

D.R. NO. 2003-5

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

In the Matter of

ATLANTIC CITY CONVENTION AND
VISITORS AUTHORITY,

Public Employer,

-and-

SPORTS ARENA EMPLOYEES' LOCAL 137,
LIUNA, AFL-CIO,

Docket No. RD-2002-6

Intervenor,

-and-

KELLY DILLON,

Petitioner.

SYNOPSIS

The Sports Arena Employees' Local 317, LIUNA, AFL-CIO, filed an unfair practice charge against the Atlantic City Convention and Visitors Authority alleging that the Authority interfered with employees rights by refusing to deduct dues from a new unit employee and conducting a survey among certain employees by way of e-mail, requesting that they provide their pension enrollment dates and pension service credits. LIUNA claims that these actions by the employer have interfered with the laboratory conditions necessary to conduct a pending decertification election and sought to have the charge serve as a block to the election. LIUNA's request that the charge block the election was denied on the grounds that LIUNA did not establish that the Authority's actions impaired voters' free choice in the election.

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Appearances:

For the Public Employer
Genova, Burns & Vernoia, attorneys
(Kevin McGovern, of counsel)

For the Intervenor
Gene Locks, attorney
(Karl N. McConnell, of counsel)

For the Petitioner
Kelly Dillon, pro se

DECISION

On January 15, and January 25, 2002, Kelly Dillon
(Petitioner), an employee of the Atlantic City Convention and
Visitors Authority (Authority), filed a Petition for Decertification
and an amended Petition, Docket No. RD-2002-6, with the Public
Employment Relations Commission (Commission). The negotiations unit

is currently represented by Sports Arena Employees' Local 137, LIUNA, AFL-CIO (LIUNA) and is comprised of all full-time and regular part-time clerical and secretarial employees of the Authority. There are approximately 21 employees in the unit. On February 26, 2002, all parties entered into a consent election agreement which was approved by the Director of Representation. A secret ballot election was scheduled for March 19, 2002, at the Authority's Atlantic City facility. The election was to determine whether the unit employees wish to continue to be represented by LIUNA. On March 12 and March 13, 2002, LIUNA filed an unfair practice charge and an amended charge (CO-2002-247) with the Commission, seeking to have the election blocked. On March 18, 2002, in Atlantic City Convention Center, D.R. No. 2002-9, 28 NJPER 170 (¶33061 2002) we blocked the conduct of the decertification election which was scheduled for March 19, 2002.

Subsequently, on or about April 24, 2002, by the parties' consent and in settlement of the charge (CO-2002-247)^{1/}, a new election was scheduled for September 5, 2002. The settlement terms included, inter alia, a consent to delay the decertification election, a posting by the Authority, and LIUNA's voluntary withdrawal of the unfair practice charge.

^{1/} The unfair practice charge was withdrawn and the case was closed.

Dues Deduction Issue

On August 22, and August 27, 2002, LIUNA filed a new unfair practice charge, and an amended charge (Docket No. CO-2003-50), respectively, with the Commission. The new charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (2), (3), (5) and (7)^{2/} when on August 5, 2002, the Authority refused LIUNA's shop steward's request to begin payroll dues deductions for a new employee until after September 6, 2002. This refusal allegedly represents a unilateral change of "the status quo only as to terms involving the union and union supporters." The charge adds that, "the [Authority's refusal] is meant to have an [intimidating or coercive] effect upon employees in the exercise of their statutory rights." LIUNA requests that the charge block the conduct of the September 5, 2002 election. In the amended charge, LIUNA additionally alleges that between July 9, 2002 and July 18, 2002, the Authority requested that certain employees provide the human resource specialist with pension service and

^{2/} 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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; and (7) Violating any of the rules and regulations established by the commission.

enrollment information, "as tacit reminders of its threats to employees--many of whom have not yet vested [their pensions] in PERC [sic] -- of the prior threats . . ." (amended charge, para. 3).

