

D.R. NO. 95-10

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

In the Matter of

CAPE MAY COUNTY WELFARE BOARD,

Public Employer,

-and-

Docket No. RO-94-130

AFSCME, DISTRICT COUNCIL 71,

Petitioner,

-and-

UNITED INDEPENDENT UNION, NFIU,

Intervenor.

SYNOPSIS

The Director of Representation sustains election objections filed by AFSCME, Council 71, to pre-election statements made by the United Independent Union, NFIU, and sets aside the results of an election conducted for a bargaining unit of all non-supervisory employees employed by the Cape May County Welfare Board. The Director finds that the UIU knowingly allowed false and misleading statements concerning AFSCME to be made less than 14 hours before the election was held. The statements were made at a time when AFSCME could not effectively reply. The Director orders that a second election be conducted.

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Appearances:

For the Public Employer
Gruccio, Pepper, Giovinazzi, DeSanto & Farnoly, attorneys
(Lawrence Pepper, Jr., of counsel)

For the Petitioner
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

For the Intervenor
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION AND DIRECTION OF ELECTION

Pursuant to an Agreement for Consent Election, the Public Employment Relations Commission conducted a representation election on June 16, 1994 among all non-supervisory employees employed by the Cape May County Welfare Board. N.J.A.C. 19:11-4.1. Forty-one votes were cast for the incumbent majority representative, United Independent Union, NFIU, 40 votes were cast for AFSCME, and no votes

were cast for no representation. Therefore, the majority of the valid votes counted were cast for representation by the UIU.

On June 22, 1994, AFSCME filed timely post-election objections, supported by two affidavits and other documents, objecting to conduct on the part of the UIU and the Board during the week before the date of the election.

Two of AFSCME's allegations warranted further inquiry:^{1/}

(1) an allegation that the UIU made false and misleading statements at a June 15, 1994 meeting, less than 14 hours before the election was conducted; and (2) an allegation against the Board that it allowed the UIU to convene a meeting on June 13, 1994, at 4:00 p.m., before the end of the work day. On August 10, 1994, the Director ordered an investigation. See N.J.A.C. 19:11-9.1(i).

By August 29, 1994, AFSCME, the UIU and the Board had submitted statements of position and documentary material. The UIU and the Board also submitted affidavits. AFSCME relies upon previously submitted affidavits from its Associate Director, John Hemmy and Board employee, Susan Kenney.

AFSCME alleges that on June 15, 1994, the UIU conducted a meeting on Board property less than 14 hours before the election, during which the UIU falsely accused AFSCME of criminal behavior, mishandling local union funds and failing to provide adequate

^{1/} However, AFSCME had not established a prima facie case as to allegations against the Board and the UIU concerning unequal access to employees. These allegations were dismissed. See N.J.A.C. 19:11-9.1(h).

representation to its members. It asserts that the accusations interfered with the employees' freedom of choice. AFSCME also argues that the timing of the meeting was such that it had no opportunity to respond to or rebut the falsehoods. Therefore, it seeks a new election.

AFSCME submitted a copy of an announcement from the UIU's Local 5 Executive Board to all Local 5 members. It was on UIU letterhead and dated June 13, 1994. The announcement gave notice of a "special union meeting" scheduled for June 15, 1994, from 4:30 p.m. to 6:00 p.m. in the Board's conference room. It stated that the UIU's general president, Francis Chiappardi, its business agent, Paul Diana, and "two guest speakers would be in attendance."

AFSCME submitted an affidavit from Board employee Susan Kenney, who attended the June 15 meeting. She states that the UIU introduced two "guest speakers" who were corrections officers employed by the State of Delaware. The speakers claimed that they had been represented by AFSCME, Local 1726, but were no longer members because AFSCME had failed to provide adequate representation to its bargaining unit members. They claimed that AFSCME had refused to arbitrate grievances, denied members the right to vote and sided with management. Kenney also stated that the speakers accused AFSCME of "embezzling" large sums of money from the Local's treasury, spending it on "bribes," "booze parties" and a chartered plane trip. Kenney states that these comments created the impression that all AFSCME councils and their locals acted in the same way.

