

D.U.P. NO. 2004-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF KENILWORTH,

Respondent,

-and-

Docket No. CO-2003-73

UNION COUNCIL #8, IFPTE, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge filed by the recently decertified employee organization alleging that the foreman who filed the decertification petition was a supervisor, acting on behalf of the employer. The union alleged that the "supervisor" illegally "infiltrated" the unit and influenced other employees to vote against union representation.

The Director found that the foreman had always been included in the unit without objection from the union, the union signed a consent agreement stipulating that the existing unit was appropriate and waiving its right to raise any issues, and failed to challenge the eligibility of the foreman at the election. The Director concluded that the union was estopped from now claiming that the foreman acted as a supervisory agent of the employer. Further, he observed that, as a continuing member of the unit, the foreman had a right to file the decertification petition and attempt to influence voters.

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Appearances:

For the Respondent,
Ruderman & Glickman, attorneys
(Allan C. Roth, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 13 and October 17, 2002, Union Council No. 8, IFPTE, AFL-CIO filed an unfair practice charge and amended charge, respectively, alleging that the Borough of Kenilworth violated 5.4a(1), (2), (3) (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq.^{1/}

^{1/} 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
(continued...)

Council 8 charges that Borough agents "held themselves out as employee representatives" and "infiltrated the rank-and-file employee [negotiations] unit," "colluded to orchestrate a decertification petition" and a "rigged and tainted voting process" for the purpose of destroying Council 8's status as the employee representative. Council 8 more specifically asserts that Michael Mauro, a Borough "supervisor," acted as an agent of the Borough, actively campaigned for decertification, implicitly threatened employees with retaliation if they did not vote for decertification, and created an atmosphere of fear and reprisal among unit employees. Council 8 asks by way of remedy that the Commission void the decertification election conducted among the employees on August 1, 2002 and order the Borough to negotiate in good faith with Council 8.

The Borough denies the allegations and contends that the charge lacks the necessary specificity to meet the Commission's complaint issuance standards. It denies that Foreman Michael

1/ (...continued)
exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (7) Violating any of the rules and regulations established by the commission."

Mauro is a supervisor and maintains that Mauro has long been a member of the blue-collar, public works negotiations unit previously represented by Council 8. It argues that Council 8 is judicially estopped from bringing this charge in light of our prior dismissal of these same allegations pled as objections to the election. Borough of Kenilworth, D.R. No. 2003-4, 28 NJPER 379 (¶33139 2002), req. for rev. den. P.E.R.C. No. 2003-26, 28 NJPER 438 (¶33161 2002).

The Commission has authority to issue a Complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a Complaint. N.J.A.C. 19:14-2.3. I find the following facts.

Union Council No. 8 was certified to represent a unit of the Borough's blue-collar employees in August, 1982. The unit had always included the title "foreman." Council 8 negotiated specific salaries for foremen in their collective agreements as recently as the 1998-2000 collective agreement.

On June 24, 2002, employees of the Kenilworth department of public works filed a Petition for Decertification of Public Employee Representative (RD-2002-011), seeking to decertify Council 8 as the employees' negotiations representative. The

decertification petition was signed by unit employee Michael Mauro, a foreman with the Kenilworth department of public works. Council 8, the Borough and Mauro entered into an Agreement for Consent Election on July 12, 2002, agreeing to the appropriateness of the existing unit and consenting to an election to be conducted by the Commission on August 1, 2002. The Consent Agreement provided, in part, that the parties "hereby waive a hearing on all issues that could be raised at a hearing and agree as follows" The parties specifically agreed that those employees in Council 8's historical unit would be eligible to vote in the election. Mauro is employed by the Borough in the job classification, "working foreman," a title which had historically been included in the unit represented by Council 8 and was listed in the salary schedule in Appendix A of the 1998-2000 collective agreement between the Borough and Council 8.

The parties executed an Agreement for Consent Election, which stipulated the appropriate unit as follows:

Included: All regularly employed non-supervisory employees of the Borough of Kenilworth, Department of Public Works.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft, professional, police and casual employees, employees in other bargaining units, and all other employees. . . .

The Consent Agreement further provided that the Commission would conduct a secret ballot election among the employees in the existing unit. The Borough provided a list of eligible voters to all parties. Mauro's name appeared on the list of eligible voters. By letter dated July 12, 2002, I provided Notices of Election and advised the parties of their rights to challenge voters for cause at the election, and other details of the election.

On August 1, 2002, a staff agent of the Commission conducted an on-site election. The petitioner and the Borough each provided election observers. Mauro acted as the election observer for the Petitioner. Council 8 did not designate an election observer nor attempt to challenge any voter's eligibility. All seventeen employees on the eligibility list cast valid ballots. A majority of unit employees voted against representation. There were no challenged ballots.