In its amended charge, LIUNA also requests that the previously closed unfair practice charge, Docket No. CO-2002-247, be either reopened or refiled, together with all supporting documents. The motion to reopen CO-2002-247 is denied. However, since it appears that some of the claims alleged in CO-2002-247 may be timely, we have refiled what was CO-2002-247 as a new charge (Docket No. CO-2003-55), but do not consider that charge as constituting an independent request to block this election. I do consider the allegations and supporting affidavits contained in Docket No. CO-2003-55 as background information in LIUNA's current request to block.

By letters on August 23 and 28, 2002, the Authority and the Petitioner were given the opportunity to formally respond to LIUNA's blocking request and to set forth their respective positions on whether the September 5, 2002 election should be suspended pending litigation of the unfair practice charge. Kelly Dillon, on behalf of the Petitioner in Docket No. RD-2002-6, requested and was granted status as an intervenor in Docket No. CO-2003-50 in light of the charging party's request that the charge block the September 5 election. The Authority and Dillon were instructed to submit their responses on the request to block by August 28. Both parties submitted timely position statements. Charging Party and the Authority each submitted brief reply statements on August 29, 2002.

The Petitioner opposes the blocking request and disputes that there is any connection between the dues deduction of one unit member and the conduct of this election. The Petitioner argues that the payroll deduction issue is not relevant to the election, in part, because the employee about whom the union is raising the issue is not eligible to vote in the election. The Petitioner also argues that regardless of the merits of the charge, the charge should not further delay the conduct of a decertification election, already delayed once for 120 days. Petitioner disputes the claim that the Authority has intimidated, coerced or discriminated against any union supporters. The Petitioner asserts that LIUNA is engaging in a delaying tactic by filing the charge and request to block the election.

The Authority opposes LIUNA's blocking request and denies it committed an unfair practice. The Authority states that in April 2001, it implemented a new payroll system wherein deductions are implemented in the month following the month in which the employee becomes eligible for the deduction. With respect to union dues, the Authority relies on notice from the union that the employee is eligible for dues deduction along with the submission of a signed authorization card. In the case of Paula Jo King, the employee whose dues deductions are at issue in the unfair practice charge, the union provided notice to the Authority on or about August 9, 2002, and the Authority, consistent with the practice in place since April 2001, notified the union that King's deductions would begin on

September 6, 2002. The Authority notes that no other examples of conduct relating to dues deductions were provided and argues that the allegations that the Authority's alleged discriminatory and coercive conduct affected "union supporters," is without merit. "While the union's charge is worded so as to give the appearance of widespread discrimination, the union fails to set forth any facts in support of this implicit allegation." Finally, the Authority argues that LIUNA has failed to present sufficient documentary evidence in support of its claim that the Authority's conduct prevents a free and fair election and the election should not be delayed.

E-mail issue

The issue raised by LIUNA in its amended charge asserts that on July 9, 2002, the Authority's personnel assistant requested by way of e-mail that unit members provide their pension enrollment dates and pension service credits as of December 31, 2001. The employees had recently received their annual benefits statement from the NJ Division on Pensions. LIUNA asserts that many unit employees do not have the requisite ten (10) years of credit to be vested in the pension system and that the mere request for this information was a "subtle reminder" of the Authority's alleged earlier threats of the loss of benefits if the union continued to be the

representative.^{3/} LIUNA alleges that the request caused great fear and concern among the unit.

The Authority contends that the e-mail was sent to evaluate costs associated with its potential participation in an early retirement incentive program which was then under consideration. The Authority asserts that pursuant to enabling legislation providing for the early retirement incentives program, applicable to autonomous authorities such as the Authority, it may offer the incentive to employees retiring before December 31, 2002. Thus, it was necessary and appropriate for it to send the e-mail and conduct this survey.

It is the Petitioner's position that she was told that the e-mail was sent to employees for the sole purpose of enabling the employer to update and correct its files.

ANALYSIS

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 or the Commission's Rules. The decision on whether an unfair practice charge should block a representation petition is a matter within the Commission's

^{3/} A review of Docket No. CO-2003-55 does not appear to support the allegation that many employees did not have the requisite pension credit to be vested in the system or were concerned about that issue.

discretion. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981).

