

D.R. No. 2009-6

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

In the Matter of

TOWNSHIP OF BERKELEY,
Public Employer,

-and-

BERKELEY TOWNSHIP WHITE COLLAR
WORKERS ASSOCIATION,
Petitioner,

Docket No. RO-2009-026

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 97,
Intervenor.

SYNOPSIS

The Director of Representation finds that a request to block a representation election among all permanent white-collar employees of the Township of Berkeley, based upon the allegations in an unfair practice charge filed by Local 97 is not supported by sufficient evidence to block the election while litigation of the unfair practice charge ensues. The Local asserted in its charge that the Township provided the petitioner, Berkeley Township White Collar Workers Association with overt and material support for its organizing campaign among employees currently represented by Local 97. The Director found that none of the certifications submitted by Local 97 established a factual nexus between the asserted conduct and the Township's knowledge or support of the Association's actions. As to alleged unlawful activity by Township supervisors, including speaking to Local 97 unit members about the benefits of an independent white collar unit, the Director found that even assuming their occurrence, no facts showed that the Township was aware of the supervisors conduct.

Based upon a review of the character and scope of the allegations, the Director determines that the acts alleged do not tend to impair the unit employees' free choice in a secret ballot election.

The Director orders that a secret mail ballot election be conducted within 30 days of this decision.

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LOCAL 97,

Intervenor.

Appearances:

For the Respondent,
Eric M. Bernstein and Associates, attorneys
(Eric M. Bernstein, of counsel)

For the Petitioner,
Detzky and Hunter, attorneys
(Stephen B. Hunter, of counsel)

For the Intervenor,
Mets, Schiro and McGovern, LLP, attorneys
(Kevin P. McGovern, of counsel)

DECISION

On September 17, 2008, the Berkeley Township White Collar Workers Association (Association) filed a representation petition seeking to represent all white collar permanent employees of the Township of Berkeley (Township). The petition was accompanied by an adequate showing of interest. The employees are currently

represented by the International Brotherhood of Teamsters, Local 97 (Local 97 or the Local). Local 97 intervened in this matter based upon its collective negotiations agreement with the Township, which expires on December 31, 2008. N.J.A.C. 19;11-2.7.

The parties do not dispute the description or the appropriateness of the petitioned-for unit. The Township has taken no position on the petition. Local 97 opposes the petition and will not consent to an election.

On September 12, 2008, Local 97 filed an unfair practice charge (Docket No. CO-2009-083), alleging that the Township violated 5.4a (1) and (2) of the New Jersey Employer-Employee Relations Act (Act).^{1/} By letter of September 29, Local 97 requested that its charge block further processing of the Association's representation petition.

The charge alleges that on July 22, 2008, the Township allowed one of its unit employees to distribute a notice to employees printed on Township stationary through the Township's inter-office mail system. The notice informed employees that on July 30, 2008, a meeting would be held at the Township recreation

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

building to discuss removal of Local 97 as the negotiations representative of all white collar employees. Local 97 also alleges that after the July 30 meeting, the Township allowed the unit employee to travel during work hours to unit members' work sites for the purpose of obtaining signatures for a petition to "decertify" Local 97 as the majority representative.^{2/} The charge also alleges that on August 5 and 22, 2008, unit employees received the second and third memoranda through the Township's inter-office mail, written on Township letterhead and enclosed in a Township envelope. These memos advised of a second meeting to further discuss decertification and urged unit members to obtain signatures of their peers during work hours to support the petition. Finally, the charge alleges that non-unit Township supervisors encouraged Local 97 white collar unit members to sign a decertification petition and made disparaging remarks about Local 97.

Local 97 contends that the Township violated N.J.S.A. 34:13A-5.4a (1) and (2) by allowing; in-house distribution of memoranda on Township letterhead; use of the Township's recreation hall for a meeting to discuss decertification of Local

^{2/} The filed petition is one for certification of public employee representative seeking an election on whether the white collar employees wish to be represented by the Berkeley Township White Collar Workers Association, Local 97, or no representative. This petition is not a "decertification" petition.

97; solicitation of unit members' signatures for a decertification petition during work hours; and certain conduct of its non-unit supervisors to encourage unit members to decertify Local 97. Local 97 contends that the Township has provided overt and material support to the Association, thereby undermining the exercise of free choice in an election among Local 97 unit members.

Local 97 demands that its charge be litigated before an election is conducted so that an effective remedy can be administered. On October 6, 2008, Local 97 submitted documents and certifications supporting its request to block an election. The Township and the Association have filed letters and other documents, including a certification, denying the allegations set forth in the charge.

