D.R. NO. 95-2

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

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

DISTRICT 6, I.U.I.S.T.H.E., Docket No. RO-94-114

Petitioner,

-and-

POLICE EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

The Director dismisses objections to an election conducted among City of Newark communications personnel. The objections filed by District 6 allege that P.E.A. representatives campaigned near the polling site; that certain permanent, part-time employees were told they could not vote; that the Police Captain changed the voting hours and gave P.E.A. supporters additional release time to vote; that the P.E.A. was unequally permitted access to voters and that the Commission "made a ruling" endorsing P.E.A. conduct.

The Director found that insufficient evidence was submitted by the objecting party supporting a prima facie case demonstrating conduct which would warrant setting aside the election.

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Appearances:

For the Public Employer
Michelle Hollar-Gregory, Corporation Counsel
(Wendy Young, Assistant Corporation Counsel)

For the Petitioner
William Perry, President

For the Intervenor
Fox & Fox, attorneys
(Craig S. Gumpel, of counsel)

DECISION

Pursuant to an Agreement for Consent Election, the Public Employment Relations Commission conducted a representation election on May 6, 1994 among civilian communications personnel employed by the City of Newark Police Department. Twenty votes were cast in favor of District 6, 28 votes were cast for the PEA, and no votes were cast against representation. There were seven unresolved

challenges; the number of challenges were insufficient to affect the outcome of the election. Therefore, a majority of the valid votes counted were cast for representation by the PEA.

Pursuant to N.J.A.C. 19:11-9.2(h), on May 11, 1994, District 6 filed timely post-election objections to conduct affecting the outcome of the election. District 6 raises the following objections:

1. Until May 4, 1994, District 6 was denied access to the employer's premises, while the PEA was permitted to hold meetings and post its literature on the employer's premises.

2. In response to District 6's complaint about PEA literature being posted, the City advised District 6 and the employees that "PERC made a ruling" that "[the PEA conduct] was "alright."

3. The PEA Attorney and "several of the executives and supervisors" were stopping voters, distributing literature and campaigning "thirty feet from the voting place."

4. Certain permanent, part-time employees were told they could not vote.

5. The Police Captain changed the voting hours and gave PEA supporters additional release time to vote.

In response to our directive to submit affidavits or other evidence to support its allegations, on May 25, 1994, District 6 submitted a statement signed by its President, William Perry, together with two PEA campaign posters and its correspondence with

the City. No affidavits or other supporting evidence relating to the alleged improper conduct were furnished.

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

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

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. 19:11-9.2(i), if the objecting party presents a prima facie case, I initiate an investigation; 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. 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.

I have reviewed the objections and the supporting documents submitted by District 6. I find that District 6 has not established a prima facie case as required by N.J.A.C. 19:11-9.1(h). A review of District 6's objections and accompanying statement by District 6 President Perry shows the following:

In its first objection, District 6 alleges it was denied equal access to unit employees with respect to the posting of campaign materials and meetings with the employees. District 6 claims they were not able to post signs until just two days before the election.

In Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50 (1976), and County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983), the Commission found that during a representation campaign period, employee organizations are entitled to have equal access to employees. A claim of unequal access will only be sustained when one organization shows that it made a request for but was denied the access granted to another organization. Monmouth Cty, D.R. No. 92-24, 18 NJPER 201 (¶23090 1992); Monmouth Cty, D.R. No. 92-11, 18

NJPER 79 (¶23034 1992); Ocean County, D.R. No. 86-25, 12 NJPER 511 (¶17191 1986).[1/]

While District 6 submitted two PEA campaign posters, it submitted no affidavits or other evidence to show that the City granted permission to PEA to post materials or hold meetings. Nor has District 6 submitted evidence to show that it had asked the City to post materials and hold meetings and was denied such similar rights. Even assuming that PEA campaign literature appeared on City property, we cannot presume that the City supported this organizational activity. Nor has District 6 presented any evidence showing that the City actually permitted the PEA to post literature or hold meetings, as alleged. City of Newark, D.R. No. 92-14, 12 NJPER (¶23054 1992). Accordingly, I find that District 6 has not met its burden to supply specific evidence to support this allegation and I dismiss objection number 1.

