

D.R. NO. 97-3

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

In the Matter of

BOROUGH OF NEPTUNE CITY,

Public Employer,

-and-

Docket No. RO-96-112

IFPTE LOCAL 196,

Petitioner.

SYNOPSIS

The Director of Representation directs a rerun election among a unit of employees sought to be represented by IFPTE, Local 196. The Director sustains Local 196's election objection, finding that the Borough's pre-election conferral of benefits necessitates the setting aside of the first election.

The Director, however, declines to order a Gissel bargaining order, as requested by Local 196, and also declines to narrow the scope of the voting unit for the second election, as alternately requested by Local 196.

D.R. NO. 97-3

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

In the Matter of

BOROUGH OF NEPTUNE CITY,

Public Employer,

-and-

Docket No. RO-96-112

IFPTE LOCAL 196,

Petitioner.

Appearances:

For the Public Employer
Joel Popkin, Administrator

For the Petitioner
Leonard C. Schiro, attorney

DECISION AND DIRECTION OF ELECTION

On June 28, 1996, the New Jersey Public Employment Relations Commission conducted a representation election among a unit of blue and white collar employees, including sewer operator, public works, court administrator, deputy court administrator, police admin. clerk, secretaries, police dispatchers, librarian, library aides, construction official, welfare director, crossing guards, tax assessor and fire prevention inspector employed by the Borough of Neptune City.

Out of approximately 30 eligible voters, 12 ballots were cast for the International Federation of Professional and Technical Engineers, Local 196 and 12 ballots were cast for no representative. There were no challenged ballots.

On July 3, 1996, Local 196 filed a timely objection to the election pursuant to N.J.A.C. 11-9.2(h). Specifically, the objection is that prior to the June 28, 1996 election, the Borough granted four percent pay raises to certain employees who were eligible to vote in the election. The objection was supported by the affidavit of Leonard C. Schiro, attorney for Local 196. On July 17, 1996, Local 196 also submitted a copy of a May 28, 1996, Resolution adopted by the Mayor and Council granting the raises to the employees.

On July 23, 1996, the Director of Representation initiated an investigation into the election objection, pursuant to N.J.A.C. 19:11-9.2(i). Through its July 22 and 25, 1996 statements, the Borough responded to the objection. It claims that it did not interfere with the election, as the salary increases for the affected employees were planned prior to the May 28, 1996 investigatory conference and the June 28, 1996 election. It submitted a copy of a salary ordinance introduced on May 13, 1996, proposing raises for certain unrepresented employees.

Our investigation into Local 196's election objection reveals the following facts:

1. On August 27, 1992, the Neptune City Employees Association was certified as the majority representative of a unit of blue collar and white collar employees employed by the Borough, excluding the Borough Clerk, Deputy Borough Clerk, secretary to the Borough Clerk, managerial executives, confidential employees,

police, professionals, craft employees, and supervisors within the meaning of the Act. The Association and the Borough entered into an agreement which ran from January 1, 1993 through December 31, 1995; its recognition clause reflected the unit description in the August 27, 1992 Certification.

2. In March 1996, Local 196 began its organizing drive at the Borough and it filed its representation petition with the Commission on April 22, 1996. The petition sought a 17-employee unit described as "public works, court administrator, deputy court administrator, police admin clerk, secretaries and police dispatchers." According to Local 196, these employees constituted the unit then represented by the Employees Association.

3. On April 22, 1996, Borough Administrator Joel Popkin was instructed to prepare an ordinance granting unrepresented employees a four percent salary increase. According to Popkin, he thereafter received the May 1, 1996 letter from the Commission informing him of the petition and scheduling an informal investigatory conference for May 23, 1996.

4. By letter dated May 7, 1996, the Employees Association sent a letter to the Commission disclaiming any further interest in representing the petitioned-for employees.

5. On May 13, 1996, Borough Council introduced an ordinance to provide for a raise for unrepresented employees of the Borough.

6. On May 23, 1996, the investigatory conference was conducted by Commission Staff Agent Regina A. Muccifori and was attended by Schiro and Popkin. At the conference, the parties agreed that the titles of librarian, library aides, construction official, sewer operator, welfare director, crossing guards, fire prevention inspector and tax assessor also belonged in the unit. Local 196 then amended its petition to reflect the inclusion of these 12 additional employees in the unit description. The unit description in the amended petition reads "all blue and white collar positions, including sewer operator, public works, court administrator, deputy court administrator, police admin. clerk, secretaries, police dispatchers, librarian, library aides, construction official, welfare director, crossing guards, tax assessor and fire prevention inspector employed by the Borough of Neptune City." That day, the parties reached an Agreement for Consent Election scheduling an election for June 28, 1996.