Two Local 97 shop stewards and three other unit employees have filed certifications supporting the request to block the pending representation petition. The unit members certify that notices or memoranda were distributed to unit members through the Township inter-office mail on Township letterhead. They certify that supervisors allowed certain unspecified unit members supporting the removal of Local 97 to travel to other work locations during work hours to discuss decertification and obtain signatures to the petition. They certify that the same employees were allowed to phone Local 97 unit members during work hours to

discuss representation of the unit. The certifications also provide that at least one meeting regarding decertification and solicitation of employee signatures was held in the Township recreation hall after work hours. The unit employees certified that Township supervisors, represented by an independent supervisors association for purposes of collective negotiations, discussed the selection of a new representative with Local 97 unit members, and arranged for the Association to phone the attorney representing the supervisor's association.

The certifications do not provide that supervisors attended the meetings with Local 97 unit members. They certify that the supervisors approached Local 97 members during work hours. Several certifications assert that misinformation was provided to the unit about the consequences of decertification and that a number of signators were coerced or misled into signing the petition.

Copies of the memos allegedly distributed to unit members informing them of meetings on July 30 and August 13, 2008 do not demonstrate that Township letterhead was used or that distribution was through inter-office mail. The documents indicate that they were sent by facsimile on August 24 and 26, after 5:00 pm. The memoranda informed employees that the purpose of the meeting was to discuss termination of Local 97's representation, and that a petition was being circulated

throughout the Township's offices to solicit signatures. The certifications do not identify any supervisors or other Township officials who allegedly made disparaging remarks about Local 97, or permitted the Association to use the Township's equipment during work hours for the organizing campaign.

The Township denies that it engaged in any of the actions alleged by Local 97; denies that it condoned or authorized any actions by any employee or supervisor regarding union activities during work hours; and denies that it authorized the use of Township facilities for the Association's campaign. It writes that when it learned that an employee had used Township equipment, time and material for non-work related purposes, it took disciplinary action against the employee. The Township also denies knowing of any non-unit supervisors who supported the Association, or who publicly disparaged Local 97.

The Association contends that Local 97 has presented no evidence showing that the Township actively assisted any solicitation seeking the termination of the collective negotiations relationship between the Township and Local 97. A unit employee organizing on behalf of the Association certifies that she was disciplined for her use of Township equipment and that no other Association correspondence was delivered through Township inter-office mail. The employee certifies that many organizations, including Local 97, use the Township's recreation

hall after work hours, and, that as an employee of the recreation department, she is required to travel to other Township offices. The employee denies "campaigning" during work hours but acknowledges that signatures in support of the representation petition may have been obtained during employee break times. She denies that the Township or any of its supervisors assisted the Association's organizational efforts. Finally, the Association argues that the timing of the notices and the meetings (i.e., months before the filing of the petition), together with the lack of evidence demonstrating Township involvement in favor of the Association rebuts Local 97's claim that the Township's alleged unfair practices would influence the employees' free choice in a representation election if it was conducted before litigation on the merits of the charge.

ANALYSIS

The Commission's policy is to expedite the processing of representation disputes so that the question of whether employees will be represented by either competing organization (or none) can be resolved by the Commission's secret ballot election mechanism.

The filing of an unfair practice charge or issuance of an unfair practice complaint will not automatically block the processing of a representation petition. A blocking charge procedure is not required by the Act or the Commission's rules.

The decision whether an unfair practice charge will block the processing of a representation petition lies within the Commission's discretion. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981). We ordinarily require that a charging party provide affidavits or other documents to support a claim that the employer's alleged unfair practice(s) prevent(s) a free and fair election. See Bor. of Berlin, D.R. No. 93-9, 19 NJPER 74 (¶24033 1992); South Jersey Port Corp. P.E.R.C. No. 90-45, 16 NJPER 3 (¶21001 1989); and Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1988).

The legal standard for determining whether an unfair practice charge should block the processing of a representation petition was set forth in State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), and reaffirmed in Matawan. The charging party must first request that the charge block the representation proceeding. It must also submit documents showing that the conduct underlying the unfair practice prevents a free and fair election. The Director of Representation will exercise discretion to block if under all of the circumstances, the employees could not exercise their free choice in an election. See Atlantic City Convention & Visitors Authority, D.R. No. 2002-9, 28 NJPER 170 (¶33061 2002); Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following substantive factors in evaluating whether a fair election can be conducted during the pendency of an unfair practice charge:

The character and the scope of the charge(s) and its tendency to impair the employee's free choice; the size of the working force and the number of employees involved in the events upon which the charge is based; the entitlement and interests 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; a showing of interest, if any, presented in the [representation] case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5]
[7 NJPER at 109]

In this matter, Local 97 has filed identical certifications from two shop stewards. They are intended to support the Local's allegations that the Township allowed Association supporters to use inter-office mail during work hours to distribute notices and to telephone or personally approach unit employees in Township buildings to discuss the organizing campaign and to solicit signatures in support of the Association's petition. The shop stewards describe the Township as "enabling" the Association when "some" supervisors "talked down" Local 97 during work hours and arranged for legal representation for the Association.

The remainder of unit member certifications offered by Local 97 corroborate the stewards' certifications. One of them describes a telephone call purportedly from the Association's

lead organizer to a Local 97 unit member during work hours. The caller assertedly sought to discuss the unit member's support for the Association.