AFSCME also submitted an affidavit from its Associate Director, John Hemmy. Hemmy was responsible for conducting AFSCME's representation campaigns in Cape May County for two bargaining units of non-supervisory employees: one of Board employees and another of County employees. UIU was the incumbent majority representative for both units. AFSCME won the election for the County-wide unit which had been held on June 3, 1994, and was certified as the majority representative on June 13, 1994. In his affidavit, Hemmy states that another AFSCME council, Council 81, is the majority representative of Delaware State employees, and that Council 71 and Council 81 are separate organizations. He states that no criminal charges have been brought against Council 81 or its officials.

The UIU denies that it invited the two Delaware corrections officers to the June 15, 1994 meeting. UIU submitted an affidavit from its president, Francis Chiappardi, who states that he attended the June 15th meeting along with staff representatives Paul Diana and Ron Ferguson. He states that he was the only one to address the group during the formal meeting, which lasted only 20 minutes.

In support of Chiappardi's contention, the UIU also submitted a copy of the handwritten minutes of the meeting taken by the UIU, Local 5 secretary. The minutes indicate that the meeting lasted from 4:30 p.m. to 4:50 p.m.. The only names listed under the caption "General Membership Meeting," are Chiappardi, Diana and Ferguson. The minutes indicate that, of the three, only Chiappardi ("F.C.") addressed the meeting and the meeting was adjourned after no questions were posed to him.

Chiappardi asserts that the two Delaware corrections officers did not attend the meeting. He states that a Board employee, who is the sister of one of the officers, invited them to talk informally with employees after the meeting was adjourned. Although Chiappardi agrees that the Delaware employees did talk about their experiences with AFSCME, he contends that their comments were limited to only how unhappy they were with AFSCME's representation efforts; that they questioned the way AFSCME officials had handled money; and that after two attempts, AFSCME was eventually decertified. Chiappardi denies that the two officers talked of bribes or directed any comments to or alleged any misconduct on the part of AFSCME, Council 71.

Chiappardi states that one of the corrections officers had talked with employees under similar circumstances on June 1, 1994, when AFSCME and the UIU were campaigning for the county-wide bargaining unit. Chiappardi notes that AFSCME did not object to the comments at that time.

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].

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 employees' 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.

AFSCME contends that the false statements and factual misrepresentations made by the speakers at the UIU June 15 meeting had the reasonable tendency to interfere with the employees' freedom of choice. A representation election will be set aside for improper pre-election campaign statements only where there has been a factual misrepresentation involving a substantial departure from the truth made at a time which precludes an effective reply. Jersey City Medical Center, P.E.R.C. No. 49 (1970), City of Salem, D.R. No. 81-30, 7 NJPER 182 (¶12080 1981), aff'd P.E.R.C. No. 81-121, 7 NJPER 239 (¶12107 1981). Where an objecting party alleges that material factual misrepresentations interfered with employee free choice, that party must prove either inability to effectively reply or direct evidence of interference. Passaic Valley Sewerage Auth., P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980); County of Atlantic,

D.R. No. 79-17, 5 NJPER 18 (¶10010 1979); Borough of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 63 (¶19021 1987), adopting H.E. No. 88-20, 13 NJPER 828 (¶18318 1987).

Chiappardi denies that the Delaware corrections officers were invited by the UIU and that they were speaking in behalf of the UIU. AFSCME argues that the announcement for the June 15 meeting indicates that "two guest speakers" in addition to President Chiappardi and Business Agent Diana would be present at the meeting. This would appear to support Kenny's assertion in her affidavit that the two corrections officers were introduced as the guest speakers. However, the contemporaneous record of that meeting, the handwritten minutes of the UIU Local 5 secretary, show that Chiappardi was the only person to officially address the meeting.

The UIU asserts that the two corrections officers were merely visitors, who mingled with those employees who stayed behind after the official meeting was over. The UIU claims that they were speaking on their own behalf, expressing their own opinions. But, by its own admission, the UIU knew that the corrections officers would speak out against AFSCME. Chiappardi stated in his affidavit that one of the corrections officers had made "essentially the same comments" under "similar circumstances" to the June 15 meeting, occurring during the earlier representation campaign between the UIU and AFSCME for the county-wide bargaining unit. Therefore, even assuming that the UIU had not actually invited the corrections

officers to its meeting, it would reasonably have anticipated why the visitors were there and what they could say.