7. On May 28, 1996, the Borough and Council adopted the salary ordinance. The ordinance granted retroactive raises to certain unrepresented employees, including five employees who first became eligible to vote in the upcoming election after their titles were added to the unit by mutual agreement of the parties.

8. On June 28, 1996, the election was conducted which resulted in 12 votes being cast for Local 196 and 12 votes being cast for no representative; there were no challenged ballots. On July 2, 1996, Local 196 learned of the salary increases granted to

the eligible voters and filed the instant objection on July 3, 1996.

Local 196 asserts that the pre-election conferral of benefits by the Borough necessitates the setting aside of the election and cites Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1990) and Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987).

Further, citing, N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969), Local 196 requests that the Commission issue a bargaining order to remedy the illegal acts of the Borough. It believes that a rerun election will not achieve the laboratory conditions necessary for a fair election, as the Borough has effectively bribed potential union members. Local 196 asserts that besides a bargaining order, the only other appropriate remedy is to limit a rerun election to only those employees who were not granted a pay raise, that is, those that comprised the unit it originally petitioned for.

The Borough contends that it did not interfere with the election. It claims that the wage increases had been public knowledge for at least 45 days prior to the election. Further, on May 13, 1996, when the ordinance was introduced, neither Popkin nor the Council knew that some of the employees who were subject to it, would later become part of the voting unit as a result of the parties' agreement reached at the May 23, 1996 conference.

ANALYSIS

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 the specific evidence which that party relies upon in support of the claimed irregularity in the election process. (emphasis added.)

The Commission's standards of review applicable to election objections were originally stated in In re Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 43 (1970) (Slip opinion at 10), aff'd sub nom AFSCME Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971):

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. [emphasis supplied]

However, as the Commission noted in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504, 505 (¶11258 1980), the above standard is necessarily flexible:

The Commission recognize[s]...that election objections can encompass a broad range of abuses. In reviewing the spectrum of possible election campaign misconduct, it would be unrealistic to require the same type of

proof or apply any standard in an inflexible manner. To rigorously apply one test would not provide for the varying severity of election abuse and the ability of the parties to counteract certain types of misconduct on their own during the campaign. The latter part of the standard enunciated in Jersey City Dept. of Public Works is intended to provide the flexibility essential to the Commission if it is to meet its responsibility to regulate the conduct of elections in a manner which achieves the goal that the tally of ballots is a reflection of the free choice of employees. The standard recognizes that elections should not be easily or routinely overturned but that types of conduct which have a strong tendency to jeopardize the atmosphere necessary for a fair election will not be condoned.

Passaic at 505.

More severe allegations of election misconduct require a lesser burden of proof. See, e.g., Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (19021 1987); Passaic Valley Sewerage Commission. Accordingly, in Passaic Valley Sewerage Commission, the Commission found that the pre-election conferral of benefits by the employer "...had such a strong tendency to interfere with the free choice of the employees that the election must be set aside even in the absence of direct evidence [of interference]." 6 NJPER at 505; Borough of Wildwood Crest. In so ruling, the Commission cited the United States Supreme Court's ruling in NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 55 LRRM 2098, 2100 (1964):

The danger inherent in well-timed increases and benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up, if it is not obliged.

Exchange Parts at 2100.

However, in Passaic Valley Sewerage Commission, the Commission noted that the conferral of benefits is not automatically improper and does not always compel a new election:

Even if it is established that the timing of the increases or promise of benefits coincided with the filing of a representation petition, the objections to election may be dismissed if the record also shows that the employer's conduct was governed by factors unrelated to the impending election.... N.J.A.C. 19:11-9.2(h) places the initial burden of proof on the objecting party to come forward with evidence to show that the conduct warrants setting aside the election. If the objecting party can establish such a prima facie case the burden would normally shift to the responding party to show that its conduct was governed by considerations unrelated to the representation proceeding. [6 NJPER at 506; footnote omitted]

Here, it is undisputed that five eligible voters were granted raises after the filing of the petition and prior to the election. Because the election ended in a tie vote, the outcome of the election could have been affected by their votes. Thus, Local 196 has met its burden of establishing conduct which warrants setting aside the election. Passaic Valley Sewerage Commission; Borough of Wildwood Crest.

