

D.R. NO. 2014-3

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

In the Matter of

RIVER VALE BOARD OF EDUCATION,,

Public Employer,

-and-

Docket No. RO-2014-002

UNITED PUBLIC SERVICE EMPLOYEES
UNION, NEW JERSEY DIVISION,

Petitioner,

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 68,

Invervenor.

SYNOPSIS

The Director of Representation finds that a request to block a representation election among all custodial and maintenance staff of the Rivervale Board of Education is not supported by sufficient evidence to block the election while litigation of the unfair practice charge ensues. The Director found an absence of factual support for the allegations that the Board participated or materially assisted in the acts specified in the unfair practice charge. The Director orders that a secret mail ballot election be conducted.

D.R. NO. 2014-3

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

In the Matter of

RIVER VALE BOARD OF EDUCATION, ,

Public Employer,

-and-

Docket No. RO-2014-002

UNITED PUBLIC SERVICE EMPLOYEES
UNION, NEW JERSEY DIVISION,

Petitioner,

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 68,

Invervenor.

Appearances:

For the Respondent,
Fogarty & Hara, attorneys
(Jane Gallina Mecca & Brian Pete, of counsel)

For the Petitioner,
Law Offices of Richard M. Greenspan, attorneys
(Eric J. LaRuffa, of counsel)

For the Intervenor
Pitta & GIBLIN, attorneys
(Lauren Bonaguro, of counsel)

DECISION

On July 1, 2013, the United Public Service Employees Union (UPSEU) filed a representation petition, which was amended on July 8, 2013, seeking to represent all head custodians, custodians, lead custodians, and maintenance employees of the River Vale Board of Education (Board). The petition was

accompanied by an adequate showing of interest. The employees are currently represented by the International Union of Operating Engineers, Local 68 (Local 68). On July 10, 2013, Local 68 sought to intervene in this matter as the incumbent employee organization, based upon its collective negotiations agreement with the Township, which expired on June 30, 2013. N.J.A.C. 19:11-2.7. I granted the request to intervene on July 15, 2013.

The parties do not dispute the description or the appropriateness of the petitioned-for unit. The Board has taken no position on the petition. Local 68 opposes the petition and will not consent to an election.

On April 24, 2013, prior to the filing of UPSEU's representation petition, Local 68 filed an unfair practice charge (Docket No. CO-2013-307), which was amended on May 6, 2013. The charge as amended alleges that the Board violated 5.4a (1), (2), (3), (4), (5), (6), and (7) of the New Jersey Employer-Employee Relations Act (Act).^{1/} By letter dated July 10, 2013, Local 68

^{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 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
(continued...)

requested that its charge block further processing of the UPSEU's representation petition.

The charge alleges that since being served with Local 68's collective negotiations proposals via letter dated February 1, 2013, the Board has failed to respond or otherwise engage in the collective negotiations process with Local 68. Local 68 alleges that it has placed several telephone calls to the Board, e-mailed the Board, and sent letters dated April 12 and April 22, 2013 in an effort to discuss its proposals with the Board. Further, Local 68 alleges that the Board, through Acting Superintendent and School Business Administrator/Board Secretary Kelly Ippolito, has contacted employees directly and attempted to negotiate outside the presence of Local 68.

Local 68 requests that its charge be litigated before an election is conducted. On July 23, 2013, Local 68 submitted an affidavit in support of its request to block an election. On July 26, 2013, the Board filed its statement of position, including a certification by Ippolito, denying the allegations set forth in the charge and opposing the request to block an

1/ (...continued)
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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

election. The UPSEU has not filed any documents or a statement of position.

