

D.R. No. 2011-13

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

In the Matter of

CITY OF HACKENSACK,

Public Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES
UNION,

Docket No. RO-2011-045

Petitioner,

-and-

IBT LOCAL 560,

Intervenor.

SYNOPSIS

The Deputy Director of Representation dismisses election objections filed by United Public Service Employees Union (UPSEU), asserting that the employer impermissibly refused UPSEU the opportunity to leaflet, the employer did not provide UPSEU equal access, and that the rival union's business agent impermissibly electioneered near the polling site. The Deputy Director finds that UPSEU has not demonstrated how the alleged conduct interfered with voters' free choice, and, therefore, certified the results of the election.

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Appearances:

For the Public Employer,
Eric M. Bernstein & Associates
(Eric M. Bernstein, of counsel)

For the Petitioner,
Law Offices of Richard M. Greenspan, PC
(Matthew P. Rocco, of counsel)

For the Intervenor,
Cohen Leder Montalbano & Grossman, LLC
(Bruce Leder, of counsel)

DECISION

On March 7, 2011, the United Public Service Employees Union (UPSEU) filed timely objections to a secret ballot election we conducted five days earlier, on March 2. UPSEU had filed a representation petition, seeking to represent a negotiations unit represented by the International Brotherhood of Teamsters, Local

560 (IBT or Local 560). The unit is comprised of about 70 regularly employed full-time blue collar employees of the City of Hackensack (City) in the department of public works (DPW). On February 4, 2011, the parties signed a consent agreement setting forth details about the election.

On March 16, 2011, UPSEU filed an affidavit of its Business Agent Mark McCart.^{1/} N.J.A.C. 19:11-10.3(h). UPSEU requests that the election be set aside and a new one ordered. It asserts four objections: first, that the City unlawfully prohibited UPSEU agents from leafleting on public property outside the entrance to the DPW, where voters entered and exited the premises; second, that the City denied UPSEU's request for a meeting with employees prior to the election, while permitting the IBT to hold pre-election meetings; third, that the City permitted Local 560's representatives on DPW premises on the day of the election in violation of the Commission election officer's order to both unions to leave the premises, and permitted the IBT to campaign,

^{1/} UPSEU was provided about one week, or until March 15, 2011 to submit "supporting documents and/or affidavits." On March 16, 2011, one day after the due date, UPSEU submitted two certifications by its representatives McCart and James Bush. UPSEU did not provide proof of service of McCart's affidavit on the other parties until March 21, 2011. No proof of service was provided for Bush's certification.

Objecting parties are required to send a copy of their submission to all parties N.J.A.C. 19:11-10.3(h). For purposes of this decision, I consider only McCart's certification.

harass and attempt to coerce voters; and finally, that the City permitted the IBT's business agent to meet with selected voters on the day before the election, after having declined to allow UPSEU to hold a meeting with the voters on that date.

On March 29, 2011, the City and IBT were invited to respond to UPSEU's objections. On April 7, 2011, both filed letters and affidavits, and the City also filed documents. Both deny many of the allegations in the objections and offer explanations for their conduct. The City and the IBT argue that the objections should be dismissed.

On May 20, 2011, I wrote to the parties, advising that I was inclined to dismiss the elections objections. I provided the parties with an opportunity to respond. No party filed a response. I make the following:

FINDINGS OF FACT

1. The most recent collective agreement between the City and IBT expired on December 31, 2010. On January 10, 2011, UPSEU filed a petition seeking to represent the unit of blue collar employees represented by Local 560. On February 2, 2011, I approved IBT's request to intervene in the petition. N.J.A.C. 19:11-2.7. On February 4, 2011, the City, IBT and UPSEU signed a consent agreement for a secret ballot election at the DPW office.

First Objection

2. On February 18, 2011, McCart and James Bush arrived at the Hackensack DPW and began leafleting outside the gate and off the City's property. City Personnel Director Art Koster observed that the UPSEU representatives alternately stepped on and off the City's premises and disrupted work. He informed them that leafleting was not necessary, asked them to leave, and stated that if they did not leave, he would call the police. Koster asked the two union representatives to leave because the leafleting was interfering with the workday - employees were delayed as they stopped to receive the leaflets on their way out to perform their jobs (Koster affidavit, pg. 2, number 4). McCart argued with Koster that he had a right to leaflet outside the premises on public property, but Koster insisted that he leave the area. Koster advised them that they were required to call him and request his permission to hold a meeting with the employees (McCart Affidavit, pg. 1-2; Koster Affidavit pg. 2, number 4). Soon after their conversation, a City police officer arrived and ordered McCart and Bush to leave, and they left.