Another certification provides that Local 97 never contacted unit members by inter-office mail and that employees merely assumed that a supervisor or the business administrator gave it permission to use the Township's system. This affiant certifies that she received memos from the Association by inter-office mail.

In another certification filed by Local 97, the employee wrote that she observed members of the group seeking support for the representation petition arrive at her workplace with the ". . . sole purpose [of] strong-arm[ing] people into signing the petition." The certification also provides that certain facts about the supervisor's unit were revealed at the meetings convened by the Association. No facts indicate that any supervisor(s) attended any meeting. The employee also certified that some supervisors explained the benefits of employing the Supervisor's Association counsel on behalf of the petitioning white collar employees.

We assume that the certifications are true. In this matter, we assume as true the use of inter-office mail; that an Association supporter made phone calls during work hours to unit employees in order to discuss the campaign; that information

concerning the supervisory unit's negotiated benefits was disseminated to unit employees; and that two Association organizational meetings were conducted at the Township recreation hall. None of the certifications provide a factual nexus between the asserted conduct and the Township's knowledge of it or of the Township's support of the Association's actions. None of the certifications specifically identify any supervisors or Township official(s) who assisted the Association. Assuming that certain supervisors spoke to unit employees about the benefits of employing their attorney to create an independent white collar negotiations unit, I find that no facts show that the Township was aware of any such supervisors' conduct. The certifications filed by Local 97 set forth, at best, assumptions and conclusions about the Township's knowledge of and participation in the Association's activities. Under these circumstances, I cannot conclude that the statements in the filed certifications tend to support Local 97's request to block the conduct of an election while litigation of the charge ensues.

Similarly, by applying the substantive factors set forth in State of New Jersey (which are relevant to this case), I cannot conclude that the charge filed by Local 97 warrants a delay in conducting a secret ballot election. I note the absence of factual support for the allegation that the Township participated or materially assisted in the acts specified in the

charge. The facts do show that one named unit employee and perhaps several more unnamed unit employees distributed campaign literature; held meetings and attempted to convince Local 97 unit members that they should support representation by a representative other than Local 97. Such conduct is lawful, particularly without evidence that the Township actively supported the Association's efforts. Two certifications provide that when the Township learned that a named unit employee used Township facilities to convey organizational materials to others, the employee was disciplined. I find that the character and scope of the allegations do not tend to impair the unit employees' free choice in a secret ballot election.

About 56 employees are included in the existing and petitioned-for unit. It is unclear from the employee certifications whether more than a few unit employees were involved in the activities upon which the charge is based. Also, the number of remaining unit employees who were approached directly by the Association activists during work hours, or at their work locations has not been established. It is also unclear how many unit employees actually received notices of the Association meetings, attended the meetings, or felt coerced by Association supporters in any of the situations set forth by Local 97 in its charge.

The right of employees to vote on whether they wish to be represented by the Association, Local 97, or no representative is paramount. No allegation indicates that any unlawful conduct occurred after August 2008. The petition was filed on September 17, 2008. Delaying the election for another significant period of time while the charge is litigated would not satisfy the interests of these employees in expressing their representational wishes.

Finally, the current collective negotiations agreement between Local 97 and the Township expires on December 31, 2008. In light of the pending question concerning representation, the Township and Local 97 cannot enter collective negotiations for a successor agreement. If the charge were to block the election, the employees' terms and conditions of employment would remain status quo. All the above circumstances mandate that employees be given the opportunity to expeditiously express their representational preference.

For all of the foregoing reasons, I determine that the unfair practice charge filed by Local 97 should not block the conduct of an election in this case. The charge will otherwise be processed in accordance with N.J.A.C. 19:14-1.6.

In the absence of a dispute over the appropriateness of the negotiations unit, I direct that a secret mail ballot election be conducted among all white collar permanent employees of the

Township of Berkeley, who shall vote on which, if any, collective negotiations representative they wish to represent them for purposes of collective negotiations. Excluded are all permanent blue collar employees, civilian telecommunications operators, senior telecommunications operators, police dispatchers, assistant sanitation supervisors, assistant collector, deputy court clerk and all other deputy or assistant supervisors, managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police employees, casual employees and all other employees of the Township of Berkeley.

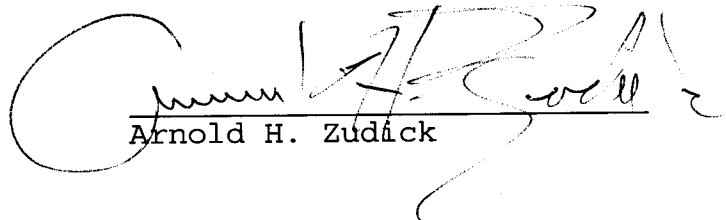
The election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the 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.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job

titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR OF
REPRESENTATION



Arnold H. Zudick

DATED: December 8, 2008
Trenton, New Jersey

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 December 18, 2008.