Local 68 submitted the Affidavit of Keith Weicker (Weicker) in support of its request to block an election. Weicker is employed by Local 68 as a business agent. Weicker certifies that Local 68 sent collective negotiations proposals to Ippolito by letter dated February 1, 2013. He certifies the Board did not respond to those proposals, nor did it respond to several telephone calls placed to the Board by Local 68. He certifies that on or about March 1, 2013, he was told by "MEMBER 1^{2/}" (Member 1) that Ippolito approached Member 1 and asked if he was aware that negotiations proposals had been submitted to the Board. Ippolito then stated to Member 1 that "this is ridiculous why can't we just sit down you and me without the Union and take care of this." Weicker provided a copy of his handwritten notes memorializing the conversation he had with Member 1. Weicker alleges that Ippolito was attempting to deal directly with unit members in an attempt to circumvent negotiations with Local 68.

Weicker certifies that Ippolito "recruited" unit members (recruited members) "in her campaign to circumvent and decertify

^{2/} Weicker's affidavit refers to "MEMBER 1" and "MEMBER 2" (Member 2), neither of whom are identified by name. Weicker alleges that the members have specifically requested that they not be identified for fear of retaliation by the Board or by supporters of UPSEUs who are allegedly allied with the Board.

the Union." These recruited members held a meeting with Local 68 membership and informed them that Ippolito would "help them form an association after they were able to get rid of the Union."

Weicker claims that the recruited members have intimidated other members of the bargaining unit. Weicker claims that Ippolito has directed the recruited members to disparage and decertify Local 68.

Weicker certifies that at a membership meeting he called on or about June 2013 he informed the membership that Member 2 might "give a statement." Weicker states that one of the recruited members has since "intimidated" and "threatened" Member 2. Member 2 has informed the unit members of the recruited member's threats and, according to Weicker, the unit members now fear retaliation for their support of Local 68.

Weicker states that because of the actions of Ippolito and the recruited members, the unfair practice charge must be heard prior to an election, as Local 68 will otherwise be prevented from participating in a free and fair election. Further, Weicker claims that if a hearing is conducted, he will be able to subpoena Member 1 and Member 2, who will testify to the events and actions contained in Weicker's affidavit.

The Board asks that Local 68's request be denied and that the petition filed by UPSEU be processed in an expeditious manner. The Board alleges that Local 68's request to block

fails to meet the required evidentiary showing that the underlying allegations contained in the charge would prevent a free and fair election. Further, blocking the election would deny the rights of the employees to select a majority representative in a timely manner.

The Board submitted a certification of Kelly Ippolito. Ippolito certifies that she received collective negotiations proposals from Local 68 on February 1, 2013. She was thereafter informed by unit members that they no longer wished to be represented by Local 68. Specifically, Ippolito certifies that on March 7, 2013, she received a letter signed by ten (10) unit employees requesting that the Board refrain from negotiating with Local 68^{3/}. Ippolito states that the combination of unit member statements and the March 7 letter created a good faith doubt in her mind as to Local 68's majority status. Ippolito claims that she informed Local 68 that she would not negotiate with them until the "issue of representative status was resolved."

Ippolito denies that she attempted to persuade unit members to negotiate without representation and states that at no time did she conspire with two unit members (Members 1 and 2) to displace Local 68 as the exclusive majority representative. Ippolito further states that she does not harbor any anti-union

^{3/} A copy of the letter setting forth the date, names and signatures accompanied the Board's representation petition filed on April 30, 2013 (Docket No. RE-2013-001).

animus toward Local 68, nor does she prefer any particular union as the exclusive majority representative. Finally, Ippolito states that she finds Weicker's suggestion of possible retaliation by the Board or herself against unit members that support Local 68 "preposterous" and that Weicker's allegations ignore the longstanding harmonious relationship between the Board, Ippolito, and Local 68 and its membership; Ippolito expresses a willingness to negotiate in good faith with whichever union is selected by the unit members as their representative for collective negotiation.

The Board's position statement asserts that the documentary evidence submitted by Local 68 is comprised solely of hearsay statements and is insufficient to support the request to block the processing of the pending petition. The Board argues that even if Local 68's "unsubstantiated hearsay statements" were accurate, Local 68 has failed to demonstrate how the alleged conduct which prevents a free and fair election.