Second Objection

3. On February 24, 2011, four work days before the election, McCart asked Koster to allow him to conduct a meeting with voters. Koster consulted the DPW superintendent to ensure that any meeting would not interfere with the DPW workload and

schedules. Koster told the superintendent that McCart asked for a meeting on March 1st. The superintendent told Koster that on March 1st many of the DPW employees would be filling potholes and doing other related work (off the premises), and requested that any union meeting be held on Friday, March 4th rather than March 1st. Koster advised McCart that he would not be able to accommodate a meeting with the employees until March 4, 2011, two days after the scheduled election (McCart Affidavit, pg. 2).

4. McCart certified that he "had heard from several employees in the bargaining unit that . . .Local 560 . . . had been allowed to have meetings on site and, therefore, he thought that UPSEU should have equal access to the employees" (McCart Affidavit, pg. 2, number 7). This statement is hearsay and not otherwise supported by a certification revealing personal knowledge.

Third Objection

5. An employee informed McCart that on March 1, 2011, the day before the election, IBT business agent Michael Arsi was on the DPW's premises conducting a meeting with a group of hand-picked voters, and that he was combative with the employee who questioned him about it (McCart Affidavit, pg. 3). This statement is also hearsay.

Arsi submitted an affidavit, admitting that on March 1st he met with several DPW employees regarding an issue with their shop

steward. The City had recently fired the employees' shop steward. The purpose of the meeting was to address their concerns about who would assume that leadership role during the pendency of the termination appeal. When sanitation department employees appeared at the meeting, Arsi instructed them to leave, limiting the meeting to those directly affected by the termination. No electioneering took place during the meeting.

Arsi neither sought nor received permission to conduct the meeting from Koster, who later issued the IBT business agent a letter chastising him for holding a meeting on the premises without permission (Koster certification and exhibit B; Arsi certification numbers 6 to 8). On March 8, 2011, Arsi wrote to Koster acknowledging the policy and contractual requirement of seeking prior approval for a meeting, and writing that he viewed the March 1st "meeting" as a small group concern rather than a traditional union meeting. He wrote that at the March 1st meeting he did not campaign for the election or regard the meeting as a campaign opportunity.

Fourth Objection

6. On March 2, 2011, a Commission staff agent (election officer) conducted the on-site election.

7. Before the voting began, the election officer advised the parties that the business agents would have to leave the voting area and relocate away and out of sight. The election

took place from 12 noon to 3:00 p.m. At about 2 p.m., the election officer was informed that IBT Business Agent Arsi was standing at the outer gate of the DPW premises, about 1/4 mile from the polling site. The IBT election observer was instructed to tell Arsi to remove himself from the line of vision from the election site. By that time, most voters had cast their ballots.

8. UPSEU Business Agent McCart was informed by an employee that during the election, Arsi was present on the DPW property, electioneering and intimidating voters, speaking to Koster and that he departed quickly upon learning that McCart was on his way to witness his presence on the property. McCart's certification is largely hearsay, but Arsi's presence on the property during the election was admitted in his own certification. The assertion that Arsi intimidated or harassed voters is hearsay, and unsubstantiated by any other document or certification. McCart conceded in his certification that he was precluded from the DPW premises.

9. McCart certifies that he was informed by an employee that Arsi was seen meeting and talking with Koster on the premises. On March 2, 2011, Koster attended a League of Municipalities-sponsored training from 8:30 a.m. to 12 p.m. (Koster Affidavit; exhibit A). He briefly returned to his office by using a back or rear staircase and later drove away in his car to meet with the City's business administrator for most of the

afternoon. Koster did not attend the ballot count at 3:00 p.m. Koster and Arsi spoke briefly about a disciplinary matter while Koster was seated behind the wheel of his car, as he was leaving the area.

10. The Election Officer tallied the results of the election. IBT received a majority of the valid votes cast.

ANALYSIS

Elections conducted by the Commission carry a presumption that each voter's secret ballot choice is collectively, a valid expression of the employees' representational desires. Allegations of what may seem to be objectionable conduct must be supported by evidence that the alleged misconduct interfered with or reasonably tended to interfere with the employees' free choice. The objecting party must provide evidence of a direct nexus between the alleged objectionable conduct and the freedom of choice of the voters. Hudson Cty. Schools of Technology, D.R. No. 99-14, 25 NJPER 267, 268 (¶30113 1999); Jersey City Dept. of Public Works, P.E.R.C. No. 43, NJPER Supp. 153 (¶43 1970), aff'd sub nom.; Am. Fed. of State, County and Municipal Employees, Local 1959 v. PERC, 114 N.J. Super. 463 (App. Div. 1971) citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924 (5th Cir. 1969).

