

D.R. NO. 93-18

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

In the Matter of

ATLANTIC COUNTY UTILITIES AUTHORITY,  
Public Employer,

-and-

Docket No. RO-93-110

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 68,

Petitioner.

SYNOPSIS

The Director of Representation dismisses election objections filed by Local 68, International Union of Operating Engineers. Specifically, he finds that Local 68 failed to provide any evidence in support of Objection 1. With respect to Objections 3 and 4, which are also the subject of unfair practice charges filed prior to the election, the Director finds that Local 68 requested the Commission proceed with the election, notwithstanding the filing of the charges and expressly waived its right to file election objections over the conduct alleged in the charges. As to the objection set forth in two of Local 68's affidavits, the Director finds it is untimely. Finally, Objection 2 which involves a pool held during the election in which employees bet on the outcome of the election, the Director finds that there is no evidence that precisely and specifically shows that conduct has occurred which would warrant setting aside the election.

Specifically, Local 68 did not present any evidence that the Employer sponsored or conducted the pool, or required or requested employees to participate in it. Moreover, the pool was conducted away from the polling area and was ended immediately when Local 68 made a complaint about it. Further, while there is evidence that the Employer reviewed the list of pool participants, the list simply contained employees' names and predictions and did not, necessarily, reflect how they voted.

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Appearances:

For the Public Employer  
Blank, Rome, Comisky & McCauley, attorneys  
(Jeffrey E. Myers, of counsel)

For the Petitioner  
Kroll & Gaechter, attorneys  
(Raymond G. Heineman, of counsel)

DECISION

On February 5, 1993, the New Jersey Public Employment Relations Commission conducted an election among employees in a broad-based unit<sup>1/</sup> of the Atlantic County Utilities Authority. The election was conducted in two sessions; the first from 6:45 a.m. to 8:30 a.m. and the second from 3:30 p.m. - 4:30 p.m.

Out of approximately 150 eligible voters, 58 ballots were cast for the International Union of Operating Engineers, Local 68

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<sup>1/</sup> Including handler, driver, equipment operator, auto car driver, baler operator, maintenance, laborer, scalemaster, maintenance mechanic, mechanic, diesel mechanic, and inspector.

and 84 ballots were cast for no representative. There were no challenged ballots.

On February 16, 1993, Local 68 filed the following four objections to the election pursuant to N.J.A.C. 11-9.2(h).

One: on February 5 at or about 8 a.m., a supervisor, David "Roberto," apparently referring to David Liberto, gave an anti-union campaign speech to an assembly of over 20 voters on work time in the Authority's cafeteria.

Two: on February 5, the Authority, through supervisors Leslie Houston and Salvatore Celano, sponsored, participated in and kept under surveillance a lottery pool on the second floor of its facility in which employees were polled as to the outcome of the election. Employees were allegedly asked, in the presence of Houston, Celano and other supervisors, to enter a pool for one dollar to guess the outcome of the election. The employees signed their names and predicted how many votes they thought would be cast for and against Local 68.

Three: since on or about January 14, the employer evaluated employees and implemented wage increases in order to induce employees not to select Local 68 as their representative. Specifically, it granted level two pay increases to certain employees in order to induce them to refrain from supporting Local 68 and granted level one pay increases to avowed union supporters.

Four: since on or about December 21, 1992, the Authority, through Brian Lefke, Donald Smith, Celano and other supervisors,

threatened to subcontract its operations, terminate its employees and unilaterally reduce existing benefits if Local 68 was selected as the majority representative.

On February 18, Local 68 filed a memorandum and six affidavits from employees in support of its objections. The employees who submitted the affidavits will be referred to as Employees A through F. On February 22, Local 68 representative James Thomas filed an affidavit and on February 25 Employee E filed a second affidavit in support of Local 68's objections.

The affidavit of Employee A states that at or about 7:20 a.m. on February 5, the day of the election, he went upstairs at the Recycling Center. There, at the secretary's desk, Bob Thornewell, a rank-and-file employee, asked him if he wanted in on the pool. He gave him one dollar, put his name on the list and gave Thornewell his predicted vote, he had the union winning. He also states that Thornewell asked another employee if she wanted in and she said no. He claims that there were 25 or more names on the list before him and that others signed after him.