The Board also notes that Ippolito has worked amicably with Local 68 for nine (9) years and participated in the last two (2) rounds of negotiations with Local 68. Finally, the Board requests that the representation petition be processed in an expeditious manner in order to protect the compelling interest of the unit members to select their majority representative,

particularly when, as now, the collective negotiations agreement has expired.

ANALYSIS

The Commission's policy is to expedite the processing of representation disputes so that the question of whether employees will be represented by either competing organizations (or none) can be resolved by the Commission's secret ballot election mechanism. Berkeley Tp., D.R. No. 2009-6, 34 NJPER 422, 423 (¶131 2008).

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 whether an unfair practice charge will block the processing of a representation petition lies within the Commission's discretion. State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981). We ordinarily require that a charging party provide affidavits or other documents to support a claim that the employer's alleged unfair practice(s) prevent(s) a free and fair election. See Bor. of Berlin, D.R. No. 93-9, 19 NJPER 74 (¶24033 1992); South Jersey Port Corp., P.E.R.C. No. 90-45, 16 NJPER 3 (¶21001 1989); and Matawan-Aberdeen Reg. School Dist., P.E.R.C. No. 89-69, 15 NJPER 68 (¶20025 1988).

The legal standard for determining whether an unfair practice charge should block the processing of a representation petition was set forth in State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105 (¶12044 1981), and reaffirmed in Matawan. The charging party must first request that the charge block the representation proceeding. It must also submit documents showing that the conduct underlying the unfair practice prevents a free and fair election. The Director of Representation will exercise discretion to block if under all of the circumstances, the employees could not exercise their free choice in an election. See Atlantic City Convention & Visitors Authority, D.R. No. 2002-9, 28 NJPER 170 (¶33061 2002); Village of Ridgewood, D.R. No. 81-17, 6 NJPER 605 (¶11300 1980).

In State of New Jersey, the Commission adopted the following substantive factors in evaluating whether a fair election can be conducted during the pendency of an 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 [representation] case by the charging party; and the timing of the charge. [NLRB Case Handling Manual, Section 11730.5]
[7 NJPER at 109]

In this matter, Local 68 has filed an affidavit signed by Keith Weicker, a business agent employed by Local 68. Weicker certifies that he forwarded collective negotiations proposals to the Board, emailed the Board to discuss Local 68's proposals, and sent letters to the Board requesting negotiations. Local 68, however, has requested that the Commission block the continued processing of UPSEU's petition based upon on allegations of inappropriate conduct that it has not supported by any facts certified by individuals with personal knowledge of those facts. Weicker alleges that Ippolito made comments to an unnamed unit member, and that she conspired with unit members and recruited them to decertify Local 68. Weicker further alleges that those recruited members have acted to intimidate unnamed members.

No facts supported by personal knowledge aver that the Board, through Ippolito, engaged in a pattern of conduct meant to decertify and/or disparage Local 68. Weicker's affidavit does not reflect personal knowledge that Ippolito acted as claimed; the affidavit is comprised of hearsay and double hearsay statements of unnamed unit members. Hearsay and double hearsay statements cannot form a basis to block a representation election. See Monmouth Cty., D.R. No. 92-11, 18 NJPER 79 (¶23034 1992).

In the absence of any competent evidence substantiating Local 68's claims, I cannot conclude that the conduct alleged in Local 68's charge will interfere with a free and fair election. I do not find that the statements in the filed certifications tend to support Local 68's request to block the processing of the petition while litigation of the charge ensues.

A refusal to negotiate in good faith could justify a decision to block the processing of a representation petition, under certain circumstances. The Commission has determined that a union is presumed to have majority status but the presumption may be rebutted by a showing that, 1) at the time of the refusal to negotiate, the union in fact no longer enjoyed majority status or 2) that the employer's refusal was predicated on a good faith and reasonably grounded doubt of the union's continued majority status and raised in a context free of employer unfair labor practices. Essex Cty. Ed. Svcs. Comm'n, P.E.R.C. No. 86-68, 12 NJPER 13, 15 (¶17004 1985).