On August 5, 2002, Council 8 filed timely objections to the election, claiming among other issues, that Mauro and another employee holding the position of lead foreman are supervisors and should not have been permitted to vote in the election. Council 8 also contended that Mauro, acting as the spokesperson for the petitioning employees, unlawfully coerced unit employees he supervises into decertifying Council 8. It provided an affidavit from its shop steward and a job description to support its arguments.

In deciding the objections, I found that, having failed to assert a challenge to the eligibility of Mauro and the other foreman at the time of the election, Council 8 could not substitute an objection to the election for a timely assertion during the conduct of the election challenging the voter's eligibility. As to Council 8's claim that Mauro "unlawfully" influenced other voters, I noted that Mauro was a member of the unit and an eligible voter. As such, he was lawfully entitled to campaign and influence other unit employees about union representation. Having found that Council 8 waived its right to object to Mauro's status as a unit member, I dismissed the objections to the election, and certified the election results on August 28, 2002. Kenilworth.

In this charge, Council 8 alleges that the Borough (1) colluded to orchestrate the decertification; (2) colluded to "manufacture a rigged and tainted petition, campaigning process, voting process and activities. . . to retaliate against Council 8 . . . and deprive Council 8 of its bargaining unit status; and (3) "used management agents to infiltrate the rank-and-file unit members, hold themselves out as employees . . . to co-opt a neutral voting process." In the October 17 amended charge, Council 8 additionally alleges that Mauro acted as an agent of the Borough in filing the decertification petition and campaigned for decertification. It claims that Mauro, as a "supervisor", held the power of discipline over employees, and implicitly threatened that

they would be disciplined or treated adversely if they did not support the decertification effort.

I find that this charge does not meet the Commission's complaint issuance standards. N.J.A.C. 19:14-1.3a(3) requires that a charge contain a clear and concise statement of the facts. The charge must "specify the date and place the alleged acts occurred, [and] the names of the persons alleged to have committed such acts" Here, the original charge, alleging employer collusion and interference with the election process, consists entirely of generalized assertions and conclusions. It does not plead facts with sufficient specificity to comply with the requirements of the Rule. Accordingly, it is not appropriate to issue a complaint on merely conclusory allegations.

In its amended charge, Council 8 asserts, in essence, that Mauro acted as an agent of the employer in filing the petition and campaigning for decertification. N.J.S.A. 34:13A-5.3 prohibits supervisors from being included in the same negotiations unit as the employees they supervise. N.J.S.A. 34:13A-5.4 prevents public employers or their agents from engaging in certain conduct violative of the Act. A supervisor as defined by the Act may certainly be held to be an agent of the employer. Here, however, I find that Council 8 has waived its right to now assert that Mauro is a statutory supervisor or an agent of the employer. It was Council 8 that included the foreman title in its negotiations unit

for many years.^{2/} It negotiated collective agreements including the title working foreman. It signed the Consent Election Agreement based upon the decertification petition filed by Mauro. In the Consent, it waived all issues that could be raised in a hearing and agreed to proceed with a secret ballot election among the employees in the existing unit. It did not assert a challenge to Mauro's ballot at the time of the election. Accordingly, I find that Council 8, by its conduct, has waived the right to now assert that Mauro acted as an agent of the Borough, even assuming that Mauro engaged in soliciting support for the decertification. I have already so ruled in Kenilworth, D.R. No. 2003-4. As I said there, Mauro as a unit employee had a right to file a decertification petition and solicit support from co-workers. Therefore, Council 8 is estopped from now attempting to litigate the same issue as an unfair practice.

Moreover, Council 8 has not alleged facts concerning any specific conduct and action in which Mauro engaged that might be an unfair practice. It did not assert any dates, times or events that Mauro actually threatened or coerced any employee. Council 8

^{2/} When Council 8 originally petitioned to represent this unit in 1982, it argued for inclusion of the working foreman title over the objections of the Borough. We directed an election, permitting the title to vote subject to challenge ballot. Borough of Kenilworth, D.R. No. 83-6, 8 NJPER 511 (¶13236 1982).

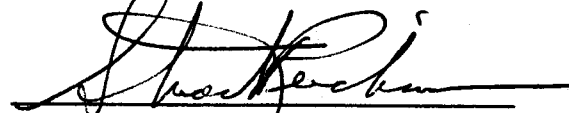
merely conjectured that as a "supervisor" he might be perceived as a threat.

Based upon the foregoing, I find that the unfair practice charge does not meet the Commission's compliant issuance standard and must be dismissed.^{3/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: October 2, 2003
Trenton, New Jersey

^{3/} N.J.A.C. 19:14-2.3.