is no evidence that factual inaccuracies, if any, in the letter

confused employees. 7/ CWA asserts that the tenor of the letters illustrated the Governor's opposition to CWA's contractual and legal right under current law to receive representation fees, that it suggested a future negotiations position, and that it encouraged anti-CWA sentiments. Assuming again solely for the present purposes the accuracy of CWA's allegations and conclusions, and the claimed uniqueness of the method of communication, it would appear that an employer's communications to unit employees of its views of law as well as its positions concerning negotiable subjects is permissable free speech in the absence of threats, coercion, intimidation or promises of benefit on the part of the employer. In re City of Jersey City, H.E. No. 79-9, 4 NJPER 276 (¶ 4141 1978); NLRB v. Va. Electric Power Co., 314 U.S. 467 (1941).

Given the noncoercive nature of the Governor's letter, its issuance at a time contemporaneous with implementation of the representation fee deduction, and the confinement of the subject to one communication, the undersigned cannot reasonably conclude that the conduct of an election many months thereafter can be said to be within a period of taint. The issue of agency fee deduction is of vital interest to unit employees, and its effect upon

7/ The third paragraph of the letter concludes with the sentence: "It permits such a fee even if the union does not represent 50% or more of the total employees in the bargaining unit." The affidavit of Hetty Rosenstein, bearing upon this sentence, indicates that employees understood that the 50% figure referred to union membership: " ... employees asked me why CWA was collecting agency fees if it didn't have 50% membership." CWA does not allege that it had more than 50% membership in any of the units it represented as of July 15, 1982.

issues concerning representation may be addressed by the parties extensively during the representation campaign.

CWA asserts that the Governor's meeting with UPE representatives one week after the issuance of the Governor's letter demonstrated favoritism to UPE. CWA has not produced evidence indicating that the Governor has endorsed UPE, that the Governor's purported opposition to the representation fee is harmonious with the position of UPE, or that UPE organized in any way on the basis of the Governor's purported support for UPE and/or its positions.

The undersigned now turns to CWA's third allegation that in July 1982, the State provided UPE with lists of names, addresses and work locations of all State employees represented by CWA and that in September 1982, the State provided UPE with CWA membership statistics. The evidence in support of this assertion is an affidavit submitted by CWA representative Larry Cohen. Cohen asserts that at a meeting, the date and location of which is unspecified, a coordinator employed by the State's Office of Employee Relations ("OER") responded in the affirmative to his inquiry as to whether OER had provided lists of unit employees to UPE. Cohen states that the coordinator,

> ... also indicated that lists which had been provided to UPE contained the same or similar information as the computer print-outs which the State makes available to CWA. Lists to which CWA has access contain the name, address, title, work location, payroll number, and a designation of member/non-member of all bargaining unit employees.

Cohen's affidavit does not state the date or the month when the material was made available. It is assumed for the present purposes that the lists were furnished in July 1982, as CWA has alleged, and contained member/nonmember designations. There is no evidentiary submission to support the claim that "membership statistics" were made available in September.

In In re Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976), the Commission, reviewing the propriety of exclusive access clauses which grant majority representatives the sole right to use employer communications facilities, appears to have envisioned the facts of the instant matter as it relates to providing names and addresses of unit members. Union County Regional holds that exclusive access clauses which are permissible in the "insulated" contract period are not enforceable in the "open" period during which a Petition for Certification of Public Employee Representative may be filed. While the Commission held that minority access to communications facilities during the insulated period may be precluded through an exclusive access clause, it stated, at footnote 16, that "This is not to say that both the majority representative and any challenging group are not free to attempt to organize support among the employees during this [i.e., insulated] period by utilizing the alternative methods referred to in n. 15, supra." Footnote 15 identifies the use of lists of employee names and addresses obtained through a public employer as an "alternative means of communicating with

the employees." 8/

The use of lists containing employee names and addresses would alone be sufficient for UPE to identify the pool of employees from whom the showing of interest had to be secured. While the dissemination of additional information concerning job title, work location and payroll number is an additional factor presented in the Charge, there is no evidence submitted by CWA to provide even a basis for speculation that UPE would not have been able to successfully raise a question concerning representation solely on the basis of names and addresses.

Finally, there is no reason to believe that the purported receipt of the above information by UPE taints the atmosphere of free choice at an election. Union County Regional, supra, holds that "public employers may not treat employee organizations unequally in the competition for the support of their employees." Thus, at least commencing with the "open" period, the State would have been required upon request to provide UPE with the same data it has provided CWA. 9/ An election directed herein would be

8/ A hearing officer of New York PERB, in a decision which interpreted, pursuant to its Act, the right of a challenging organization to have access to the names and addresses of unit members during an insulated period proximate to the representation filing period, concluded that the Petitioner was entitled to all name and address information which had been made available to the incumbent organization. In re County of Erie, 13 PERB 4605 (1980). In consequence, New York PERB's Director of Public Employment Practices and Representation extended the time period for the submission of the challenging organization's showing of interest because, among other access violations, the challenging organization had been denied access to employee names and addresses during the above described period. 13 PERB 4053 (1980).

9/ UPE's access to such information as an entitlement is not subject to CWA's prior use of that information for campaign purposes. In re Essex Cty. Voc. Tech. Bd. of Ed., D.U.P. No. 81-23, 7 NJPER 367 (¶ 12165 1981).

conducted at a time well beyond the period when UPE would unquestionably have been legally entitled to the material provided by the State.

For the above reasons, the undersigned concludes that the evidence presented does not substantiate the claim that the atmosphere of free choice has been so tainted as to prevent a fair election nor has it established that the nature of the State's conduct could have rendered such assistance so as to require the dismissal of the Petition. Accordingly, the undersigned determines that character and scope of allegations submitted by CWA as constituting unfair practices and the evidence proferred by CWA in support of its claims are neither individually nor in their entirety cause to "block" the conduct of an election at this time. In the absence of any other substantial and material disputed factual issues, the undersigned further concludes that the policies of the Act can be best effectuated by the direction of an election at this time. The election shall be conducted by mail ballot, commencing with the mailing of ballots on February 28, 1983. Ballots shall be returned to the Commission's postal address on March 21, 1983. Thereafter, the ballots will be tallied.

Those eligible to vote are higher level supervisors who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, including those in military service. Ineligible to vote are

employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

The State is directed to file with the undersigned and with UPE and CWA, an election eligibility list, consisting of an alphabetical listing of the names of eligible voters together with their last known mailing addresses and job title. In order to be timely filed, the eligibility lists must be received by the undersigned no later than February 14, 1983. The eligibility list shall be simultaneously filed with UPE and CWA with statement of service to the undersigned.

Employees shall vote as to whether they desire to be represented for the purpose of collective negotiations by United Public Employees, CWA Supervisors (Higher Level) AFL-CIO, or neither.

A majority of valid ballots cast by employees shall determine the results of the election. The election directed herein shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: January 31, 1983
Trenton, New Jersey