

D.R. No. 2006-9

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

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-2006-013

NEW JERSEY EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation dismisses objections filed over the conduct of a representation election finding that the information submitted by the objecting party did not demonstrate election interference that would justify overturning the election results. The Director reiterates long-standing policy that such evidence must demonstrate that there were factual misrepresentations and/or threats to voters or obstructions to voting that affected the exercise of the voters freedom of choice.

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Appearances:

For the Public Employer,
Schwartz, Simon, Edelstein, Celso & Kessler, attorneys
(Nicholas Celso, of counsel)

For the Petitioner,
Vickie Hendrickson, NJEA UniServ Field Representative

DECISION

On September 8, 2005, the New Jersey Education Association (Association or Petitioner) filed a Representative Petition for certification by election with the Public Employment Relations Commission (Commission) seeking to represent in a separate unit all employees in assistant titles employed by the Bridgewater-Raritan Regional Board of Education (Board). The Association and Board executed an Agreement for Consent Election providing for a secret ballot election to be conducted among the Board's employees holding the titles in question to determine whether they wished to be represented for collective negotiations by the

Association. Pursuant to the terms of the Consent Agreement, an election was held on November 7, 2005. A majority of employees voted against representation. On November 16, 2005, the petitioning Association filed its intent to object to the election and filed its supporting documentation by December 6, 2005. Due to a notice error, the Board was given until January 30, 2006 to submit its response.

Based upon the information available to me to date, the following facts appear:

Prior to the filing of this petition, employees holding the titles in question had been represented in a separate unit by the Bridgewater-Raritan Educational Assistants Association (Assistants Association). The last collective agreement between the Assistants Association and the Board was effective from July 1, 2003 through June 30, 2006, which, pursuant to N.J.A.C. 19:11-2.8(c)3, meant that the period from September 1 - October 15, 2005 was the timely period for the filing of a representation petition seeking to represent the titles/employees in question.

The Association filed its petition to represent the titles in the then existing Assistants Association on September 6, and amended it on September 8, 2005. Since it was filed in accordance with N.J.A.C. 19:11-2.8(c)3, the petition was timely. The Petitioner appropriately listed the Assistants Association as the then current majority representative of the employees in

question. By letter of September 12, 2005, the Assistants Association was notified of the petition and told what steps it could take to intervene in this matter. The letter explained that if it failed to intervene, it would not be able to participate in this proceeding. The Assistants Association did not file for intervention.

By letter of September 29, 2005, the Assistants Association was again notified of the petition by the Commission, advised that if it did not intervene it would be excluded from any representation election affecting the petitioned-for employees, and told it would thereby surrender any representational claim it had to that unit. The letter notified the Assistants Association that a consent conference had been scheduled for October 11, 2005, and that if it did not appear and participate in that conference it would not appear on the ballot in that election. The letter also confirmed that no intervention had yet been filed and that we had been verbally informed that the Assistants Association did not intend to attend the conference.

The conference was conducted on October 11, 2005. The Assistants Association had not intervened up to that point, and did not attend the conference. The Board and the petitioning Association signed a consent agreement scheduling an election for November 7, 2005. The question on the ballot for the employees was did they wish to be represented for purposes of collective

negotiations by "NJEA/ASSISTANTS" yes or no. I approved that consent agreement on October 17, 2005.

The election was held on November 7, 2005 as scheduled. Of 176 eligible voters, 117 ballots were cast with the following results:

Votes For the Association: 45 votes,

Votes Against Representation: 71 votes

There was one challenged ballot. Out of the 116 valid votes counted, a majority were cast against representation by the Association. The parties were served with the tally of ballots on November 7. On November 16 and December 6, 2005, the Association filed its objections to the election. N.J.A.C. 19:11-10.3(h). The Board filed its response on January 30, 2006.