On April 30, 2013, the Board filed a representation petition (Docket No. RE-2013-001), together with a supported claim of a good faith and reasonably grounded doubt of the continued majority status of Local 68. On May 8, 2013, we dismissed the petition as untimely. We also advised that a public employer's duty to negotiate a successor agreement with a union about which it has a good faith doubt of continuing majority status is

distinguishable from any question concerning representation. Boulton-Emerson v. NLRB, 899 F.2d 104, 133 LRRM 3105 (1st Cir. 1990); Abbey Medical/Abbey Rents, Inc., 254 NLRB No. 129, 111 LRRM 1683 (1982).

Under all of the circumstances, I cannot conclude that the charge filed by Local 68 warrants a delay in conducting a secret ballot election. I note the absence of factual support for the allegation that the Board, through Ippolito, participated or materially assisted in the acts specified in the charge. Local 68 claims that two recruited members held meetings to convince Local 68 unit members to decertify or support another union. Such conduct is lawful, particularly in the absence of any facts that indicate that the Board initiated or supported the efforts of the recruited members. In addition, Local 68 claims that the recruited members intimidated, harassed, and "relentlessly approached" unit members in an effort to decertify Local 68. No factual support is offered for these claims.

The right of employees to vote on whether they wish to be represented by the UPSEU, Local 68, or no representative is paramount. No allegation contained in the unfair practice charge indicates that any unlawful conduct occurred after May 6, 2013, the date upon which the amended charge was filed. The representation petition was filed on July 1, 2013 and amended on July 8, 2013. Delaying the election for a significant period of

time while the charge is litigated would not satisfy the interests of these employees in expressing their representational wishes.

Finally, the current collective negotiations agreement between Local 68 and the Board expired on June 30, 2013. In light of the pending question concerning representation, the Board and Local 68 cannot enter collective negotiations for a successor agreement. If the charge were to block the election, the employees' terms and conditions of employment would remain status quo. All the above circumstances mandate that employees be given the opportunity to expeditiously express their representational preference.

For all of the foregoing reasons, I determine that the unfair practice charge filed by Local 68 should not block the conduct of an election in this case. The charge will otherwise be processed in accordance with N.J.A.C. 19:14-1.6.

In the absence of a dispute over the appropriateness of the negotiations unit, I direct that a secret mail ballot election be conducted to determine which collective negotiations representative they wish to represent them for purposes of collective negotiations as follows:

Included: All regularly employed head custodians, custodians, lead custodians, and maintenance employees of the River Vale Board of Education.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, professional employees, police employees, casual employees and all other employees of the River Vale Board of Education.

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. 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. The assigned staff agent shall contact the parties in order to determine ballot placement preferences and other details. In the event of a dispute concerning any of these matters, the Director shall decide the detail(s) of the election.

Employees in the unit described above shall vote to determine the collective negotiating representative, if any, for the unit in which they are employed and will have the option to vote for United Public Employees Service Union (UPSEU), No Representative, or International Union of Operating Engineers, Local 68.

Pursuant to N.J.A.C. 19:11-10.1, 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 not later than August 27, 2013. 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.

Ballots will be mailed by the Commission to eligible voters in the unit on **September 6, 2013**. Any employee who believes s/he is eligible to vote in this election and does not receive a ballot in the mail by **September 13, 2013** should contact PERC at 609-292-6780 immediately, if they wish to participate in the election. Ballots must be returned to the Commission's Post Office Box by 9:00 a.m. on **October 3, 2013**. The ballots will be counted at 10:00 a.m. on **October 3, 2013**, at the Commission's Trenton Office at 495 West State Street, Trenton, New Jersey.

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


Gayl R. Mazuco

DATED: August 6, 2013
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 August 20, 2013.