

D.R. NO. 2018-11

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

In the Matter of

BOROUGH OF LODI,  
Public Employer,

-and-

Docket No. RD-2018-3

UNITED SERVICE WORKERS UNION,  
LOCAL 1N,  
Intervenor,

-and-

SHERRI CIAROCCO, et al.,  
Petitioner.

SYNOPSIS

The Director of Representation finds that a request to block a decertification election among all non-supervisory white collar employees employed by the Borough of Lodi is not supported by sufficient evidence to block the election while litigation of the unfair practice charge ensues. The Director found an absence of documentary evidence for the Union's contention that the Borough refused to execute a memorandum of understanding for a successor agreement in order to undermine the employees' support for the Union and to influence them to file a decertification petition. Further, the Director found an absence of facts to support the contention that the voters' freedom to choose a majority representative would be influenced by the purported refusal to sign the memorandum of understanding. As such, the Director orders that a secret mail ballot election be conducted.

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Appearances:

For the Public Employer  
Florio, Perrucci, Steinhardt & Fader, attorneys  
(J. Andrew Kinsey, of counsel)

For the Intervenor  
Rothman, Rocco, LaRuffa, attorneys  
(Eric J. LaRuffa, of counsel)

For the Petitioner  
Sherri Ciarocco

**DECISION**

On September 5<sup>th</sup>, 2017 and September 7<sup>th</sup>, 2017, Sherri Ciarocco (Petitioner) filed a representation petition and amended representation petition (Docket No. RD-2018-003), seeking to decertify the United Service Workers Union, Local 1N (Union) as

the majority representative of a collective negotiations unit of thirteen (13) "regularly employed, white collar employees employed by the Borough of Lodi" (Borough). The petition is timely and accompanied by an adequate showing of interest among unit employees. N.J.A.C. 19:11-1.3; 2.8. The Union has intervened in this matter, based on its current status as the majority representative. N.J.A.C. 19:11-2.7. The Union was certified as majority representative on June 27<sup>th</sup>, 2003 (Docket No. RO-2003-278). There is no dispute as to the unit description or the appropriateness of the petitioned-for unit.

The Union refuses to consent to an election, asserting that its pending unfair practice charge against the Borough, filed on September 15<sup>th</sup>, 2017 (Docket No. CO-2018-080), should block further processing of the petition. The charge alleges that the Borough violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act)<sup>1/</sup> by refusing to "execute the agreed upon Memorandum of Understanding (MOU) in order to undermine the employees' support for the Union and to influence them to decertify the Union..."

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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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On September 18<sup>th</sup>, 2017, we wrote to all parties, advising that the Union seeks to block processing of the petition until its charge can be fully litigated and invited the Union to submit a position statement, accompanied by documentary evidence, to support its allegations and to establish a nexus between the alleged unfair practice and the preclusion of a free and fair election.

On September 25<sup>th</sup>, 2017, the Union filed a position statement together with an affidavit from Mark A. McCart (McCart), Labor Relations Representative for the Union, in support of its request to block an election. Also on September 25<sup>th</sup>, 2017, the Petitioner filed a position statement opposing the Union's blocking request. On October 2<sup>nd</sup>, 2017, the Borough filed a certification of Vincent Caruso (Caruso), Borough Manager, denying the allegations as set forth in the charge and opposing the blocking request.

McCart certifies that the Union and the Borough were engaged in negotiations for a successor contract to the January 1<sup>st</sup>, 2016 through December 31<sup>st</sup>, 2017 agreement. McCart states that securing a salary guide for its members was of primary importance to its membership. McCart certifies that it proposed a salary guide at the first negotiation session on or about June 29, 2017, and the Borough accepted the salary guide in its response to multiple proposals at the second negotiation session. McCart

states that the Union held a "general meeting" on August 10<sup>th</sup>, 2017 to inform its members about the salary guide. According to McCart, the employees were attentive, and nobody seemed unhappy. McCart certifies that on August 11<sup>th</sup>, Caruso emailed him the Borough's "final" proposal which McCart forwarded to other Union negotiating committee members for their consideration.

McCart states that on August 21<sup>st</sup>, 2017, he learned from Anne Kotsev, fellow Union negotiating committee member, that Caruso informed her that there was not going to be a salary guide and that each employee was going to receive a 2% wage increase, instead. McCart certifies that Caruso called him on August 24<sup>th</sup>, 2017 and asked why newer employees were to be placed on the salary guide at Step 3. McCart avers that Caruso accepted his explanation and the negotiating committee subsequently voted to accept the Borough's final proposal on August 28<sup>th</sup>, 2017. That same day, McCart certifies that on the same date, he emailed a draft MOU to Caruso. McCart states he did not hear back from Caruso, so he followed-up with an email to him on August 31<sup>st</sup>, 2017. McCart certifies that Caruso responded on September 1<sup>st</sup>, 2017 and advised that further discussion regarding negotiations must cease because a decertification petition was filed.

In support of the Borough's opposition to the Union's blocking request, Caruso denies the allegations in the Union's charge and asserts that the statements in McCart's certification

are inaccurate. According to Caruso, at no time did he have any discussion with any Union negotiating committee member about a 2% raise. Caruso also certifies that he did not have a chance to review the MOU on August 28<sup>th</sup>, and he first reviewed it on August 31<sup>st</sup>, 2017, after receiving the follow-up email from McCart. Caruso certifies that he found a problem with some civil service titles that were added to the salary guide that needed to be changed. Caruso certifies that the next day, on September 1<sup>st</sup>, he received notice from the Petitioner that a decertification petition was filed with our office.<sup>2/</sup> Caruso states that despite McCart's and Union business agent Ed Kahn's (Kahn) insistence that he continue to negotiate and sign the MOU, he declined to do so and ceased all negotiations. Caruso certifies that he has no legal authority to bind the Borough to a collective negotiations agreement and even if he had signed an MOU, it would have been subject to the ratification of the Mayor and the Borough Council.