The burden now shifts to the Borough to show that its conduct was governed by considerations unrelated to the representation petition. Passaic Valley Sewerage Commission. However, the Borough has not met its burden. Borough Administrator Popkin admits he was instructed to prepare the ordinance granting raises to unrepresented employees on April 22, 1996 -- the same day the representation petition was filed. He also acknowledges that

five eligible voters were granted raises prior to the election. However, he believes that the Borough did not act unlawfully because when the ordinance was introduced on May 13, 1996, the Borough did not know that any employees subject to it would later become eligible voters. He points out that only after the May 23, 1996 conference, did five employees subject to the ordinance become eligible voters, after the parties agreed to include them within the voting unit.

However, the Borough's argument is unpersuasive. First, the timing of the salary ordinance is suspect. Popkin acknowledges he was instructed to prepare the ordinance the same day the petition was filed. Further, while the Borough claims that when the ordinance was introduced none of the affected employees were within the voting unit, five such employees were placed into the unit by the May 23, 1996 consent election agreement. However, the union was not aware of the pending raises. Thereafter, on May 28, 1996, prior to the election, the five employees were granted raises by the Borough. The votes of these employees could have easily affected the results of the election, as the election ended in a tie. Thus, under Passaic Valley Sewerage Commission and Wildwood Crest, I find this pre-election conferral of benefits reasonably tended to interfere with the free choice of employees. Accordingly, under the totality of the circumstances, I order that the prior election be

set aside and that a new election be conducted. Wildwood Crest.

While Local 196 requests that I issue a Gissel bargaining order instead of a new election, I decline to do so here. In Passaic Valley Sewerage Commission and Wildwood Crest, two cases involving the illegal conferral of benefits during the critical pre-election period, the remedy ordered by the Commission was a new election, not a bargaining order.

In any event, I do not believe the instant case to have facts analagous to Gissel, so as to warrant a Gissel bargaining order. In Gissel, the facts were more egregious. Specifically, during the critical period prior to the election, the employer discharged two employees for their union activities, interrogated employees as to their union activities, promised them better benefits than the union could offer, warned them of dire consequences should the union win, and had an agent present at a union meeting to report the identity of the union's adherents. 71 LRRM at 2482-2483.

Finally, Local 196 asks that any new election ordered be limited to the unit described in its April 22, 1996 petition, and exclude those employees whom the parties agreed to include in the unit at the May 23, 1996 conference. However, I deny this request. The titles added fall within the unit description set forth in the August 27, 1992 Certification of Representative and in the January 1, 1993 through December 31, 1995 agreement. They share a community

of interest among the employees in the originally petitioned-for unit and that unit is most appropriate with them in it. In re State of New Jersey and the Prof. Assn. of N.J. Dept. of Education, 64 N.J. 231 (1974); N.J.S.A. 34:13A-5.3. Therefore, they are included in the voting unit for the new election.^{1/}

Accordingly, pursuant to N.J.A.C. 19:11-9.2(j), I set aside the first election conducted in this matter and direct that a second election be conducted among employees in the unit described as follows:

Included: All blue and white collar employees, including sewer operator, public works, court administrator, deputy court administrator, police admin. clerk, secretaries, police dispatchers, librarian, library aides, construction official, welfare director, crossing guards, tax assessor and fire prevention inspector employed by the Borough of Neptune City.

Excluded: Borough Clerk, Deputy Borough Clerk, and Secretary to the Borough Clerk, managerial executives, confidential employees, craft employees, professional employees, police employees, supervisory employees within the meaning of the Act and all other employees employed by the Borough of Neptune City.

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. Employees must appear in person at the polls in order to be eligible to vote. Ineligible

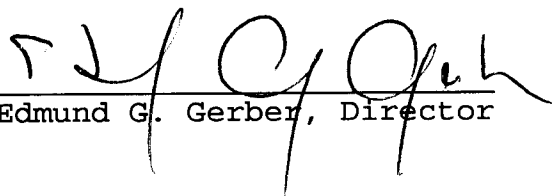
^{1/} Local 196 agreed that these employees belonged in its petitioned-for unit and amended its petition to specify so.

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


Edmund G. Gerber, Director

DATED: September 11, 1996
Trenton, New Jersey