Further, Chiappardi specifically denies only that there was "anything said about bribes," and that the two corrections officers implicated AFSCME Council 71. Unrefuted are Kenney's allegations that the Delaware employees stated that (1) AFSCME embezzled money from the local, (2) was negligent in spending union dues money in other ways, and (3) failed to provide fair and adequate representation to unit employees.

I find no merit in the UIU's argument that AFSCME had not objected when the Delaware corrections officer spoke during the earlier county-wide representation campaign. AFSCME won that election, where, as here, AFSCME lost by one vote. Kenny states that the comments of the two corrections officers left her with the impression that all AFSCME councils and their locals embezzle money, misuse dues and fail to represent their bargaining unit members.

I find that the UIU knowingly allowed false and misleading statements concerning AFSCME to be made less than 14 hours before the representation election in this matter was conducted. Further, the statements were made on the evening before the election, which was conducted at the start of the next work day (between 8 a.m. and 9:30 a.m. the following morning). These false statements were made at a time when AFSCME could not effectively reply. Therefore, AFSCME has met the standards for setting aside the election conducted on June 16, 1994.

AFSCME's second objection concerns the allegation that the Board allowed the UIU to use its meeting room for a meeting on June 13, 1994, before the close of the work day. The Board denies that the June 13 meeting was held on company time. Executive Director Fahy states that Board employees work staggered hours: one group of employees works from 8 a.m. to 4 p.m., while another group works from 8:30 a.m. to 4:30 p.m. Historically, the Board has permitted the UIU to hold two regular union meetings at the end of each shift; one beginning at 4 p.m. and a second one at 4:30 p.m.. AFSCME has not shown that any employees who were attending the June 13 meeting at 4 p.m. were there on company time.

AFSCME argues, however, that its objection implicates more than the June 13 meeting. It claims that because the Board did not deny the UIU the use of its meeting room on June 13 and June 15, 1994, it created the appearance of support of the UIU. AFSCME particularly objects to the June 15 meeting. It asserts that the UIU's use of the Board's property within the 24 hour period before the election has the same improper influence over voters as if the meeting were held by the Board.

AFSCME has not proffered evidence to show that any voters were unduly influenced by the UIU's use of the Board's meeting room on either date. Moreover, not all meetings held by a union or an employer within 24 hours of the election are a per se violation of the Act. Only those meetings, whether conducted by the employer or a majority representative, held among employees on company time are

deemed to interfere with a voter's freedom of choice. Op. of East Windsor, D.R. No. 79-13, 4 NJPER 445 (¶4202 1979). The June 15 meeting was held at 4:30 p.m., after work hours and was voluntary. I dismiss this objection.

Finally, AFSCME also objects to pre-election statements in a campaign flyer distributed by the UIU on the day before the election. Kenny states that on the morning of June 15, 1994, within 24 hours of the election, an undated memo addressed to "Undecided Fellow Union Workers" and signed by Bill Fitzgerald, a Board employee, was passed out to all Board employees. The memo claims, in part, that if UIU won the election, the Executive Director "had said that everyone will get their retroactive increases in their June 30th paycheck. However, Executive Director Fahy denies making this statement to Fitzgerald. Since AFSCME's objection to other pre-election conduct by the UIU have neem sustained, it is not now necessary to rule on this objection.^{2/}

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 non-supervisory employees employed by the Cape May County Welfare Board, including income maintenance aide, receptionist/typing, clerk, clerk/typist, account clerk, data entry machine operator, social service worker,

2/ It is also unnecessary to rule on the objection alleging that Chiappardi adopted the misstatement in Fitzgerald's memo as his own.

telephone operator, sr. clerk typist, sr. building service worker, sr. account clerk/typing, sr. account clerk, sr. receptionist/typing, sr. telephone operator, sr. data entry machine operator, social service technician, principal clerk/typist, principal account clerk, income maintenance technician, principal data entry machine operator, sr. maintenance repairer, accounting assistant, income maintenance worker, principal maintenance repairer, graduate nurse, social worker, investigator, investigator/process server and income maintenance specialist.

Excluded: All supervisors within the meaning of the Act, managerial executives, confidential employees, police and all other employees.


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 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. 19:11-9.6, 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 rerun 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: November 7, 1994
Trenton, New Jersey