The Director of Representation must review the objections and supporting evidence to determine ". . . if the party filing

objections has furnished sufficient evidence to support a prima facie case." N.J.A.C. 19:11-10.3(i). The veracity of the proffered evidence is assumed. If the evidence submitted is not enough to support a prima facie case, the Director may dismiss the objections immediately. If sufficient evidence is submitted, then, and only then, will the Director investigate the objections. See State of New Jersey, P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp. 2d 123 (¶104 App. Div. 1982).

The standard of review of election objections contemplated by N.J.A.C. 19:11-10.3(i) was discussed in Jersey City Medical Center, D.R. No. 86-20, 12 NJPER 313 (¶17119 1986). There, the Director found:

This regulatory scheme sets up two separate and distinct components to the Director's evaluation process. The first is a substantive component: the allegation of conduct which would warrant setting aside the election as a matter of law. The second is a procedural or evidentiary component: the proffer of evidence (affidavits or other documentation) which precisely or specifically shows the occurrence of the substantive conduct alleged. Both of these components must be present in order for an investigation to be initiated. If this two-prong test is not met, the objections will be dismissed. [Id., 12 NJPER at 314]

Applying this standard to my review of UPSEU's objections, I find that the UPSEU has not met the evidentiary or substantive component necessary to establish a prima facie case.

First Objection

UPSEU alleges that the City unlawfully denied it the opportunity to leaflet outside the entranceway to the City property used by DPW employees. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Service v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981). A public employer has the ability to impose time, place, and manner regulations, and "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Id. 453 U.S. at 131, n. 7. A public employer ". . . has [the] power to preserve the property under its control for the use to which it is lawfully dedicated." Id., 453 U.S. at 129; Greer v. Spock, 424 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 48 (1966).

In Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983), the Commission wrote:

. . . [C]laimed rights of access to the premises of a public employer must be determined on a case-by-case and fact-by-fact basis. The range of potentially relevant factors is wide and complex and may include such circumstances as who was attempting to organize whom, where, by what means, and when, what other methods of communication, access, and organization were available, what was the employer's stated policy concerning access to its premises and how had it been applied to different groups, and what is the employer's

specific interest - for example, maintaining safety, preventing disruption of operations, or preserving property - in not allowing access to a particular location. [Id., 9 NJPER at 456]

In this case, the City required both unions to obtain its approval before meeting with or soliciting employees on the its property in order to avoid disruptions of the City's operations. UPSEU does not allege that the City's policy was content-based or discriminatorily applied. Nor has it disputed that leafleting delayed DPW employees from performing their work. Also, UPSEU does not allege how the City's requirement interfered with the voters' right of free choice. Accordingly, I dismiss this allegation.

Second and Third Objections

UPSEU alleges that its request for a union meeting on the employer's premises was denied, but IBT was permitted to hold a union meeting. This allegation is supported solely by McCart's certification. His certification provides no personal knowledge of the circumstances of the IBT meeting, its purposes or agenda. Certifications filed by the IBT and the City together with supporting documents show that the IBT meeting concerned a recently-terminated employee/shop steward; that the election was not discussed at the meeting; that it took place without the permission of the employer; and that the employer immediately chastised the IBT about holding the meeting.

UPSEU has presented no facts indicating how the meeting influenced voters. Nor do any facts describe how the objectionable

conduct interfered with or reasonably tended to interfere with the free choice of the voters. Hudson Cty.

I observe that addressing assembled employees on an employer's property is one forum through which an employee representative may communicate with employees. Communication is also available through: the normal interchange among unit employees individually during off-duty time; leaflet distribution; use of employer supplied-lists of names and addresses of unit employees for in-person visitation, mailings, and telephone solicitation; off-premises meetings and rallies; and media announcements. Accordingly, an employer may restrict campaign access to its property, and may deny organizational access by non-employees entirely. Such conduct does not have the tendency to interfere with an employee's freedom of choice, and is not cause for setting aside an election, provided that the employer enforces its policy evenly. See State of New Jersey, D.R. No. 83-26, 9 NJPER 290 (¶14135 1983), citing General Electric Co., 61 LRRM 1222 (1966). No facts indicate that the City did not enforce its policy evenly, since the IBT meeting was essentially for the purpose of administering the grievance procedure of the IBT's collective negotiations agreement with the City and took place without the City's consent. Accordingly, I dismiss these objections.

Fourth Objection

UPSEU alleges that Arsi stood on DPW property during the election, electioneering and intimidating voters, and that he was seen meeting and talking with Koster on the premises. Arsi admits electioneering on or near the DPW property. Koster and Arsi certified that they had a brief conversation on the day of the election. The voter intimidation allegation is supported solely by McCart's certification, which is hearsay.