The Petitioner maintains that the statements in McCart's certification are inaccurate. The Petitioner states that McCart never discussed with the membership any concerns or important matters for negotiations, including a salary guide. The Petitioner also certifies that the "general meeting" McCart

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<sup>2/</sup> The Petitioner's petition was dated September 1<sup>st</sup>, as well as the cover letter accompanying the petition, however it was not received and docketed by our office until September 5<sup>th</sup>.

references took place despite some members not having been invited to attend. The Petitioner further states that the MOU that McCart sent Caruso contained a salary guide that included nonexistent titles, and therefore Caruso would not have signed the MOU.<sup>3/</sup>

#### 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 organizations, or no organization, can be resolved by the Commission's secret ballot election mechanism. Berkeley Tp., D.R. No. 2009-6, 34 NJPER 422, 423 (¶131 2008).

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 nor by 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).

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<sup>3/</sup> The Petitioner's personal knowledge of the facts remains unclear. The Petitioner did not certify whether she actually attended the meeting she references, or any other Union meetings related to negotiations.

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, and reaffirmed in Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1988). 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 applying these factors to a blocking request, we carefully evaluate the certifications and documentary evidence presented in support of a blocking request to determine whether the evidence is competent and based on the affiant's personal knowledge.

River Vale Bd. of Ed., D.R. No. 2014-3, 40 NJPER 133 (¶50 2013); County of Monmouth, D.R. No. 92-11, 18 NJPER 79 (¶23034 1992); Leap Academy Charter School, D.R. No. 2006-17, 32 NJPER 142 (¶65 2006); Atlantic City Convention and Visitors Auth, supra.

Applying these legal standards, I cannot conclude that the conduct alleged in the Union's charge will interfere with a free and fair election. The Union's contention that the Borough deliberately refused to sign an MOU for a successor agreement to undermine employee support for the Union is not supported by evidence.

McCart first sent the MOU to Caruso for his review on August 28<sup>th</sup>. Due to unrelated and time-sensitive matters, Caruso did not review the MOU until after he received McCart's follow up email, three days later, on August 31<sup>st</sup>. Upon review, Caruso found some problems with the proposed salary guide that prevented him from signing the document without further discussion with the Union. The very next day, on September 1, Caruso received notice that a decertification petition was filed at PERC and he ceased communications with the Union regarding contract negotiations.

Even if Caruso agreed to all terms and signed the MOU, his authorization would not bar the processing of the Petitioner's decertification petition. When a party reserves the right to ratify an agreement, and when a party has ratified proposed agreements in the past, that ratification must occur prior to the filing of a petition in order for the agreement to act as a bar. See City of Egg Harbor, D.R. No. 91-2, 16 NJPER 424 (¶21178 1990) and City of Wildwood, D.R. No. 88-22, 14 NJPER 77 (¶19028 1987); Bor. of Palmyra, P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007)(Ratification by the governing body has become the norm, based on oral or written reservation...where the issue is not addressed during negotiations, past history may be relevant to discerning the parties' expectations...). Caruso certifies that he did not have the authority to bind the Borough and that any signed MOU still needed to be presented to the Mayor and Borough Council for ratification. This further undermines the Union's argument that Caruso refused to sign the agreement in order to influence the membership to decertify the Union.

Furthermore, there is no evidence provided indicating that the Borough's actions would interfere with or would reasonably tend to interfere with the free choice of voters in an election. Moreover, no facts were submitted showing how the voters' freedom to choose a majority representative would be influenced by the purported bad faith refusal to sign the MOU.

For these reasons, I cannot conclude that the charge filed by the Union warrants a delay in conducting a secret ballot election. The right of unit employees to elect a majority representative of their choosing, or no representative at all, is paramount. Delaying the election for a significant period of time while the charge is litigated would not serve the representational interests of the employees. I have determined that the unfair practice charge filed by the Union 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.

ORDER

An election is hereby directed among the employees in the following unit:

Included: All regularly employed white collar employees, inclusive of all keyboard clerks 1, keyboard clerks 2, keyboard clerks 3, police record clerks, data control clerks, payroll clerks, fire prevention specialists and technical assistant clerks employed by the Borough of Lodi.

Excluded: Professional employees, craft employees, confidential employees, managerial executives, police, firefighters, tax collectors, tax assessors and department heads/supervisors and all other employees.

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, and including those

in the military service. 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 are ineligible to vote. Employees in the unit described above shall vote to determine whether they want to continue to be represented by the United Service Workers Union, Local 1N.

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 name and address of each eligible voter and his or her job title. The eligibility list must be received by us **no later than October 30, 2017**. A copy of the eligibility list shall be simultaneously provided to both the Union and the Petitioner 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.

Ballots will be mailed by the Commission to eligible voters in the unit on **November 3, 2017**. Any employee who believes he or she is eligible to vote in this election and does not receive a ballot in the mail by **November 13, 2017** should contact the Commission at (609) 292-6780 immediately if they wish to participate in this election. Ballots must be returned to the Commission's Post Office Box by 9:00 a.m. on **December 4, 2017**. The ballots will be counted at 10:00 a.m. on **December 4, 2017** at the Commission's Trenton Office, 495 West State Street, Trenton,

New Jersey. The election shall be conducted in accordance with the Commission's rules.

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/s/Daisy Barreto  
Acting Director of  
Representation

DATED: October 23, 2017  
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 November 2, 2017.