The Association alleges that a unit employee interfered with the voting process by compromising the election site when she spoke negatively about the Association to other voters in line to vote. In support of its objection, the Association submitted a statement of its position and five letters submitted by five eligible voters. None of these letters were in the form of affidavits or certified statements, but four of them were notarized. The following summarizes the employees' statements submitted by the Association:

Voter Theresa A. D'Angelo stated that she observed Ms. Kathy Hess, an assistant at the High School, "aggressively voicing her opinion" about the union vote as she exited

the voting booth. She also stated that Ms. Hess "continued shouting information regarding union dues, to all of us who were in line waiting to vote." . . . She also claimed that Ms. Hess then stood by the library entrance and "gave the same speech to every assistant that was coming in to vote." She felt Ms. Hess's intention was clearly to sway voters to vote "NO".

Voter Barbara Redvanly stated that while in line to vote, she "overheard some boisterous comments from Kathy Hess about the union and why her vote would be 'no' ". She recalls that Ms. Hess mentioned paying a fee just to join the union in addition to paying monthly dues. She said "Ms. Hess continued her discussion outside the building with other school district assistants."

Voter Joyce Picone "heard negative remarks about the union" while in line to vote.

Voter Jeff Schroeder, while on line to vote, overheard "a couple of women . . . making negative comments about the possibility of having a union." He said they "seemed to have stared at anyone who was entering the room and whispering."

Voter Sandra J. Tirrell, while standing in line to vote, "heard negative talking about the union."

The Board disputed the Association's assertion that negative comments were made during the voting, but argued, nevertheless, that even if such comments were made there was insufficient basis to conclude that such comments constituted factual misrepresentations or interfered with the employees freedom of choice. Therefore, the Board concluded that the Association did not submit sufficient evidence to meet the Commission's

objections requirements, N.J.A.C. 19:11-10.3(h), and argued that the Association's objections be dismissed.

N.J.A.C. 19:11-10.3(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 specific evidence which that party relies upon in support of the claimed irregularity in the election process.

This rule sets up two separate and distinct components for evaluating election objections. 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 for the objecting party to make its prima facie case. Under N.J.A.C. 19:11-10.3(I), if the objecting party presents a prima facie case, I initiate an investigation; if the conduct does not warrant setting aside the election as a matter of law, or if the

objecting party fails to proffer sufficient evidence to support a prima facie case, I may immediately dismiss the objections.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), 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. [NJPER Supp. at 156.]

I have reviewed the Association's objections and supporting documents and find that the Association has not established a prima facie case as required by N.J.A.C. 19:11-10.3(h), nor has it met the standard established by Jersey City Dept. of Public Works.

Of the five letters from unit members supplied by the Association in support of their objection to the election, three note generally hearing "negative remarks" or "negative talking" about the union from other unit members in line to vote. The other two letters specifically allege that a fellow unit member,

Cathy Hess, spoke negatively about union dues to people in line waiting to vote and then made similar comments to people entering the library (voting occurred in the library's media/conference room) and later to unit members outside of the building. But there was no showing how many voters actually heard her comments.

Nevertheless, assuming the truth of the allegations, the most objectionable version of these statements would be that one (or possibly more) unit members essentially campaigned against the Association to other unit members waiting in line to vote or entering the polling location. The Association does not offer evidence or claim in its objection that Kathy Hess or anybody else spread misinformation about the union or threatened or intimidated the voters in any way during the election. Consequently, I find that, even if the most objectionable allegations are taken as fact, the employees' statements do not show conduct which is destructive of the atmosphere necessary for a free and fair election, nor show that any voters were interfered with or prevented from exercising their free choice.

In Morris County Bd. of Social Services (Morrisview Nursing Home), D.R. No. 89-27, 15 NJPER 237 (¶20097 1989), one employee was in the voting booth casting her vote while another employee just outside of the booth was speaking to her. One union alleged that the employee outside the booth was telling the voter to mark an "x" by the name of the other union. The Director of

Representation held that the evidence supporting the objections did not precisely and specifically show that conduct occurred which would warrant setting aside the election as a matter of law. The Director also found that given the wide margin of the tallied ballots, this conduct involving only one voter did not affect the outcome of the election." Id. at 239.

A group of decisions involved electioneering by union representatives or supervisors in very close proximity to polling areas, but nonetheless concluded there was no voter interference as a matter of law. In County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979), union representatives within 10-20 feet of the polling area passed out campaign buttons and literature for the duration of the election while urging employees to vote for the union. The Director found that absent any evidence of factual misrepresentation (spoken or in the campaign literature), the electioneering did not cause apprehension, confusion or otherwise interfere or tend to interfere with employee exercise of free choice. Id. at 19.