Several Commission decisions regarding electioneering by union representatives in very close proximity to polling areas concluded that no voter interference had occurred as a matter of law. In Atlantic Cty., D.R. No. 79-17, 5 NJPER 18 (¶10010 1979), union representatives standing within 10 to 20 feet of the polling area distributed campaign buttons and literature for the duration of the election while urging employees to vote for the union. The Director found that absent any evidence of factual misrepresentation (spoken or written in the campaign literature), the electioneering did not cause apprehension, confusion or otherwise interfere or tend to interfere with employee exercise of free choice. Id., 5 NJPER at 19.

In Weehawken Educational Assn., D.U.P. No. 81-25, 7 NJPER 371 (¶12169 1981), one union alleged that representatives of a rival union stationed in the hallways immediately accessible to the

polling place campaigned and solicited voters as they entered. The Director wrote:

The charge does not allege facts which would establish coercion, harassment, intimidation or restraint of employees in the exercise of protected rights.

The undersigned concludes that mere campaigning cannot constitute interference with, restraint or coercion of employees in the exercise of protected rights.

[7 NJPER at 371]

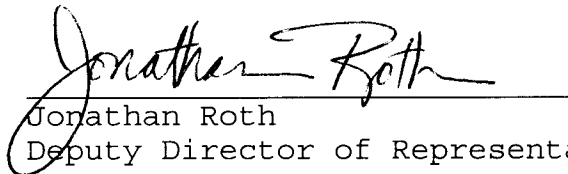
In light of these decisions, I am inclined to find that UPSEU's objection about Arsi's electioneering 1/4 mile from the polling place does not, as a matter of law, assert conduct which would tend to interfere with employees' free choice. UPSEU has not proffered any evidence indicating voter apprehension or confusion or how the electioneering otherwise interfered or tended to interfere with any employee's exercise of free choice.

UPSEU also alleges that the Koster/Arsi meeting (while the polling place was open) was inappropriate. UPSEU has not demonstrated how the meeting interfered with voters' free choice. Trenton Bd. of Ed., D.R. No. 2000-7, 26 NJPER 148 (¶31058 2000). UPSEU has presented no facts regarding the number of voters who observed the meeting and were assertedly influenced by their viewing. Nor do any facts describe how the objectionable conduct interfered with or reasonably tended to interfere with the free choice of the voters. Hudson Cty.; Passaic Valley Sewerage Commissioners, D.R. No. 2011-7, 37 NJPER 122 (¶35 2011).

Accordingly, I find that UPSEU has failed to establish a prima facie case, and dismiss its objections.

ORDER

The election objections are dismissed. A Certification of Representative is attached.


Jonathan Roth
Deputy Director of Representation

Dated: June 2, 2011
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by June 13, 2011.

**STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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| CITY OF HACKENSACK , | > | |
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| | > | |
| -and- | > | DOCKET NO. RO-2011-045 |
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| UNITED PUBLIC SERVICE EMPLOYEES UNION, | > | |
| Petitioner. | > | |
| | > | |
| -and- | > | |
| | > | |
| TEAMSTERS LOCAL 560, | > | |
| Intervenor. | > | |
| | > | |

CERTIFICATION OF REPRESENTATIVE

An election was conducted in this matter in accordance with the New Jersey Employer-Employee Relations Act, as amended, and the rules of the Public Employment Relations Commission. A majority of the voting employees selected an exclusive majority representative for collective negotiations. No valid timely objections were filed to the election.

Accordingly, **IT IS HEREBY CERTIFIED** that

TEAMSTERS LOCAL 560

has been selected by a majority of the employees of the above-named Employer, in the unit described below, as their representative for the purposes of collective negotiations, and that pursuant to the New Jersey Employer-Employee Relations Act, as amended, the representative is the exclusive representative of all the employees in such unit for the purposes of collective negotiations with respect to terms and conditions of employment. The representative is responsible for representing the interests of all unit employees without discrimination and without regard to employee organization membership. The representative and the above-named Employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment as required by the Act.

UNIT: Included: All regularly employed full-time blue collar employees of the City of Hackensack in the Department of Public Works.

Excluded: Managerial executives, confidential employees, supervisors within the meaning of the Act; craft employees, professional employees, casual employees, police, white collar employees and all other employees of the City of Hackensack.

DATED: June 2, 2011
Trenton, New Jersey



Jonathan Roth, Deputy Director of
Representation

Attachment:

Certification of Representative dated: June 2, 2011

In the Matter of

CITY OF HACKENSACK

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION

-and-

TEAMSTERS LOCAL 560

Docket No. RO-2011-045

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