Employee B's affidavit states that at approximately 7 a.m., he went to the second floor of the Recycling Center where Thornewell was sitting at the secretary's desk. Thornewell, in the presence of Assistant Secretary to the Authority Leslie Houston, asked if he wanted to get in the pool for one dollar. He answered yes and gave his prediction, his prediction also had the union winning. His prediction was added to a list of approximately 15 names. He states

that he observed Houston review the list and watched others participate in the pool.

Employee C's affidavit states that at approximately 7:20 a.m. on the second floor of the Authority, Thornewell asked if he wanted to get in the pool. He responded he had no money and Thornewell said "all right". He states that he saw Thornewell holding a list with names and a fist full of money.

Employee D's affidavit states that at or about 6:50 a.m., he went to the second floor of the Authority. There, Thornewell was sitting at the secretary's desk with Houston behind him. Thornewell asked if he wanted to get in the pool and explained how it worked. He gave him a dollar and gave a prediction which again had the union winning. Thornewell recorded this and Houston reviewed what Thornewell had recorded. Houston then gave him a "cocky look" and walked away. Employee D claims that supervisor Celano sat there while this was happening. He also states there were approximately 30 names on the list and people were waiting to join in.

The affidavit of James Thomas states that after the first poll closing at 8:30 a.m., an employee told him about the lottery pool. He then went into the voting area and confronted Houston and Commission Election Agent, Regina Muccifori, about the lottery. According to Thomas, Houston responded that she saw nothing wrong with the pool and noted that one had taken place during last year's Commission election. He then said to Muccifori "they are keeping a running tab on the election results, this way they know what they

have to do. They are also influencing how people are voting" and he was filing a protest against the election. According to Thomas, Muccifori responded that she was unaware that a lottery was going on and if she had known one was going on, she would not have allowed it and will ensure that it does not continue this afternoon.

The Affidavits of Employees E and F state that on February 2, a captive audience meeting was conducted in the drivers' room by Richard Dovey, the president of the Authority. Employee F's affidavit states that in response to an employee question, Dovey stated that if Local 68 won the election, he would propose that employees' benefits be lessened or taken away. Employees E and F both claim that Dovey said something to the effect that it would be unrealistic to think Local 68 and the Authority could work out a contract that would not take away benefits from the employees, because Local 68 would want too much.

On March 2, the Authority filed a position statement in response to Local 68's objections, asserting that all of the objections should be dismissed. With respect to objection one, the Authority claims that it is impossible on its face, since the election was taking place in the cafeteria at the time of the alleged meeting by Liberto. It also states that neither Liberto nor any other supervisor had a required mass assembly of voters within the 24-hour period preceding the election.

With respect to objection two, the Authority acknowledges that a lottery did take place on February 5. However, it claims

that this activity did not interfere with the conduct of the election or the choice of bargaining unit employees. Employees were instructed to clock in and vote first, if they so chose, and then proceed upstairs to await assignments. The lottery solicitation took place upstairs.

According to the Authority, while Houston and the employer's observer, Jerry Hall, were on their way down to the pre-election conference, Hall took a dollar out of his wallet and told someone to enter him in the pool, if there was going to be one. Someone produced a piece of paper and Hall and Houston each signed it indicating their guess of the number of "yes" votes and the number of "no" votes.

The pool proceeded during the morning session of the election. The sign-up sheet was maintained at the Recycling Center's secretary's desk, outside of the supervisory offices. The sheet was primarily maintained by rank-and-file employees, Terence Kenny and Robert Thornevell. According to the Authority, the sheet for the pool was never near the voting area and based on the instructions given, no employee had an opportunity to see the sheet or even know about the pool until they had been given the opportunity to vote.

Approximately 36 to 38 employees participated in the pool. The Authority states that those who participated did so of their own volition, without supervisory requests or requirements. Further, there was no surveillance over who took part in the pool. Finally,

the Authority points out that there is a practice at the Recycling Center of occasionally holding lotteries and, in fact, one was held during last year's Commission election.

As to objections three and four, the Authority points out they are also the subject of unfair practice charges filed by Local 68. Accordingly, the Authority claims they should be dismissed, since Local 68 filed requests to proceed with the election and expressly waived its right to file objections over conduct alleged in the charges.