The legal standard for determining whether an unfair practice charge will block a representation election is set forth in State of New Jersey. Procedurally, the charging party must first request that the charge block the representation proceedings. It must then submit documentary evidence establishing the basis for the claim that the conduct underlying the unfair practice prevents a free and fair election. Where the charging party proffers such evidence, the Director of Representation will exercise his discretion to block if, under all of the circumstances presented, the employees could not exercise their free choice in an election. See Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following factors in evaluating whether a fair election can be conducted during the pendency of the 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 R case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5]

For the reasons stated below, I conclude that the unfair practice charge filed by LIUNA should not block the conduct of the election scheduled for September 5, 2002.

Initially, I note that the employees are entitled to the opportunity to promptly express their preference to be represented for purposes of collective negotiations or not to be represented. Thus, an election should not be blocked except where it appears that a free and fair election cannot take place. Pursuant to the terms of the settlement in CO-2002-247, the election in this case has now been delayed for approximately 120 days.

The charge alleges that the Authority's refusal to commence dues deductions for one employee until September 6, 2002, one day after the election, was a change of the status quo of such magnitude as to amount to either intimidation or coercion of the entire unit. However, LIUNA has not alleged that any unit members other than King and LIUNA's shop steward, were even aware that King's dues deductions would not be initiated until September 6, 2002. The unit consists of approximately 21 employees. Further, King is not an eligible voter. She was hired on May 1, 2002, after the agreed-upon voter eligibility cutoff date of April 11, 2002. Also, though the tenor of the charge suggests widespread discrimination, coercion and intimidation in payroll deductions, there is only one example of an alleged dues deduction problem. Thus, I reject LIUNA's allegation that the delay in dues deductions for one out of 21 employees amounted to a level of coercion which warrants the block of this election.

Based on the certification submitted in support of the charge, it is unclear whether the manner in which the Authority has acted in processing King's dues deduction is not in keeping with its

usual procedure. Capone states in her certification that "It has been prior past practice for bargaining unit members' deductions to commence shortly after expiration of probation. . . ." It appears that a September 6, 2002 dues deduction initiation date does not necessarily conflict with Capone's claim that deductions started shortly after probation. Accordingly, I find that this claim does not tend to impair the employees' free choice in the election warranting an order to block.

On its face, the e-mail at issue is not inherently coercive. It neither threatens nor promises benefits based on the employees' vote. Absent other corroborating evidence (affidavits, documents), we will not construe it as such nor rely on a single employee's certification which only sets forth unsupported conclusions that the e-mail caused employees to be fearful. LIUNA's contention that the e-mail serves as a "veiled threat" to employees must be based upon more than conclusionary assertion and speculation.

LIUNA argues that its interpretation is the only reasonable explanation for the Authority's request, since it already possessed the requested information. I disagree. The language of the early retirement incentive program's enabling legislation, as asserted by the Authority, appears to support a reasonable alternative explanation justifying the need for the Authority to have sent the e-mail. Consequently, I do not find a sufficient nexus between the issuance of the e-mail and its tendency to impair the voters' free choice.

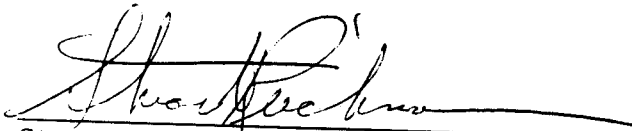
Additionally, I note that this claim was not filed until six weeks after the July 9th e-mail was sent to certain employees; merely two weeks before the election. LIUNA, the organization defending its status as majority representative, offers no explanation for the delay in filing its charge. I find, however, that such delay weighs in favor of denying a block of the election.

LIUNA did not specifically request that the charge now docketed as CO-2003-55 block the election. Accordingly, we do not consider those allegations independently for purposes of blocking the election. However, the parties have already taken curative action regarding that charge pursuant to the terms of the voluntary settlement reached by the parties.

ORDER

The request by Sports Arena Employees' Local 137, LIUNA, AFL-CIO, to block the election scheduled for September 5, 2002, is denied.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: August 30, 2002
Trenton, New Jersey