In its second objection, District 6 asserts that when it complained to the City about PEA literature being posted, the City advised District 6 and the employees that "PERC made a ruling" that

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1/ Ocean County cited LaPointe Machine Tool Company, 113 NLRB 172, 36 LRRM 1273, 1274 (1955), where the NLRB stated:

> It is not an interference with an election to permit one of two unions to solicit support on company time and property where there is no showing that the other union involved had requested, and had been denied, similar privileges.

"[the PEA's conduct] was "alright." In support of this allegation, District 6 submited a May 3, 1994, letter from Assistant Corporation Counsel Wendy Young, stating that,

> It is our understanding after discussion with [Commission Staff Agent] Susan Osborn that both PEA and District 6 may post partisan campaign posters so long as equal access and space is provided. It is the City's position that it has complied and will continue to comply with this determination from PERC.

District 6 also submitted a copy of its own letter of May 4 to City Labor Relations Director Gregg Franklin. In this letter, Perry confirmed to Franklin that Franklin had orally advised Perry that PERC had "made a ruling" about campaign materials; Perry further confirmed his understanding that PERC had made no such "ruling."

The alleged letter to employees about such a PERC "Ruling" was not supplied, nor was any evidence of such a distribution to employees submitted. In the absence of such evidence of the alleged misrepresentation to the employees, we cannot see how these volleys of charges might have tended to affect the vote. Accordingly, objection number 2 is unsupported and dismissed.

District 6's third objection concerns alleged electioneering at the polls. Mr. Perry states in his letter submitted in support of District 6's objections that he observed that PEA Attorney Craig Gumpel and other unnamed PEA representatives "campaigned 30 feet away from the voting site during the election."

This objection must be dismissed. There was no evidence submitted to support a finding that the alleged conduct unduly affected the employees' free choice. The Commission has rejected post-election objections concerning electioneering where a nexus between the electioneering and interference with employee free choice has not been established. City of Newark; County of Atlantic, D.R. 79-17, 5 NJPER 18 (¶10010 1979); Jersey City; County of Hudson, Meadowview Hospital, E.D. No. 13, NJPER Supp. 432 (¶104 1970); County of Camden, E.D. No. 9, NJPER Supp. 418 (¶100 1970). District 6 has not established such a nexus.

For the reasons discussed above, I dismiss objection number 3.

District 6's fourth objection concerns certain employees who were allegedly told they could not vote. After the City submitted an eligibility list of 90 employees to all parties, 26 names were removed from the eligibility list with the agreement of both unions on the basis that they were casually employed substitutes. The Commission agent confirmed this with all parties by letter of April 26, 1994; no party objected. Nevertheless, any employee not appearing on the eligibility list may vote in the election by challenged ballot. Seven of the employees whose names were deleted from the list appeared at the polls and did indeed vote by this procedure. District 6 did not submit affidavits from employees stating they were told not to vote. No evidence was submitted establishing that any employees were disenfranchised or otherwise hindered from voting.

Accordingly, without evidence to support the allegation that employees were prevented or discouraged from voting, I dismiss objection number 4.

District 6 also alleges, in objection number 5, that a Police Captain "changed the polling times" and gave PEA supporters more release time to vote than those he believed to be non-PEA supporters. This objection is also unsupported by evidence.

In summary, I find that District 6 has not made a prima facie showing that conduct occurred which warrants setting aside the election as a matter of law. Accordingly, I dismiss the election objections filed by District 6. In accordance with the rules of the Commission, I shall issue the appropriate Certification of Representative (see attached) to the Newark Police Employees Association.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Edmund G. Gerber, Director

DATED: July 13, 1994
Trenton, New Jersey