With respect to the assertions about a February 2 speech by Authority president Dovey, the Authority views this as a new fifth objection which is untimely. According to Commission Rules, Local 68 had five working days to file this objection to the election, that is, until February 16. Since affidavits first containing this objection were not filed until February 18, the Authority claims it is untimely. However, in the event the Commission finds a basis for considering this objection, the Authority claims that it is meritless. The Authority explains that Dovey's speech was more of a question and answer session. Dovey did address the issue of collective bargaining, advising the employees that if Local 68 prevailed in the election, all terms and conditions of employment would be negotiable. He advised employees that they could end up with more wages and benefits than they currently have, less or the same. According to the Authority, Dovey never threatened employees



nor indicated that the Authority would not bargain with Local 68 if it should prevail.

#### 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.)

An election conducted by the Commission is a presumptively valid expression of employee choice. An objecting party must show evidence of conduct that interfered with or reasonably tended to interfere with the freedom of that choice. The evidence must demonstrate a direct relationship between the improper activities and the interference with the voters' freedom of choice. An allegation of seemingly objectionable conduct, without more, will not be sufficient to set aside an election. Jersey City Dept. of Public Works, P.E.R.C. No. 43, (1970), aff'd sub. nom. AFSCME Local 1959 v. P.E.R.C., 114 N.J. Super 463 (App. Div. 1971). See also, Bor. of Wildwood Crest, P.E.R.C. No. 88-54, 14 NJPER 64 (¶19021 1989).

With respect to objection one, Local 68 has not presented any evidence in support of the objection. None of the affidavits

submitted refer to a February 5 speech or a speech at any other time by Liberto (or Roberto) in the cafeteria. Moreover, this alleged February 5 speech simply could not have taken place, as alleged since the election was in progress in the cafeteria during that time. Objection one is dismissed.

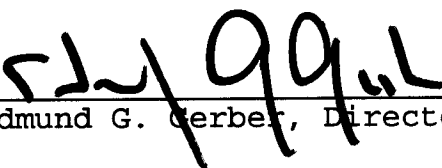
Objections three and four must also be dismissed. Objection three is the subject of an unfair practice charge, CO-93-257, filed by Local 68 on January 28, 1993. Objection four is factually identical except for the alleged dates, to an unfair practice charge, CO-93-185, filed by Local 68 on November 24, 1992. When Local 68 filed these charges, it requested that the Commission proceed with the election, notwithstanding the filing of the charges, and expressly waived its right to file election objections over the conduct alleged in the charges. Objections three and four are dismissed.

With respect to the objection about the February 2 meeting by Dovey, this objection must also be dismissed because it was not timely filed. Under N.J.A.C. 19:11-9.2(h), election objections must be filed within five days after the tally of ballots. Under N.J.A.C. 19:10-2.1(a) and (d), the date the objections were due in our offices was February 16. The objection regarding Dovey's speech was not filed until February 18, when it was set forth in two of the affidavits filed in support of Local 68's original objections. This untimely objection is dismissed. See New Jersey State College of Medicine and Dentistry, E.D. No. 36, NJPER Supp, 508 (¶127 1971).

Finally, after an investigation into objection two, we find that this objection must also be dismissed. There is no evidence that precisely and specifically shows that conduct has occurred which would warrant setting aside the election. N.J.A.C. 19:11-9.2(h). While the Authority was aware of the pool, there is no evidence that it sponsored or conducted it. Compare Glamorise Foundations, 197 NLRB 729, 80 LRRM 1433 (1972). Rather, the evidence shows that it was conducted by a rank and file employee, participation in the pool was voluntary and was neither required nor solicited by the Authority. Further, the pool was conducted away from the polling area and apparently after employees voted. While there is evidence that the Authority reviewed the pool list, the list simply contained employees' names and predictions and did not, necessarily, reflect how they voted. In any event, it does not appear that the Authority's review of the list or presence while the pool was being conducted, intimidated or otherwise influenced employees, since all the evidence presented shows that employees predicted Local 68 would win. Finally, pools apparently have been conducted in the past without objection and when a complaint was made by Local 68 about the pool, the pool was ended immediately. See Best Western Executive Inn, 272 NLRB 1315, 117 LRRM 1487 (1984). Based on the foregoing, it does not appear that the Authority's conduct regarding the pool interfered with the voters' freedom of choice. Objection two is also dismissed.

Accordingly, the election results, as set forth in the tally of February 5, 1993 will be certified.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Edmund G. Gerber, Director

DATED: March 19, 1993  
Trenton, New Jersey