In Weehawken Educational Association, D.U.P. No. 81-25, 7 NJPER 371 (¶12169 1981) one union alleged that representatives of a rival union were stationed in the hallways immediately accessible to the polling place and campaigning to voters as they entered. The Director noted:

The charge does not allege facts which would establish coercion, harassment, intimidation

or restraint of employees in the exercise of protected rights.

The undersigned concludes that mere campaigning cannot constitute interference with, restraint or coercion of employees in the exercise of protected rights. [7 NJPER at 371.]

In County of Hudson - Meadowview Hospital, E.D. No. 13, NJPER Supp. 432 (¶104 1970), a hospital foreman wore a union button within 5-40 feet of the polling area and told employees to vote for a particular union. The Director concluded that "evidence showed only that a foreman expressed a preference or an opinion near the polls" but that such conduct alone would not prejudice voters' opportunity for free choice.

Similarly, in City of Newark, D.R. No. 92-14, 18 NJPER 113 (¶23054 1992), police superior officers at the entrance to the polling site urged subordinate bargaining unit members to vote for the PBA. The Director relied on County of Hudson - Meadowview Hospital to conclude: "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." Id. at 116. Because the electioneering conduct did not involve threats or promises of benefits, it was not found to tend to interfere with voters' free choice.

In light of the decisions discussed above, the Association's objection based on a fellow non-supervisory employee allegedly campaigning against the Association to some employees in the

voting area and later at the entrance to the polling place does not, as a matter of law, assert conduct which would tend to interfere with employees' free choice.

In the instant case, Kathy Hess is neither a supervisor nor a union representative. She was not alleged to have made any factual misrepresentations about the Association, nor did she physically threaten voters or obstruct voting. Ms. Hess, as a non-supervisory co-worker, was also not in any position to credibly coerce, intimidate, or offer job-related favors because she did not possess power over hiring/firing or any other conditions of employment for unit employees. The threshold needed for her campaigning actions to reach a level of potential election interference would be much higher than for a supervisory employee or union representative.

Despite the greater potential for supervisors and union representatives to credibly coerce or intimidate voters, even when they have engaged in more overt (passing out campaign literature, wearing union paraphernalia, in addition to speaking to voters and urging them to vote a particular way) and persistent (stationed at entrance to polling area for duration of vote) campaigning, we have declined to consider such conduct as tending to interfere with free choice and thus have not found a prima facie case. City of Newark; Weehawken Educational

Association; County of Atlantic; County of Hudson - Meadowview Hospital.

Furthermore, the Association and the five witness statements have not made any claim that Ms. Hess or others made untruthful statements to employees in the polling area. A representation election will be set aside where there has been misrepresentation or other similar 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.

Middletown Township Sewerage Authority, D.R. No. 84-14, 10 NJPER 2 (¶15001 1983).^{1/} Though Ms. Hess's statements were made during the election thereby preventing the Association from effectively responding, there is no evidence that her alleged statements were a "substantial departure from the truth" as opposed to mere campaign rhetoric.

Even if we found merit to the allegations presented here, and all five voters had been improperly influenced by the

^{1/} The misstatements, whether deliberate or not, must reasonably be expected to have a significant impact on the election. While employer-sponsored meetings held within 24 hours of elections have been held as per se grounds for setting aside an election, other campaign activities in which the information conveyed does not rise above the level of campaign rhetoric have not been found to interfere with employee free choice. See Middlesex County Utilities Authority, D.R. No. 90-2, 15 NJPER 501 (¶20207 1989); Middletown Township Sewerage Authority, supra; Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987); Township of East Windsor, D.R. No. 79-13, 4 NJPER 445 (¶4202 1979).

employee's conduct around the polls, their "no" votes could not alter the outcome of the election. The margin of those who voted against representation by the Association was 26 votes. Where there is a flaw in the election process which potentially affects the election outcome, we will conduct an investigation and take appropriate corrective action, including, where necessary, re-running the election. See Rutgers University, D.R. No. 2000-12, 26 NJPER 241 (¶31095 2000), req. for rev. den., P.E.R.C. No. 2000-101, 27 NJPER 1 (¶32000 2000) (order that 112 ballots, originally misplaced by the post office, be opened and counted). However, where objectionable conduct could not affect the outcome of the election, there is no basis to set the election aside and re-run the election. See Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002) (claim that two voters were improperly permitted to vote was dismissed where those votes could not have affected the outcome). Here, even if all five voters voted against representation, such voting would be numerically insufficient to affect the election outcome and there was no showing Kathy Hess affected another 21 voters.

Finally, the five witness statements do not connect any perceived threat or intimidation to the alleged interference with free choice.^{2/} Thus, it is not apparent how, in a secret ballot

^{2/} "Where allegations of election campaigning in the vicinity of the polling location have not been factually demonstrated
(continued...)"

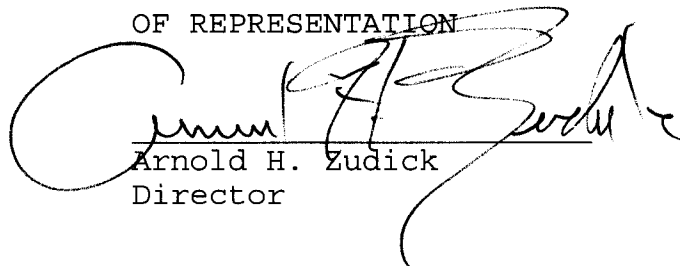
vote setting, they were not free to choose because of the alleged remarks by Ms. Hess.

Accordingly, I find that the Association's objections do not warrant setting aside the election as a matter of law and, therefore, do not state a prima facie basis to void the election. For the above reasons, I dismiss the objections. A copy of the certified election results through which the unit chose not to be represented by the Petitioner is attached and effective from November 17, 2005.

ORDER

The objections to the election are dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director

DATED: February 1, 2006
Trenton, NJ

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 February 14, 2006.

(...continued)

or where a nexus between the electioneering and actual interference with employee free choice has not been established, the Commission has rejected post-election objections." In re City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982); See County of Atlantic, supra.

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Public Employer,

-and-

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DOCKET NO. RO-2006-013

CERTIFICATION OF RESULTS

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. No exclusive representative for collective negotiations was selected, and the objections to the election were dismissed.

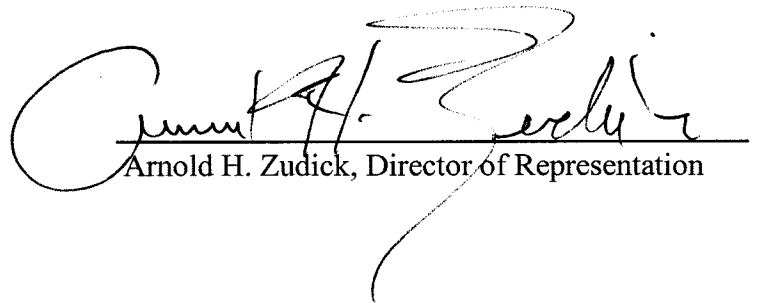
Accordingly,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast by the employees in the unit described below for any employee organization appearing on the ballot. There is no exclusive representative of all the employees within the meaning of the New Jersey Employer-Employee Relations Act.

UNIT: Included: All regularly employed cafeteria assistants, cafeteria assistants-in-charge, playground assistants, teacher assistants, paraeducators, team teaching assistants, language lab assistants, library assistants and special education assistants employed by the Bridgewater-Raritan Regional Board of Education.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police, casual employees, craft employees and all other employees of the Bridgewater-Raritan Regional Board of Education.

DATED: November 17, 2005
Trenton, New Jersey



Arnold H. Zudick, Director of Representation

Attachment:

Certification of Results dated: November 17, 2005

In the Matter of

BRIDGEWATER-RARITAN REGIONAL BOARD OF EDUCATION

-and-

NJEA

Docket No. RO-2006-013

Service on the following:

Nicholas Celso, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
Ten James Street
Florham Park, NJ 07932

Vickie Hendrickson
Field Representative
NJEA Uniserv Office 13
Macedo Business Park I
27 Minneakoning Rd
Flemington, NJ 08822